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Sup Ct

Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF STATE OF NEBRASKA, ET AL., APPELLANTS,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

FILED AUGUST 6, 1940.

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VOL. I

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[fol. 7]

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEBRASKA, LINCOLN DIVISION

Equity 5621

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, Complainants,

against

HARRY R. SWANSON, as Secretary of State of Nebraska, Walter H. Jensen, as State Treasurer of Nebraska, William H. Price, as Auditor of Public Accounts of Nebraska, Richard C. Hunter, as Attorney General for the State of Nebraska, James T. English, as County Attorney of Douglas County of Nebraska, Max G. Towle, as County Attorney of Lancaster County of Nebraska, Grace Ballard, as County Attorney of Washington County, of Nebraska, S. S. Diedrichs, as County Attorney of Lincoln County of Nebraska, Raymond B. Morrissey, as County Attorney of Johnson County of Nebraska, Maynard N. Grosshaus, as County Attorney of York County of Nebraska, Charles H. Hood, as County Attorney of Saunders County of Nebraska, Alvin B. Lee, as County Attorney of Valley County of Nebraska, Gerald J. McGinley, as County Attorney of Keith County of Nebraska, Floyd Lundberg, as County Attorney of Kearney County of Nebraska, Edwin Moran, as County Attorney of Otoe County of Nebraska, Rush C. Clarke, as County Attorney of Scotts Bluff County of Nebraska, "John Doe" and "Richard Roe", Defendants

BILL OF COMPLAINT—Filed June 7, 1937

Complainants, suing on behalf of themselves and others similarly situated bring this Bill of Complaint against the aforementioned defendants, and allege as follows:

1. The complainant, American Society of Composers, Authors and Publishers (hereinafter referred to, for brev-

ity's sake, as the "Society"), at all times hereinafter men- [fol. 8] tioned, was and still is an unincorporated association duly organized and existing under the laws of the State of New York, and has its principal place of business, in the Borough of Manhattan, City of New York, in the State of New York, in the Southern District of New York. The membership of the Society exceeds 1,000, and is comprised of authors, composers and publishers of musical works; said Society was organized and has been issuing licenses for the public performance for profit of musical compositions copyrighted by its members to users located throughout the United States, including the State of Nebraska, and said Society has protected the performing rights of musical works copyrighted by said members respectively, against infringement because of the public performance thereof for profit, and continues so to do.

2. Complainant, Gene Buck is President of said Society; because said membership, as is above indicated, is exceedingly numerous and it would be impracticable to join all the members of said Society as parties plaintiff, and as the issues and questions involved here are of common and general interest to all of the members of said Society, the said Society has duly authorized and empowered the said Gene Buck as President thereof to institute and prosecute this suit in its behalf, and this action is accordingly brought by Gene Buck as President, for and on behalf of said Society, as well as in his own individual right.

3. Complainant, Carl Fischer, Inc., is a corporation, duly organized and existing under and by virtue of laws of the State of New York, having its principal place of business in the City of New York in said State; complainant G. Schirmer, Inc., is a corporation, duly organized and existing under and by virtue of the laws of the State of New York, [fol. 9] having its principal place of business in the City of New York in said State; complainant, Irving Berlin, Inc., is a corporation, duly organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in the City of New York in said State; all of said last mentioned complainants have been for upwards of twenty-five years and are presently engaged in the business of publishing musical compositions in the State of New York and elsewhere, and are hereinafter for brevity's sake referred to as "Publishers".

4. Complainant, Gene Buck, for upwards of twenty years has been and now is an author of lyrics of musical compositions; complainant, Deems Taylor, for upwards of fifteen years has been and now is a composer of musical and dramatico-musical works; complainant, Oley Speaks, for upwards of fifteen years has been and now is a composer of musical compositions; complainant, William J. Hill, for upwards of five years has been and now is a composer of musical compositions; complainant, Anne Paul Nevin, is the widow of Ethelbert Nevin, who was for more than twenty years a composer of musical compositions, and who departed this life in 1901; complainant, Ella Herbert Bartlett, is the daughter of Victor Herbert, who was for over twenty years a composer and who departed this life in the year 1924; complainant, Jane Sousa, is the widow of John Philip Sousa, who was for more than thirty years a composer and who departed this life in the year 1932; all of the complainants in this paragraph mentioned are citizens of the United States and all are residents and citizens of the State of New [fol. 10] York, and of the Southern District of New York, with the exception of Buck and Sousa, who are residents of the Eastern District of New York, and Nevin, who is a resident and citizen of the State of Maine.

5. Upon information and belief, the defendant, Harry R. Swanson, is the duly elected, appointed, qualified and acting Secretary of State of the State of Nebraska; the defendant, Walter H. Jensen, is the duly elected, appointed, qualified and acting State Treasurer of said State; the defendant, William H. Price, is the duly elected, appointed, qualified and acting Auditor of Public Accounts of said State; the defendant, Richard C. Hunter, is the duly elected, appointed, qualified and acting Attorney General of said State; the defendant, James T. English, is the duly elected, appointed, qualified and acting County Attorney of Douglas County in said State; the defendant, Max G. Towle, is the duly elected, appointed, qualified and acting County Attorney of Lancaster County in said State; the defendant, Grace Ballard, is the duly elected, appointed, qualified and acting County Attorney of Washington County in said State; the defendant, S. S. Diedrichs, is the duly elected, appointed, qualified and acting County Attorney of Lincoln County in said State; the defendant, Raymond B. Morrissey, is the duly elected, appointed, qualified and acting County Attorney of

Johnson County in said State; the defendant, Maynard N. Grosshaus, is the duly elected, appointed, qualified and acting County Attorney of York County in said State; the defendant, Charles H. Hood, is the duly elected, appointed, qualified and acting County Attorney of Saunders County in said St- the defendant, Alvin B. Lee, is the duly elected [fol. 11] qualified and acting County Attorney of Valley County in said State; the defendant, Gerald J. McGinley, is the duly elected, appointed, qualified and acting County Attorney of Keith County in said State; the defendant, Floyd Lundberg, is the duly elected, appointed, qualified and acting County Attorney of Kearney County in said State; the defendant, Edwin Moran, is the duly elected, appointed, qualified and acting County Attorney of Otoe County in said State; the defendant, Rush C. Clarke, is the duly elected, appointed, qualified and acting County Attorney of Scotts Bluff County in said State; and the defendants, "John Doe" and "Richard Roe", are the duly elected, appointed, qualified and acting officials of the State of Nebraska, whose names are at present unknown to complainants, who are also charged with the enforcement of Legislative Bill No. 478, enacted by the 52nd Session of the Legislature of Nebraska, and signed by the Governor of that State on May 17, 1937, and made effective immediately (such Statute being hereinafter referred to throughout as the "State Statute"), and each of said defendants is a citizen and resident of the State of Nebraska.

6. The value of the matter in dispute herein between complainants and defendants is in excess of the sum of $3,000.00, exclusive of interest and costs.

7. This action is a suit in equity arising under the Constitution and laws of the United States, as will hereafter more particularly appear. Among other things, this suit is brought to repress and prevent the deprivation under color of the said Statute of certain rights, privileges and immunities secured to complainants by the Constitution and laws of the United States and the Constitution of the State of [fol. 12] Nebraska, that is, the right to have and enjoy exclusive rights under certain copyrights granted and owned by the respective complainants, other than the Society, as well as the exclusive right to publicly perform for profit such copyrighted musical compositions, which has been vested in the complainant Society for a limited period, as

hereinafter set forth, which rights have been respectively granted to the complainants pursuant to Article 1, Section 8 of the Constitution of the United States, and the Copyright Act of 1909 as amended (35 Stat. L. 1075-1078 U. S. Code, Title 17); to repress and prevent the deprivation of such rights without due process of law and without being denied the equal protection of the laws, and to repress and prevent the impairment of obligations of contracts heretofore made by the respective complainants and others similarly situated; to repress and prevent the operation and enforcement of the said State Statute as an ex post facto law, and to repress and prevent the interference by the State of Nebraska with the federal judicial power and the privileges of complainants as citizens of the United States by denying the complainants the right of access to the Federal Courts; to repress and prevent a compulsory, irrevocable grant of special privileges to the users of complainants' copyrighted music in the State of Nebraska in violation and disregard of complainants' rights; to repress and prevent the taking of complainants' property without just compensation and for a private purpose; to repress and prevent the enforcement of said State Statute as a special law granting to corporations, associations or individuals a special privilege and retroactive in its operations; and this suit, among other things, involves the question as to [fol. 13] whether or not each of the complainants may combine with a substantial number of other persons, corporations or associations for the purpose of licensing the public performance for profit of their copyrighted musical compositions without the State of Nebraska and without doing any act within the State of Nebraska; whether or not the complainants have the right to issue to citizens of Nebraska licenses for the public performance for profit of their copyrighted musical compositions copyrighted and owned by complainants, apart from the sale of copies of such compositions in the form of sheet music; whether the complainants have the right to act collectively in combination with a substantial number of persons, corporations or associations for the purpose of granting blanket licenses at fixed fees for the public performance for profit of the complainants' copyrighted musical compositions to users located within the State of Nebraska, or for the purpose of dividing among them the fees derived from the licensing of the right to publicly perform for profit their several

copyrighted musical compositions, or for the purpose of collecting or attempting to collect within the State of Nebraska license fees, fixed and determined, as aforesaid, for the right to publicly perform for profit the complainants' musical compositions within said State; whether the State of Nebraska has the right to declare by statutory enactment that the membership of a substantial number of authors, composers, proprietors, publishers, owners or their heirs, successors or assigns of copyrighted musical compositions in any society, association, club, firm, membership, corporation, group or entity (the complainants other than the Society now being members of the complainant [fol. 14] Society together with more than 1,000 others similarly situated), shall be prima facie evidence against complainants of the existence of a combination made unlawful by the State Statute; whether the State of Nebraska has the right to require and compel complainants to fix a price for the public performance for profit or other use of their copyrighted musical compositions and to affix such price to the copies of such musical compositions in the form of sheet music, and to include in the selling price of said sheet of music the price for the public performance for profit or other use of such copyrighted musical compositions; whether the State of Nebraska has the right to compel complainants, whether acting individually or collectively, to file in the office of the Secretary of State a copy of each of their respective copyrighted compositions with a fee of 25¢ with each copy of said composition before selling or disposing of any such composition in the State of Nebraska, upon which composition shall be affixed over the respective signatures of such complainants a statement to the effect that he or it controls the sale or disposition of such composition; whether the State of Nebraska has the right to declare void and unenforcible all existing contracts, agreements, licenses and arrangements made by complainants with or granted to users in the State of Nebraska; whether the State of Nebraska may impose a penalty upon complainants for collecting or attempting to collect the moneys due them under said existing contracts; whether the State of Nebraska has the right to grant to owners, lessees, operators or managers of radio broadcasting, radio receiving or radio rebroadcasting stations within that State, the right to [fol. 15] receive, broadcast and rebroadcast complainants' copyrighted musical compositions within said State with-

out the payment to complainants of any license fee or other compensation for such use; whether the State of Nebraska has the right to grant to owners, lessees, operators or managers of any theatre, moving picture house or similar place for amusement and public performance within Nebraska, the right to receive, use and render or cause to be received, used or rendered within Nebraska the copyrighted musical compositions of the combinations declared unlawful by said Statute, including the musical compositions of complainants, without the payment to complainants of any license fee or other compensation for such use; whether the State of Nebraska has the right to prevent the complainants from suing users in Nebraska for infringement of their respective copyrighted musical compositions or for loss or damage within Nebraska for the use or rendition, including the public performance for profit, of their respective copyrighted musical compositions originating or emanating from outside the State of Nebraska and performed, rendered or otherwise used within said State; whether the State of Nebraska has the right to subject complainants and others similarly situated to the jurisdiction of the Courts of Nebraska, by providing that any representative of any combination declared to be unlawful under said State Statute shall be deemed an official representative and agent of such combination and shall be construed to be doing business within Nebraska, and that service of any process may be had against complainants and others similarly situated by service upon said representative or the agent of [fol. 16] any such representative, with the same force and effect as if service were made upon the duly elected officer or acting agent or other official representative; whether the State of Nebraska may prevent complainants from engaging an agent in said State, by enacting that any such agent shall be subject to the penal provisions of the said State Statute; whether the State of Nebraska may dissolve the Society, which is organized under the laws of the State of New York and has its principal place of business therein, by an action brought within the State of Nebraska for committing any of the acts specified in said Statute to be in violation thereof upon service secured by service upon any representative that the Society may have within said State; whether the State of Nebraska may in a suit brought for the dissolution of the Society, or other civil suit, adjudicate the ownership of any copyrighted musical compositions

owned by the respective members of the said Society, including the other complainants, under which the Society has been granted the exclusive right of public performance for profit for a limited period, and whether the Courts of Nebraska may in such proceeding adjust, determine and adjudicate all rights for or against the person, firm or corporation, including complainants and others similarly situated whom the Court shall finally determine to be the owner or proprietor of such copyrighted musical composition, and whether the State of Nebraska may debar complainants from suing for damages or infringement in any Court other than the Court in which said dissolution or other civil suit is pending; whether the State of Nebraska may require the complainants and others similarly situated under penalty [fol. 17] of being held in contempt of Court and being fined $100.00 for every day that they shall fail or refuse to furnish such documents, to file with the Clerk of the Court in which any civil or criminal action or proceeding is pending against complainants, or others similarly situated, exact copies of all documentary evidence, facts, figures, records or data in the possession or under the control of complainants and others similarly situated (being defendants in such suit or proceeding) pertaining to the issues in said action; whether said State Statute is sufficiently definite to apprise complainants of the acts for which they may be subjected to the penal provisions of said State Statute, including, fine, imprisonment, contempt and penalties therein provided for, and whether or not the defendants, in threatening to enforce the provisions of said State Statute against complainants are not depriving the complainants of their property and their right to liberty without due process of law, and whether they are not denying the complainants the equal protection of the laws; whether the State of Nebraska may compel complainants and others similarly situated to be witnesses against themselves and be subjected to unlawful search and seizure, and whether the State of Nebraska may impose conditions upon the enjoyment of copyright in the United States by the 44,000 members of foreign societies, who have authorized the Society to grant blanket licenses in the United States on their behalf, which conditions are not embraced in, but are in conflict with existing Treaties, Presidential Proclamations, and the Copyright Act of the United States.

[fol. 18] This suit is brought to repress and prevent de-

fendants from proceeding under and by virtue of the provisions of said State Statute, and from illegally and unlawfully threatening complainants and their employees, representatives and agents with fine, arrest, imprisonment and penalties under the color of said State Statute.

8. The Publishers, in furtherance of their business of publishing musical compositions, acquired from writers and composers the right to publish musical compositions written and composed by such writers and composers, respectively, either by outright purchases of such rights or upon a royalty basis; and in the great majority of cases, complainants acquired from such writers and composers the right to secure copyright in the compositions purchased by Publishers; when such compositions are published by Publishers, two of the best copies thereof are deposited with the Register of Copyrights at Washington, D. C., and the required fee paid to him with a claim for copyright registration, and said compositions are always registered for copyright with the Register of Copyrights in Washington, D. C., pursuant to the provisions of the Copyright Act of 1909 (hereinafter referred to as the "Copyright Act"), and on each and every one of the compositions published by publishers there appears upon the first page of music at the foot thereof, the copyright notice prescribed by said Copyright Act; that each of the Publishers in the course of its many years of conducting its respective business, has registered many thousands of compositions with the Register of Copyrights, and each has secured for its respective corporation the ownership of the copyright in many thousands [fol. 19] of musical compositions; that in the music business or trade the totality of copyrights of a particular publisher is known as its "catalogue"; that the great majority of each Publisher's respective catalogue is likewise copyrighted in foreign countries, as well, and copyright protection is obtained by said publishers for their catalogues in almost every civilized country of the world; that none of the copyrights owned by the complainants has a situs within the State of Nebraska; that each publisher's business is extensive, and that the value of the copyrights owned by each publisher is in excess of $1,000,000.00; that it is impossible at any given time to ascertain the names or addresses of the persons who at any time have had an interest in such respective copyrights; old copyrights expire

currently and are renewed, sometimes by the publisher and sometimes by the writer and composer, or such others as may be entitled to renewal under the Copyright Act, and new compositions are constantly being registered; the rights in the copyrights are manifold and are sub-divided as to locality, extent and term; in many cases certain rights are reserved to the author or composer and disposition thereof is not within the control or knowledge of the publisher complainant, and is not ascertainable; that each of the publisher complainants would be compelled to expend a sum in excess of $25,000.00 for payment to investigators, lawyers, clerical help and other expenses, in an attempt to compile and formulate a list of their respective copyrights containing the data required by said State Statute.

9. Each of the publishers has secured copyright registration in many thousands of musical compositions of which copyrights each of said publishers is respectively the [fol. 20] proprietor; said copyrights have been secured in manner similar to that described hereinabove, and with respect to each of said copyrights, the publishers have respectively obtained copyright cards, and all such copyrights are on file in the office of the Register of Copyrights in Washington, D. C., as prescribed by Statute, and copies of such cards are not annexed hereto in order to avoid unduly encumbering this complaint, but reference is made hereto and the same are incorporated herein, and copies of said cards will be produced upon the trial of this case, if necessary.

10. Complainant Gene Buck wrote the lyrics of many musical compositions, for over twenty years last past, and from time to time he entered into contracts with various music publishers, pursuant to which such publishers duly secured copyright in such respective compositions by publication, deposit and registration of the works, as required by the Copyright Act; said copyrights expire by limitation of time at various dates in the future, and the complainant Buck is advised and verily believes, that he is entitled to secure a renewal of each such copyright for an additional period of twenty-eight years, in his own name and on his own behalf, in each of said works; in such renewals of copyright, complainant Buck will have all the rights that vested in the proprietor of the original copyrights; among such works are the following: "Tulip Time", "Hello Frisco", "Gar-

den of My Dreams", "No Foolin' ", "The Love Boat", "Florida, The Moon and You"; for over fifteen years, complainant Buck wrote the words and lyrics for the Florenz Ziegfeld Follies, as well as the words and lyrics of other musical shows produced with great success; Buck's right [fol. 21] to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of $100,000.; that as and when renewal rights accrue to said complainant in his respective copyrighted works, it is and will be impossible for him to determine and ascertain what licenses, grants or rights in the original work have been made or granted by the proprietor of the copyright for the original term of twenty-eight years in said work, or the locality, extent or duration of such grants or licenses, or the names and addresses of such licensees or grantees who have acquired rights in said respective works from the proprietor of the original term of copyright.

11. Complainant Deems Taylor composed the music for two musical compositions entitled "Banks O' Doon" and "Captain Stratton's Fancy", in 1923, and entered into a contract for the publication of said compositions with J. Fischer & Bro., a music publisher; a copy of said contract is hereto annexed and marked Exhibit "A"; said publisher secured copyright of said compositions by publication and deposit of the work, as required by the Copyright Act, in and about the year 1923, and said copyrights expire by limitation of time in the year 1951, and complainant Taylor is advised and verily believes, that he is entitled to secure a renewal of said copyrights for an additional period of twenty-eight years in his own name and on his own behalf; in such renewals of copyrights, complainant Taylor will have all the rights that vested in the proprietor of the original copyrights; the complainant Taylor has composed the music for a great many other works, among [fol. 22] them "The King's Henchman", "Peter Ibbetsen" and "Through A Looking Glass Suite"; "Peter Ibbetson" has been successfully produced at the Metropolitan Opera House in the City of New York; Taylor's right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of $100,000.; that as and when renewal rights accrue to said complainant in his respective copyrighted works,

it is and will be impossible for him to determine and ascertain what licenses, grants or rights in the original work have been made or granted by the proprietor of the copyright for the original term of twenty-eight years in said work, or the locality, extent or duration of such grants or licenses, or the names and addresses of such licensees or grantees who have acquired rights in said respective works from the proprietor of the original term of copyright. Under the said contract, Exhibit "A", and other contracts between complainant Taylor and his publisher, said complainant is entitled to receive a certain percentage of the market or retail price on every copy of sheet music sold by his publisher averaging about 10% thereof. Under the contract between complainant Taylor and the Society, complainant Taylor is entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to him; in other words, complainant Taylor receives approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of his copyrighted musical compositions; if the said Statute be enforced, complainant Taylor will be entitled to receive only an average of 10% of the moneys paid to the publisher by users in [fol. 23] Nebraska publicly performing for profit his copyrighted musical compositions, and said Taylor will have no right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

12. Complainant Oley Speaks composed the music for many musical compositions and entered into numerous contracts for the publication of said compositions with complainant G. Schirmer, Inc., a music publisher; said publisher secured copyrights in said compositions by publication, deposit and registration of the works, as required by the Copyright Act, and said copyrights will expire by limitation of time at various dates in the future, twenty-eight years from the respective dates of registration of said works; and complainant Speaks is advised and verily believes that he is entitled to secure renewals of said copyrights for an additional period of twenty-eight years respectively, in each one in his own name and on his own behalf; in such renewals of copyright complainant Speaks will have all the rights that vested in the proprietor of the

original copyrights; among the works composed by Speaks are the following: "Sylvia", "Road to Mandalay" and "Morning"; Speaks' right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of $100,000.; that as and when renewal rights accrue to said complainant in his respective copyrighted works, it is and will be impossible for him to determine and ascertain what licenses, grants or rights in the original work have been made or granted by the proprietor of the copyright for the [fol. 24] original term of twenty-eight years in said work, or the locality, extent or duration of such grants or licenses, or the names and addresses of such licensees or grantees who have acquired rights in said respective works from the proprietor of the original term of copyright. Under the contracts between complainant Speaks and his publishers, said complainant is entitled to receive a certain percentage of the market or retail price on every copy of sheet music sold by his publisher averaging about 10% thereof. Under the contract between complainant Speaks and the Society, complainant Speaks is entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to him; in other words, complainant Speaks receives approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of his copyrighted musical compositions; if the said Statute be enforced, complainant Speaks will be entitled to receive only an average of 10% of the moneys paid to the publisher by users in Nebraska publicly performing for profit his copyrighted musical compositions, and said Speaks will have no right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

13. Complainant Hill composes music, and he has entered into contracts for the publication of musical compositions composed by him with Shapiro, Bernstein & Co., a music publisher who has secured copyrights of said compositions by publication, deposit and registration of such works, as required by the Copyright Act, and said copyrights expire by limitation of time at various dates in the [fol. 25] future, twenty-eight years from the date of registration of such respective works, and the complainant Hill is advised and verily believes that he is entitled to secure

renewals of said copyright for an additional period of twenty-eight years in his own name and on his own behalf; in such renewals of copyright complainant Hill will have all the rights that vested in the proprietor of the original copyrights; the complainant Hill has composed the music for a great many works, among them "The Last Roundup", "Chapel in the Moonlight", "The Old Spinning Wheel", "Lights Out", "Wagon Wheels", "Empty Saddles", "The Glory of Love" and "Timber"; Hills' right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of $100,000.; that as and when renewal rights accrue to said complainant in his respective copyrighted works, it is and will be impossible for him to determine and ascertain what licenses, grants or rights in the original work have been made or granted by the proprietor of the copyright for the original term of twenty-eight years in said work, or the locality, extent or duration of such grants or licenses, or the names and addresses of such licensees or grantees who have acquired rights in said respective works from the proprietor of the original term of copyright. Under the contracts between complainant Hill and his publishers, said complainant is entitled to receive a certain royalty on every copy of sheet music sold by his publisher averaging about one and one-half cents on each such sale. Under the contract between complainant [fol. 26] Hill and the Society, complainant Hill is entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to him; in other words, complainant Hill receives approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of his copyrighted musical compositions; if the said Statute be enforced, complainant Hill will be entitled to receive only an average of 6% of the moneys paid to the publisher by users in Nebraska publicly performing for profit his copyrighted musical compositions, since such sheets of music are ordinarily sold for about twenty-five cents; and said Hill will have no right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

14. Complainant Anne Paul Nevin is the widow of Ethelbert Nevin, who wrote and composed, among others, the

following musical compositions which were duly published and copyrighted: "The Rosary", "Mighty Lak a Rose", "Venetian Suite" and "Narcissus", and she has obtained renewals of some of said compositions in her own name, and is advised and verily believes that she will be entitled under the copyright act to obtain renewals of all of such compositions as and when the original terms thereof expire, during her lifetime; Ella Herbert Bartlett is the daughter of Victor Herbert, the foremost composer in America, who wrote and composed, among others, the following works, all of which were duly registered for copyright: "Kiss Me Again", "Natoma", "Sweet Mystery of Life", "I'm Falling in Love With Someone", "Mlle. Modiste", "Red Mill", [fol. 27] "Naughty Marietta", "Irish Fantasy" and "Pan Americana"; she has renewed some of the works on which the original term of copyright has expired, and is advised and believes that she will be entitled to renew the other works as and when they expire; Jane Sousa is the widow of John Phillip Sousa, who wrote and composed a great many compositions, and who was known as the "March King"; among his compositions are the following: "Stars & Stripes Forever", "Adeste Fidelis", "Washington Post March" and "El Capitan"; said compositions were duly registered for copyright, and said complainant Jane Sousa has renewed some of said compositions, and is advised and believes that she will have the right to renew the other works as and when they expire; that the rights, which the complainants mention in this paragraph have, in the renewal of the works written and composed respectively by the husbands and father of said complainants, are of great value and are worth in excess of $100,000. with respect to each of said complainants. Under their respective contracts with their publishers, said complainants are entitled to receive a certain percentage of the market or retail price on every copy of sheet music sold by their publishers averaging about 10% thereof. Under the respective contracts between said complainants and the Society, said complainants are entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to them; in other words, said complainants receive approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of their copyrighted [fol. 28] musical compositions; if the said Statute be en-

forced, said complainants will be entitled to receive only an average of 10% of the moneys paid to their respective publishers by users in Nebraska publicly performing for profit their respective copyrighted musical compositions, and said complainants will have no right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

15. Prior to 1917, none of complainants, nor the respective husbands and father of complainants mentioned in the next preceding paragraph, received any compensation for the public performance for profit of the musical compositions respectively owned, published, copyrighted, written or composed by them; although the copyright Statute gave to the complainants the exclusive right to publicly perform for profit their respective musical compositions, users of musical compositions throughout the country refused to recognize such exclusive rights in complainants, and persistently and stubbornly refused to pay any royalties for such public performance for profit, but, on the contrary, users of music throughout the country publicly performed for profit the musical compositions owned, written and composed by complainants respectively, without payment of any royalties; complainants and others similarly situated were unable to enforce their exclusive rights in the public performance for profit of their compositions; individually they had no means of enforcing such rights; they could not employ investigators throughout the country to detect infringement because such public performances for profit were fugitive, fleeting and ephemeral, and no record [fol. 29] was made by users of such performances; complainants had no effective means of employing lawyers throughout the United States to bring infringement suits against users for the wrongful public performance for profit of their musical compositions; and complainants and others similarly situated were helpless to enforce the rights granted to them by the Copyright Act; those of the users of music who might be willing or inclined to pay for the public performance for profit of the compositions of complainants and those similarly situated, were unable to do so because it was necessary to have ready access to a great number of musical compositions to be performed in a single evening and at a moment's notice; under such circumstances it was impossible to get in touch with the indi-

vidual owners of the particular musical compositions, many of whom were scattered throughout the world; the users of music, consisting primarily of hotel owners, innkeepers, carabet and dance hall proprietors and motion picture exhibitors were organized into very powerful trade associations who employed counsel to defend such users against claims of infringement for the unauthorized performance of public performance of musical works of complainants, and others similarly situated, and such associations of users even offered to defend infringers who were not members of their respective associations.

16. On February 13, 1914, a small group of composers, authors and publishers, under the leadership of Victor Herbert, Irving Berlin, Silvio Hein, William Jerome, Gustav Kerker, John Golden, Glen McDonough, Ernest R. [fol. 30] Ball, Raymond Hubbell, James Weldon Johnson, Louis A. Hirsch, Henry Blossom, George Maxwell, Jay Witmark, the complainant Gene Buck and the complainant publisher Irving Berlin, Inc., and others, organized a voluntary unincorporated non-profit association under the laws of the State of New York, which they designated as the American Society of Composers, Authors and Publishers (hereinafter referred to for brevity's sake as the "Society"); said Society was formed for the purpose of licensing to users of music throughout the country the right to publicly perform for profit the works of its members; said Society did not and does not deal in any commodity, did not and does not deal in any sheet music, exercised and exercises no function with respect to mechanical rights of reproduction, and was and is limited solely as aforesaid to the right of public performance for profit; said Society has functioned continuously since said date; from its very commencement it encountered tremendous opposition on the part of organized groups of users of music throughout the country; one of the functions of the Society was to detect infringements of the right of public performance for profit of its members and to institute suits on behalf of its members for such infringements; it also licensed establishments throughout the country to publicly perform for profit the musical compositions of its members upon fair and reasonable license fees; the organized groups of users of music resisted efforts to compel them to pay compensation for the performance for profit of the Society's

members; with the advent of radio broadcasting in 1922, powerful groups of radio broadcasters throughout the [fol. 31] United States joined with the other groups, aforementioned, in opposing the Society; such groups of users attacked the Society by interposing defenses in suits for infringement, by complaints made to the Attorney-General of the United States, by a suit brought against the Society in the State of New York, by attempts made annually in Congress for over twelve years last past to amend the Copyright Act so as to permit the users of music to publicly perform for profit the musical compositions of the Society's members without compensation, by initiating tax legislation in various States, and lately by introducing into various States bills similar to the Statute of the State of Nebraska herein complained of, with a view of destroying and nullifying the rights of the Society's members given to them by the Copyright Act.

17. At the present time there are approximately 123 publisher members of the Society; there are approximately 1000 writer and composer members of the Society; from time to time said publisher, writer and composer members have entered into contracts with the Society, wherein and whereby said members of the Society have assigned to the Society the exclusive right of public performance for profit in their respective musical compositions for periods of five years at a time; the last contracts were signed prior to and became operative January 1, 1936; annexed hereto and made part of this complaint is the contract entered into on the 12th day of April, 1935 between complainant Carl Fischer, Inc. and the Society and marked Exhibit "B"; annexed hereto and made part of this complaint is the contract entered into on the 25th day of June, 1935 between [fol. 32] complainant Gene Buck and the Society and marked Exhibit "C"; the other complainants, G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, prior to January 1, 1936, executed and delivered to the Society contracts in form similar to the contracts entered into between the Society and Carl Fischer, Inc. and Gene Buck; all of said contracts executed and delivered by the complainants to the Society expire by limitation of time on the 31st day of December, 1940; all of the publisher members of the Society have executed contracts similar to

Exhibit "B"; all of the other members of the Society have executed contracts similar to Exhibit "C".

18. Annexed hereto and made a part of this complaint and marked Exhibit "D" are the present Articles of Association of the Society.

19. Complainants' respective businesses and occupations are lawful ones, and the pursuit thereof cannot be prohibited directly or indirectly; the rights vested in the complainants by the Constitution of the United States and the Copyright Laws enacted by the Congress thereunder are exclusive and cannot be limited, curtailed, forfeited, confiscated or circumscribed by any of the Statutes of the several States, including the State of Nebraska.

20. The users of music have uniformly objected to dealing with individual copyright owners for the licensing of the public performance for profit of particular musical compositions; the practice of the Society has been to license theatres according to their seating capacity, radio broadcasting stations according to their income, power and cover-[fol. 33] age, and hotels, cabarets and dance halls according to the respective size, business done, number and size of orchestras, methods of performance, income and standing; licenses are granted by the Society to such users in which all the musical compositions owned, written, and composed by members of the Society are made available to such users for use at any time within the contract period without requiring the specific consent of the owner of the particular composition played; such licenses include likewise the right on the part of the users to publicly perform for profit the musical compositions copyrighted, written and composed by members of societies throughout the world organized on a basis similar to the Society with whom Society has contracts, so that by licenses made with the Society the users obtain the right to publicly perform for profit the works of over 44,000 composers, authors and publishers; said rights granted by the Society are of great value to the users who have consistently and uniformly objected to the separate licensing of individual compositions, on the ground that it would involve a great amount of bookkeeping, clerical hire and expense; the system of blanket licenses conferred by the Society performs a useful service for the users and enables them to have available

at all times for their own special purposes a vast reservoir of musical compositions that are pleasing and entertaining to the public, classical, modern, as well as popular; and the Society since 1914 has looked after the interests not only of its own members, but of other members of the musical profession who have been in distress by reason of age and indigence and who otherwise have been unable to support [fol. 34] themselves, and the Society has paid sick benefits to such individuals, as well as to its members, and has looked after the widows and orphans of indigent composers and writers throughout the United States whose families would otherwise have been objects of public charity; the individual complainants herein have neither the resources, funds, organization or ability to protect the musical copyrighted works in which they are authors and composers, or which they own, or in which they have renewal rights, or obtain renewals, against infringement by unauthorized performances for profit within the State of Nebraska in their individual capacity; and have been compelled, as aforesaid, to unite and combine for the purpose of preventing such infringement and enforcing the rights granted to them under the Copyright Act, and such rights cannot be enforced by said individual complainants without such combination; if the individual complainants were to create an agency within the State of Nebraska to protect against infringement of their respective musical copyrights by unauthorized public performances for profit and to issue licenses thereunder to users in the State of Nebraska and check up on the accuracy of uses reported, the cost thereof to each of such individual complainants would be greatly in excess of $10,000 a piece, which expenditure would be necessary in the employment of investigators, clerical help, accountants and lawyers.

21. Upon information and belief the State Statute was sponsored by an organized group of radio broadcasters and other users of music in an endeavor to destroy the Society so that they might have for their own selfish aggrandizement free access to all musical compositions without com- [fol. 35] pensation; said group of users caused a similar statute to be enacted by the State of Montana in or about February, 1937, known as Chapter 90 of the Laws of 1937 of the State of Montana; and they caused to be enacted in the State of Washington in or about March, 1937, a similar

statute known as Chapter 218 of the Laws of 1937 of the State of Washington; and similar bills have been prepared by such group of users who have circularized the legislatures of other States with a view to presenting to them for enactment similar statutes in all the forty-eight States; said State Statute was passed by the legislature of the State of Nebraska (as were the similar bills passed by the legislatures of the States of Montana and Washington) without an adequate opportunity for a hearing being afforded to complainants and others similarly situated. The following radio broadcasting stations in the State of Nebraska are members of the National Association of Broadcasters, which association on behalf of its members, for many years last past has acted and presently acts collectively in dealing with the Society, as well as for other purposes:

Station	Owner	Location
KMMJ	KMMJ, Inc	Clay Center
KGFW	Central Nebraska Broadcasting Corp	Kerney
KFAB	KFAB Broadcasting Company	Lincoln
KFOR	Cornbelt Broadcasting Corp	Lincoln
WJAG	Norfolk Daily News	Norfolk
KOIL	Central States Broadcasting Co	Omaha
WAAW	Omaha Grain Exchange	Omaha
WOW	Woodman of the World Life Insurance Association	Omaha

22. Annexed hereto and made a part of this complaint is a copy of the State Statute marked Exhibit "E".

[fol. 36] 23. Upon information and belief, the Society pursuant to the rights vested in it by the contracts made with complainants herein, and others similarly situated, has for many years entered into numerous contracts which are now in force between it, acting on behalf of and jointly for all the members of Society and for the joint benefit of all such members, and users of music within the State of Nebraska, in which the Society has licensed such users to publicly perform for profit the musical compositions of its members; there are about 391 contracts in force at the present time from which the Society received for the year 1936 the sum of $53,984.33; on or about the 20th day of January, 1936, the Society entered into a contract with Omaha Grain Exchange, proprietor of a radio broadcasting station having call letters WAAW, a copy of which is hereto annexed and made a part hereof and marked Exhibit "F", which contract is presently in force and effect, and has been duly performed both by the Society and by the radio broad-

casting station; in addition to said contract, there are 8 other contracts made between the Society and the radio broadcasters in the State of Nebraska similar to Exhibit "F" presently in force and up to the enactment of said State Statute performed both by the Society and each respective broadcaster; on or about the 19th day of June, 1936, the Society entered into a contract with Ralph D. Goldberg Theatres Corporation, proprietor of a motion picture theatres known as the Military Theatre, Omaha, Nebraska, a copy of which is hereto annexed and made a part hereof and marked Exhibit "G", which contract is presently in force and effect, and was up to the enactment of said State Statute duly performed both by the Society and by the motion picture theatre exhibitor; in addition to said contract, there are 249 other contracts made between [fol. 37] the Society and the motion picture theatres in the State of Nebraska similar to Exhibit "G" presently in force and up to the enactment of said State Statute being performed both by the Society and each respective motion picture theatre exhibitor; on or about the 10th day of June, 1935, the Society entered into a contract with Fontenelle Hotel at Omaha, Nebraska, a copy of which is hereto annexed and made a part hereof and marked Exhibit "H", which contract is presently in force and effect, and was up to the enactment of said State Statute duly performed both by the Society and by the hotel owner; in addition to said contract, there are 23 other contracts made between the Society and hotels and restaurants in the State of Nebraska similar to Exhibit "H" presently in force and up to the enactment of said State Statute duly performed both by the Society and each respective hotel and restaurant proprietor.

24. Societies similar in purpose and scope to the Society have been in existence and are organized and operating under and by virtue of the laws of Argentina, Austria, Belgium, Brazil, Bulgaria, Czecho Slovakia, Denmark, England, Finland, France, Germany, Hungary, Italy, Jugoslavia, Norway, Portugal, Rumania, Spain, Sweden and Switzerland.

By virtue of various treaties and proclamations of the Presidents of the United States, issued pursuant to Section 8 of the Copyright Act, and which are now in force between the United States and Argentina, Austria, Belgium,

Brazil, Bulgaria, Czecho Slovakia, Denmark, England, Finland, France, Germany, Hungary, Italy, Jugoslavia, Norway, Portugal, Rumania, Spain, Sweden and Switzerland, reciprocal rights are granted to citizens of the United [fol. 38] States and to citizens of the foreign countries named, whereby the citizens of such foreign countries are extended copyright protection within the United States, upon compliance with the Copyright Act with respect to their several musical compositions, and citizens of the United States are extended reciprocal protection, with respect to their several musical compositions, under the copyright acts of said countries upon complying with the copyright acts thereof. Such reciprocal protection is based upon the determination that certain reciprocal conditions for the enjoyment of copyright exist as between the United States and such respective foreign states or nations, and is accorded under and by virtue of proclamations and treaties establishing the existence of such conditions, and having the force and effect of law.

Under mutual working arrangements with foreign societies, the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all the members of said respective foreign societies, and said foreign societies have the exclusive right to, and do license within the territorial limits of their respective countries, the public performance for profit of the musical compositions copyrighted by members of the Society. Under such arrangements between the Society and said foreign societies, the latter are not required to, and never have, filed copies of the respective compositions copyrighted by their respective members. The catalogues of musical compositions of said foreign societies exceed many hundreds of thousands of compositions composed and written by more [fol. 39] than 44,000 members of such foreign societies, the exact number of compositions being utterly impossible to state at any one time on account of the expiration, renewal and obtaining of new copyrights. The right to perform the musical compositions embraced in said foreign catalogues are included in the blanket licenses issued to individual licensees by the Society in the United States. Their 44,000 members are scattered throughout the world, and they are not required to file copies of their respective musical compositions in order to enjoy copyright protection

in the United States under the Treaties, Proclamations and United States Laws aforesaid.

25. Upon information and belief, compliance with said State Statute would require the Society and its licensees to abandon the contracts between them and would compel each of the complainants, as well as other members of the Society, similarly situated, to rescind their respective contracts with the Society unless they were willing to have their works used for purposes of public performance for profit in Nebraska by any purchaser of a sheet of music, phonograph record, music roll, electrical transcription or film, who pays the price thereof fixed by the publisher of such composition or the manufacturer of such phonograph record, music roll, electrical transcription or film; under Section 1(e) of the Copyright Act of 1909, as amended, any manufacturer of parts of instruments serving to reproduce mechanically a musical work may manufacture such a reproduction of a copyrighted work upon payment to the copyright proprietor of a royalty of two cents on each such part manufactured, but the Copyright Act provides that the payment of such royalty shall not free such articles or devices from further payment of royalties in case public performances for profit are made by means of such articles [fol. 40] or devices; that many thousands of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded by manufacturers of phonograph records, music rolls, electrical transcriptions and other parts of instruments serving to reproduce mechanically such copyrighted musical compositions; that the Copyright Act does not impose any other duty upon such manufacturers, except the payment of two cents for each record, and complainants have not received any other moneys except the payment of such two cents, and have no right to demand any further sums from such manufacturers; and complainants, and others similarly situated, have no control over the manner of sale and disposition of such phonograph records, music rolls or electrical transcriptions of their said copyrighted musical works, and they cannot compel the manufacturers thereof to affix any price upon said phonograph records, music rolls or electrical transcriptions, or to collect any price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected for the public

performance for profit thereof. Complainants and others similarly situated are not willing to permit their musical compositions to be performed within the State of Nebraska publicly for profit upon such a basis or on any basis wherein the fee or compensation would be included in the price paid for a copy of the sheet of music of said composition or phonograph record, music roll, electrical transcription or film thereof; complainants believe that such a requirement and compulsory license would deprive them of the exclusive rights vouchsafed to them under the Copyright Law.

If each complainant would be required to act independently in order to have the right to fix license fees, each complainant would be required to have an investigator cover- [fol. 41] ing each of the places of public entertainment and amusement in the State of Nebraska to determine whether any infringements took place and to determine whether payments were being made in accordance with performances; the establishment of such an agency would cost each of the complainants many thousands of dollars and would in fact greatly exceed the revenue which each of them might hope to collect in the State of Nebraska; all the users of music in the State of Nebraska paid for the music of the 44,000 composers represented by the Society and its affiliated societies for the year 1936, the aggregate sum of $53,984.33. In the year 1936, users located in the following counties of the State of Nebraska paid to the Society for licenses to publicly perform for profit musical compositions of complainants and the other members of the Society and all other Societies throughout the world affiliated with the Society, the following sums:

County	Amount Collected	County	Amount Collected
Rock	$26.25	Hooker	23.30
Morrill	60.00	Frontier	33.76
Kimball	25.00	Gasper	24.80
Richardson	204.39	Nance	74.70
Jefferson	149.50	Pawnee	38.76
Sheridan	140.10	Fillmore	$89.75
Hitchcock	36.52	Wayne	64.90
Webster	30.00	Deuel	22.00
Phelps	123.01	Greeley	90.20
Madison	1623.57	Polk	98.54
Buffalo	789.94	Box Butte	20.00
Dixon	46.26	Thayer	47.00

County	Amount Collected	County	Amount Collected
Hall	526.41	Valley	95.00
Furnas	92.50	Nuckalls	39.60
Garden	35.00	Sherman	35.00
Douglas	22361.33	Kearney	41.52
Howard	55.11	Cass	164.43
Chase	51.25	Gage	270.90
Seward	77.57	Platte	252.49
Otoe	274.25	Pierce	101.65
Cuming	204.46	Adams	343.86
Stanton	22.40	Dundy	25.00
Dawson	139.90	Memaha	82.50
Hamilton	29.70	Johnson	52.50
Knox	170.65	Washington	73.40

[fol. 42]

Sarpy	57.01	Cedar	$93.08
Webster	11.00	Dodge	306.59
Antelope	56.80	Butler	91.50
Cherry	87.50	Redwillow	152.12
Colfax	198.24	Dawes	203.15
Burt	202.56	Boyd	33.80
Franklin	7.50	Brown	30.56
Lancaster	14435.55	Garfield	22.50
Dakota	125.00	Keith	105.00
Cheyenne	119.38	Blaine	30.00
Scotts Bluff	1164.21	Wheeler	7.50
Clay	3488.60	Thomas	6.00
Custer	79.50	Perkins	54.20
Saline	177.50	Harlan	30.00
Boone	81.92	York	1512.68
Saunders	73.50	Thurston	19.00
Keyapaka	10.00	Holt	113.45
Lincoln	1164.08	Merrick	132.72
		Total	$53,984.33

The proportion collected from each county represents the approximate proportions that were collected from each county for other years prior to 1936, and similar sums will be collected in the same proportion in the future unless prevented by the operation of the said State Statute.

27. Complainants will be able to license users of their music in the State of Nebraska without doing any act in

said State, but unless the injunction prayed for herein is granted, complainants will be unable to issue any licenses from without the State of Nebraska without incurring the penalties of said State Statute. The copyrighted works of the complainants and of all the other members of the Society and of the affiliated societies have at one time or another been publicly performed for profit in the State of Nebraska, and a great number of the copyrighted works of the complainants are being constantly performed in the State of Nebraska, and will continue to be performed in the State of Nebraska.

[fol. 43] 28. Radio broadcasting stations WOW and KOIL located in Omaha, Nebraska, are affiliated with and rebroadcast programs emanating from the studios of the National Broadcasting Company in New York City, New York. Station KFAB located in Lincoln, Nebraska, is affiliated with and rebroadcasts programs emanating from the studios of the Columbia Broadcasting System, Inc. Station KFOR located in Lincoln, Nebraska, and Station KOIL, located in Omaha, Nebraska, are affiliated with and rebroadcast programs emanating from the studios of the Mutual Broadcasting System in Newark, New Jersey. The following stations: Station KGFW in Kearney, and Station KGKY in Scotts Bluff, are affiliated with the National Independent Broadcasters, Inc., having its general sales office at 17 East 42nd Street, New York City, and rebroadcast programs emanate from studios located throughout the United States. It is a general practice with respect to national networks to have musical programs performed in the City of New York and in other large cities and broadcast from the radio station where such program is performed. At the same time the program is transmitted by telephone wires to other stations located throughout the country, and particularly the aforementioned broadcasting stations located within the State of Nebraska, so that the broadcast originating in the home studio of the National Broadcasting Company or of the Columbia Broadcasting Company or of the National Independent Broadcasters, Inc., or of the Mutual Broadcasting System, as the case may be, is simultaneously performed by means of a broadcast from the connecting stations, including the above mentioned stations within the State of [fol. 44] Nebraska; the programs broadcast by many stations outside of the State of Nebraska, whether affiliated or

not with any station located within the State of Nebraska are heard within the State of Nebraska, and such programs include the broadcasting of music copyrighted by the members of the Society, including the complainants herein; broadcasting stations without the State of Nebraska broadcast daily in excess of 100 copyrighted works of the complainants and other members of the Society and of its affiliated societies, which broadcasts are heard on receiving sets within the State of Nebraska.

29. The said State Statute prevents complainants from licensing the broadcasting of their compositions outside of the State of Nebraska if such broadcast may be heard within the State of Nebraska; said State Statute deprives complainants of the means of detecting infringements in the State of Nebraska; said State Statute attempts to deprive complainants of unrestricted access to the Federal Court for redress for infringement of their copyrights; said State Statute sets up a system of recording of copyrights in addition to that provided for by the Copyright Act; unless the enforcement of this State Statute is restrained by this Court, other States in addition to Montana and Washington may enact similar Statutes requiring complainants to comply not only with the recording requirements enacted in this State, but also in all the forty-eight States, all of which would work undue hardship on complainants and would violate the spirit of the Constitution and the Copyright Laws enacted thereunder.

30. Upon information and belief said State Statute is class legislation; it is aimed only at proprietors of musical copyrights and no other copyrights, and it exempts [fol. 45] the performance of musical works which are not copyrighted under the laws of the United States but which are protected at common law. A great many forms of copyright and kinds of copyrighted works are presently and constantly dealt in, licensed, sold and otherwise made available within the State of Nebraska, such as motion pictures, dramas, newspapers, magazines, books and periodicals, none of which are affected by said State Statute.

31. Said State Statute attempts to vest in the Courts of Nebraska the right to determine the ownership of complainants' copyrights and to construe, interpret, modify, rescind or annul contracts between complainants and users in the

State of Nebraska without properly securing jurisdiction over complainants and others similarly situated, who are not residents or domiciled within the State of Nebraska, and are not doing business therein, and who have no agency within said State and have no property within said State which may be seized.

32. The licensing of the right of public performance as provided for by the said State Statute of Nebraska involves only the incorporeal right secured under the Copyright Law, as distinguished from the material object copyrighted; complainants and the Society in licensing the public performance for profit do not furnish, supply or deliver any sheet music to users; they do not deal directly or indirectly with any tangible object or piece of property in connection with the licensing for public performance for profit of their copyrighted musical compositions.

33. Upon information and belief, the said State Statute [fol. 46] is a pretext under which the State of Nebraska is attempting to usurp power to enact copyright laws delegated by the Constitution of the United States solely to Congress, and said State Statute interferes with the copyrights of the complainants and others similarly situated under the guise of an exercise of the police power of said State; the said State Statute, in truth and in fact, was enacted, not in the public interest, but rather for the private benefit and gain of a group of users of music in an organized effort to enable such users to have free access to the copyrighted works of complainants and others similarly situated, without paying compensation therefor, and without danger of being compelled to pay damages for infringement as provided for in the Copyright Act.

34. The system of licensing provided for in said State Statute would deprive complainants and others similarly situated of the right to enter into voluntary contracts licensing the public performance for profit of their copyrighted musical works, and of the right to determine the conditions under which such works might be performed, and of the right to limit the frequency of the performance of such works in order to prevent the destruction of the performing right values thereof.

35. The defendants, Harry R. Swanson, as Secretary of the State of Nebraska, Walter H. Jensen, as State Treas-

urer of the State of Nebraska, William H. Price, as Auditor of Public Accounts of the State of Nebraska, Richard [fol. 47] C. Hunter, as Attorney General of the State of Nebraska, James T. English, as County Attorney of Douglas County, State of Nebraska, Max G. Towle, as County Attorney of Lancaster County, State of Nebraska, Grace Ballard, as County Attorney of Washington County, State of Nebraska, S. S. Diedrichs, as County Attorney of Lincoln County, State of Nebraska, Raymond B. Morrissey, as County Attorney of Johnson County, State of Nebraska, Maynard N. Grosshaus, as County Attorney of York County, State of Nebraska, Charles H. Hood, as County Attorney of Saunders County, State of Nebraska, Alvin B. Lee, as County Attorney of Valley County, State of Nebraska, Gerald J. McGinley, as County Attorney of Keith County, State of Nebraska, Floyd Lundberg, as County Attorney of Kearney County, State of Nebraska, Edwin Moran, as County Attorney of Otoe County, State of Nebraska, Rush C. Clarke, as County Attorney of Scotts Bluff County, State of Nebraska, and "John Doe" and "Richard Roe" have threatened to, and will enforce such State Statute in each and all of its terms and the whole thereof, and particularly against these complainants and others similarly situated, individually and as members of the Society, in the event that such complainants and others similarly situated refuse to file copies of their copyrighted musical works in the State of Nebraska; or to accept or submit to a system of involuntary licensing; and said defendants have threatened to enforce the penal and confiscatory provisions of such Statute against complainants and others similarly situated in the event complainants and others similarly situated attempt to enforce the existing contracts between themselves and the Society and between the Society and citizens and residents [fol. 48] of the State of Nebraska; or in the event that complainants and others similarly situated license persons, firms or corporations to publicly perform outside the State of Nebraska musical compositions, which performances may be reproduced and reperformed within the State of Nebraska; or in the event that complainants and others similarly situated enter into license agreements without the State of Nebraska with residents or citizens of that State for the right or license to perform publicly for profit the musical compositions of the complainants and others similarly situated within the State of Nebraska; or in the event

that complainants and others similarly situated enter into license agreements within the State of Nebraska with persons, firms or corporations, residents or citizens of that State, for the purpose of licensing them to publicly perform for profit the musical compositions of complainants and others similarly situated within or without the State of Nebraska; or in the event that complainants and others similarly situated take any means to detect infringements of their copyrighted musical works within the State of Nebraska; or in the event that complainants and others similarly situated bring any suits for infringement of their copyrights in their respective compositions by means of public performances for profit in the Federal Courts within or without the State of Nebraska; or in the event that complainants and others similarly situated, being non-residents and non-citizens of the State of Nebraska, and having no agent or representative and not transacting business within said State, or having property therein, fail or refuse to submit to the jurisdiction of the State Courts of Nebraska; and [fol. 49] defendants have threatened in the event of the aforesaid contingencies, or any of them, to enforce the penalties provided for in said State Statute, and to proceed to prosecute complainants and others similarly situated, their employees and agents, criminally, for an alleged violation of said Statute.

36. Said Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great, that neither complainants nor others similarly situated may continue to grant licenses to users of music within the State of Nebraska or even to users of music without the State of Nebraska if the public performance for profit of such music may be reproduced or performed within the State of Nebraska. There are ninety-three counties in the State of Nebraska, in each of which there are establishments publicly performing for profit the copyrighted musical compositions of members of the Society, including the other complainants herein, and the foreign societies with which the Society has reciprocal arrangements, and if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in said counties they will be subjected to a multiplicity of suits and prosecutions unless restrained by this Honorable Court; complainants will be unable to secure any com-

pensation for the public performance for profit of their respective copyrighted musical compositions by means of rebroadcasting or by means of personal performance of artists, singers, musicians, orchestras, bands, actors, loud speakers, radio, sound production or reproduction, apparatus or instrumentalities or electrical transcriptions, or by [fol. 50] any other means of rendition whatsoever within the State of Nebraska from any radio broadcasting, radio receiving or radio rebroadcasting station, or in any theatre or motion picture house located in the State of Nebraska; complainants and others similarly situated will be unable to enforce any contracts made between them or on their behalf by the Society with residents or citizens of the State of Nebraska; complainants and others similarly situated, as well as the Society, have been compelled since the effective date of the Statute, to desist from licensing the public performance for profit of their copyrighted musical compositions in the State of Nebraska and have been deprived of all sources of revenue therefrom, and have been denied the privileges granted to them by the Copyright Act; and the Society has been compelled to desist from enforcing collection of payments under existing contracts between it and users since the effective date of said Statute, and has been compelled to desist from investigating infringements of the copyrights of complainants, and other members of the Society and its affiliated societies by means of the public performance for profit of their respective copyrighted musical compositions, and complainants will continue to suffer as aforesaid unless this Court grant an injunction as prayed for; and the complainants and the Society and its affiliated societies have been and will be hindered, delayed and impeded in enforcing their rights and remedies under the Copyright Act in the Federal Court located in the State of Nebraska, for infringements committed by users within the State of Nebraska by means of public performances for profit of the copyrighted musical compositions aforesaid, all because of the drastic provisions of the said State [fol. 51] Statute and the numerous penalties, civil and criminal, to which the complainants will be liable in the event of any violation of said State Statute; and complainants and others similarly situated will be unable to detect and sue for infringement of their copyrighted musical works within the State of Nebraska; unless this Court shall determine the validity and application of said Statute in this proceeding,

complainants and others similarly situated will be deprived of the rights granted to them under the United States Constitution and the Copyright Act, and will be without any remedy for the enforcement of such rights within the State of Nebraska, and they will therefore be deprived of their property and liberty without due process of law, and denied the equal protection of the laws, all in contravention of Article I, Sections 8, 9 and 10, Article III, Section 2, Article IV, Section 2, and Article VI, Section 2, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, and Article 1, Sections 1, 3, 7, 12, 13, 15, 16, 21, and 25, of the Constitution of the State of Nebraska; and complainants have no adequate remedy at law, and are relievable only in a court of equity and if complainants are not afforded the equitable relief prayed for herein, but are required to resist, when criminal prosecutions and other suits or proceedings are instituted under the State, it will result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate.

37. Each of the complainants has received from the Society for the year 1936, as compensation for the public [fol. 52] performance for profit of the complainants' works, respectively, in excess of the following sums: Carl Fischer, Inc. in excess of $50,000.00; G. Schirmer, Inc. in excess of $50,000.00; Irving Berlin, Inc. in excess of $50,000.00; Gene Buck in excess of $5,000.00; Deems Taylor in excess of $5,000.00; Oley Speaks in excess of $5,000.00; William J. Hill in excess of $5,000.00; Anne Paul Nevin in excess of $5,000.00; Ella Herbert Bartlett in excess of $5,000.00; and Jane Sousa in excess of $5,000.00; upon information and belief, complainants will be entitled to receive for the balance of the period for which they have entered into contracts with the Society, and for which the Society has contracts with users of music, similar amounts for each year, down to December 31, 1939, and such complainants will receive such amounts for said period if their right thereto is not interfered with and destroyed by such State Statute; approximately two-thirds of the revenue obtained by the Society and distributed to the complainants and others similarly situated, is derived from moneys paid for the right to perform publicly for profit by means of radio broadcast-

ing, and if this Court does not interfere and restrain the enforcement of such State Statute, such revenue may be lost to the Society, and the complainants and others similarly situated will not participate in royalties from the public performance for profit by means of radio broadcasting, because such performances, even though given in other parts of the United States, may, under the provisions of such State Statute, be deemed a violation of such State Statute in the State of Nebraska, and complainants will lose the benefit of their said contracts with the Society and all the contracts made between the Society and users of music, and will receive no further moneys from public perform- [fol. 53] ance for profit by means of radio broadcasting of their musical compositions.

38. Said State Statute is unconstitutional and void and each and every section thereof is unconstitutional and void under the aforesaid Articles and Sections of the Constitution of the United States mentioned hereinabove, and the Fourteenth Amendment to the Constitution of the United States, in that it deprives complainants of their liberty and property without due process of law and the equal protection of the laws, impairs the obligation of contract, destroys the rights of complainants in their copyrighted works, nullifies valid contracts theretofore entered into, interferes with the Federal judicial power, destroys the privileges and immunities granted to complainants, and attempts to subordinate the Federal Constitution, Treaties of the United States with foreign nations, Presidential Proclamations and the Copyright Act to the State of Nebraska, and to subordinate complainants to an unreasonable search and seizure of their properties, effects, papers and persons.

39. If defendants are not restricted in their threatened and attempted enforcement of such State Statute, complainants and others similarly situated will suffer great and irreparable loss, for which they have no adequate remedy at law, but are relievable only in a court of equity.

Therefore, the complainants pray:

1. That defendants, Harry R. Swanson, as Secretary of the State of Nebraska, Walter H. Jensen, as State Treasurer of the State of Nebraska, William H. Price, as Auditor of Public Accounts of the State of Nebraska, Richard C. Hun-

ter, as Attorney General of the State of Nebraska, James T. [fol. 54] English, as County Attorney of Douglas County, State of Nebraska, Max G. Towle, as County Attorney of Lancaster County, State of Nebraska, Grace Ballard, as County Attorney of Washington County, State of Nebraska, S. S. Diedrichs, as County Attorney of Lincoln County, State of Nebraska, Raymond B. Morrissey, as County Attorney of Johnson County, State of Nebraska, Maynard N. Grosshaus, as County Attorney of York County, State of Nebraska, Charles H. Hood, as County Attorney of Saunders County, State of Nebraska, Alvin B. Lee, as County Attorney of Valley County, State of Nebraska, Gerald J. McGinley, as County Attorney of Keith County, State of Nebraska, Floyd Lundberg, as County Attorney of Kearney County, State of Nebraska, Edwin Moran, as County Attorney of Otoe County, State of Nebraska, Rush C. Clarke, as County Attorney of Scotts Bluff County, State of Nebraska, "John Doe" and "Richard Roe", be enjoined and restrained by temporary and permanent order of injunction of this Court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, and proceeding at law or in equity for the purpose of enforcing said State Statute, against the complainants and others similarly situated, representatives, employees, agents or any of them, and from demanding that copies of musical compositions of complainants and others similarly situated be filed, and from attempting to appoint or take any steps leading to the appointment of a receiver, and from interfering with all existing contracts entered into between complainants and others, including the Society and citizens and residents of the State of Nebraska, and from threatening to enforce against any citizens or residents of the State of Nebraska, the penalties of said Statute in the event such citizens and [fols. 55-57] residents desire to carry out their contracts with Society or complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Nebraska or elsewhere, and generally, from doing any act or thing to carry out or enforce any of the provisions of said State Statute; and that an order to show cause issue herein upon the application of the complainants, directed to the above-

named defendants, requiring them to show cause why a temporary injunction should not issue as prayed for herein.

2. That said State Statute, and each and every part and section thereof, be declared to be unconstitutional, illegal and void, and that a perpetual injunction be issued restraining the enforcement of said State Statute and each and every part and section thereof, as hereinabove prayed for.

3. That a writ of subpoena may issue to the defendants, requiring them to answer this bill of complaint fully and truthfully, but not on oath, an oath being hereby waived, and that further and general relief be granted as the nature of complainants' case may require, or to equity may seem just and proper.

L. J. TePoel, Solicitors for Complainants, Office & P. O. Address, 605-8 Farnam Building, Omaha, Nebraska.

Gene Buck.

(Duly verified)

[fol. 58] EXHIBIT "A" TO COMPLAINT

No. 5242—5210

Agreement

between

J. Fischer & Bro. (Inc.), New York City, party of the first part, and Deems Taylor of New York City party of the second part:

I. J. Fischer & Bro. agree to publish Banks O'Doon—Captain Stratton's Fancy by Deems Taylor.

II. J. Fischer & Bro. agree to defray all expenses made necessary to produce printed copies of the first and all subsequent editions of the musical compositions mentioned in Article I.

III. Deems Taylor, party of the second part, or his assigns to receive in consideration of this agreement, ten per cent (10%) of the marked or retail price on every copy sold.

IV. In said J. Fischer & Bro., its successors or assigns, or legal representatives, shall be vested the exclusive right of copyrighting, publishing and vending the said musical compositions by Deems Taylor, party of the second part, or of making arrangements for so doing with its agents and representatives in all countries.

V. J. Fischer & Bro. agree to make settlement annually in the month of January as of January First.

VI. Copies of musical compositions mentioned in Article I are to be printed and placed on sale when J. Fischer & Bro. find it convenient so to do.

VII. It is further agreed that said Deems Taylor, party of the second part, shall forthwith sell, assign, transfer and turn over to J. Fischer & Bro., party of the first part, his copyright and all his title and interest in and rights under the same unto the said J. Fischer & Bro., for the consideration aforesaid.

VIII. In said J. Fischer & Bro., party of the first part, its successors or assigns, shall be vested the rights during the full life of copyright to authorize or permit the performance of the musical compositions mentioned in Article I.

In Witness Whereof the party of the first part has hereunto affixed its corporate seal and the party of the second part his hand and seal this Sixteenth day of March, 1923.

J. Fischer & Bro., by [Name illegible]; Deems Taylor (L. S.).

Witness: A. Schmitt, H. Roth.

[fol. 59] EXHIBIT "B" TO COMPLAINT

Agreement made between the Undersigned (for brevity called "Owner") and the American Society of Composers, Authors and Publishers (for brevity called "Society"), in consideration of the premises and of the mutual covenants hereinafter contained, as follows:

The Owner sells, assigns, transfers and sets over unto the Society for the term hereof, the entire exclusive right of public performance (as hereinafter defined), in each musical work:

Of which the Owner is a copyright proprietor; or

Which the Owner, alone, or jointly, or in collaboration with others, wrote, composed, published, acquired or owned; or

In which the Owner now has any right, title, interest or control whatsoever, in whole or in part; or

Which hereafter, during the term hereof, may be written, composed, acquired, owned, published or copyrighted by the Owner, alone, jointly or in collaboration with others; or

In which the Owner may hereafter, during the term hereof, have any right, title, interest or control, whatsoever, in whole or in part.

The exclusive right of public performance in every musical work shall be deemed assigned to the Society by this instrument and shall vest in and be the absolute property of the Society for the term hereof, immediately, upon the work being written, composed, acquired, owned, published or copyrighted.

The rights hereby assigned shall include:

(a) All the rights and remedies for enforcing the copyright or copyrights of such musical works, whether such copyrights are in the name of the Owner and/or others, as well as the right to sue under such copyrights in the name of the Society and/or in the name of the Owner and/or others, to the end that the Society may effectively protect and be assured of all the rights hereby assigned.

(b) The exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and dramatico-musical compositions, the Owner reserving and excepting from this assignment the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.

(c) The right of public performance by means of radio broadcasting, telephony, "wired wireless," all forms of synchronism with motion pictures, and/or any method of transmitting sound; Provided, however, that the Owner shall have the right, in good faith, by written notice to the Society, to restrict, limit or prohibit the public performance by radio broadcasting of works the copyright of which is vested in the Owner, and the Society agrees that all licenses

by it issued shall contain a provision reserving its right to restrict or limit, or to prohibit entirely, the performance by broadcasting of any works in its repertory; and Provided further, that if the Owner notify the Society in writing to restrict, limit or prohibit the public performance of such copyrighted work, the Owner shall not, by the service of such notice, become repossessed of any of the rights transferred to the Society by this assignment.

2. The term of this agreement shall be for a period of five (5) years from the first day of January, 1936, and expiring on the 31st day of December, 1940.

3. The Society agrees, during the term hereof, in good faith to use its best endeavors to promote and carry out the objects for which it was organized, and to hold and apply all royalties, profits, benefits and advantages arising from the exploitation of the rights assigned to it by its several members, including the Owner, to the uses and purposes as provided in its Articles of Association (to which reference is hereby made), as now in force or as hereafter amended.

4. The Owner hereby irrevocably, during the term hereof, authorizes, empowers and vests in the Society exclusively, the right to enforce and protect such rights of public performance under any and all copyrights, whether standing in the name of the Owner and/or others, in any and all works copyrighted by the Owner, and/or by others; to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the Owner and/or others in whose names the copyright may stand, as parties plaintiff or defendants in suits or proceedings; to bring suit in the name of the Owner and/or in the name of the Society, or others in whose name the copyright may stand, or otherwise, and [fol. 60] to release, compromise, or refer to arbitration any actions, in the same manner and to the same extent and to all intents and purposes as the Owner might or could do, had this instrument not been made.

5. The Owner hereby makes, constitutes and appoints the Society, or its successor, the Owner's true and lawful attorney, irrevocably during the term hereof, and in the name of the Society or its successor, or in the name of the Owner, or otherwise, to do all acts, take all proceedings, execute,

acknowledge and deliver any and all instruments, papers, documents, process and pleadings that may be necessary, proper or expedient to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises.

6. The Owner agrees from time to time to execute, acknowledge and deliver to the Society, such assurances, powers of attorney or other authorizations or instruments as the Society may deem necessary or expedient to enable it to exercise, enjoy and enforce, in its own name or otherwise, all rights and remedies aforesaid.

7. It is mutually agreed that during the term hereof the Board of Directors of the Society shall be composed of an equal number of writers and publishers respectively, and that the royalties distributed by the Board of Directors shall be divided into two (2) equal sums and one (1) each of such sums credited respectively to and for division amongst (a) the writer members, and (b) the publisher members, in accordance with the system of distribution and classification as determined by the Classification Committee of each group, in accordance with the Articles of Association as they may be amended from time to time, except that the classification of the Owner within his class may be changed.

8. The Owner agrees that his classification in the Society as determined from time to time by the Classification Committee of his group and/or the Board of Directors of the Society, in case of appeal by him, shall be final, conclusive and binding upon him.

The Society shall have the right to transfer the right of review of any classification from the Board of Directors to any other agency or instrumentality that in its discretion and good judgment it deems best adapted to assuring to the Society's membership a just, fair, equitable and accurate classification.

The Society shall have the right to adopt from time to time such systems, means, methods and formulae for the establishment of a member's status in respect of classification as will assure a fair, just and equitable distribution of royalties among the membership.

9. "Public Performance" Defined. The term "public performance" shall be construed to mean vocal, instrumental and/or mechanical renditions and representations in any manner or by any method whatsoever, including transmissions by radio broadcasting stations, transmission by telephony and/or "wired wireless"; and/or reproductions of performances and renditions by means of devices for reproducing sound recorded in synchronism or timed relation with the taking of motion pictures.

10. "Musical Works" Defined. The phrase "musical works" shall be construed to mean musical compositions and dramatico-musical compositions, the words and music thereof, and the respective arrangements thereof, and the selections therefrom.

11. The powers, rights, authorities and privileges by this instrument vested in the Society, are deemed to include the World, provided, however, that such grant of rights for foreign countries shall be subject to any agreements now in effect, a list of which are noted on the reverse side hereof.

12*—As per rider below

Signed, Sealed and Delivered, on this 12th day of April, 1935. Carl Fischer Inc., Owner, per Walter Fischer, Pres.; American Society of Composers, Authors and Publishers, Society, By Joseph Young, Secretary.

*—12. This rider constitutes #12 of the foregoing contract.

By accepting this contract the Society agrees that all agreements heretofore or hereafter entered into with members for the period beginning January 1st, 1936, are or will be identical in all respects with this agreement.

[fol. 61] Foreign Agreements at This Date in Effect

(See paragraph 11 of the within agreement)

It is distinctly agreed and understood that the powers, rights, authorities and privileges vested in the Society by this instrument, do not include world rights, but are restricted to the United States, ——, Austria, Denmark, France, Belgium, Egypt, Greece, Holland, Japan, Monaco,

Portugal, Roumania, Switzerland, Germany, Hungary and Italy.

1—8—36.

It is also understood and agreed that the powers, rights, authorities and privileges vested in the Society by the within instrument shall include Great Britain.

[fol. 62] EXHIBIT "C" TO COMPLAINT

Agreement made between the Undersigned (for brevity called "Owner") and the American Society of Composers, Authors and Publishers (for brevity called "Society"), in consideration of the premises and of the mutual covenants hereinafter contained, as follows:

The Owner sells, assigns, transfers and sets over unto the Society for the term hereof, the entire exclusive right of public performance (as hereinafter defined), in each musical work:

Of which the Owner is a copyright proprietor; or

Which the Owner, alone, or jointly, or in collaboration with others, wrote, composed, published, acquired or owned; or

In which the Owner now has any right, title, interest or control whatsoever, in whole or in part; or

Which hereafter, during the term hereof, may be written, composed, acquired, owned, published or copyrighted by the Owner, alone, jointly or in collaboration with others; or

In which the Owner may hereafter, during the term hereof, have any right, title, interest or control, whatsoever, in whole or in part.

The exclusive right of public performance in every musical work shall be deemed assigned to the Society by this instrument and shall vest in and be the absolute property of the Society for the term hereof, immediately, upon the work being written, composed, acquired, owned, published or copyrighted.

The rights hereby assigned shall include:

(a) All the rights and remedies for enforcing the copyright or copyrights of such musical works, whether such copyrights are in the name of the Owner and/or others, as well as the right to sue under such copyrights in the

name of the Society and/or in the name of the Owner and/or others, to the end that the Society may effectively protect and be assured of all the rights hereby assigned.

(b) The exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and dramatico-musical compositions, the Owner reserving and excepting from this assignment the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.

(c) The right of public performance by means of radio broadcasting, telephony, "wired wireless," all forms of synchronism with motion pictures, and/or any method of transmitting sound; Provided, however, that the Owner shall have the right, in good faith, by written notice to the Society, to restrict, limit or prohibit the public performance by radio broadcasting of works the copyright of which is vested in the Owner, and the Society agrees that all licenses by it issued shall contain a provision reserving its right to restrict or limit, or to prohibit entirely, the performance by broadcasting of any works in its repertory; and Provided further, that if the Owner notify the Society in writing to restrict, limit or prohibit the public performance of such copyrighted work, the Owner shall not, by the service of such notice, become repossessed of any of the rights transferred to the Society by this assignment.

2. The term of this agreement shall be for a period of five (5) years from the first day of January, 1936, and expiring on the 31st day of December, 1940.

3. The Society agrees, during the term hereof, in good faith to use its best endeavors to promote and carry out the objects for which it was organized, and to hold and apply all royalties, profits, benefits and advantages arising from the exploitation of the rights assigned to it by its several members, including the Owner, to the uses and purposes as provided in its Articles of Association (to which reference is hereby made), as now in force or as hereafter amended.

4. The Owner hereby irrevocably, during the term hereof, authorizes, empowers and vests in the Society exclusively, the right to enforce and protect such rights of public per-

formance under any and all copyrights, whether standing in the name of the Owner and/or others, in any and all works copyrighted by the Owner, and/or by others; to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the Owner and/or others in whose names the copyright may stand, as parties plaintiff or de- [fol. 63] fendants in suits or proceedings; to bring suit in the name of the Owner and/or in the name of the Society, or others in whose name the copyright may stand, or otherwise, and to release, compromise, or refer to arbitration any actions, in the same manner and to the same extent and to all intents and purposes as the Owner might or could do, had this instrument not been made.

5. The Owner hereby makes, constitutes and appoints the Society, or its successor, the Owner's true and lawful attorney, irrevocably during the term hereof, and in the name of the Society or its successor, or in the name of the Owner, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process and pleadings that may be necessary, proper or expedient to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises.

6. The Owner agrees from time to time to execute, acknowledge and deliver to the Society, such assurances, powers of attorney or other authorizations or instruments as the Society may deem necessary or expedient to enable it to exercise, enjoy and enforce, in its own name or otherwise, all rights and remedies aforesaid.

7. It is mutually agreed that during the term hereof the Board of Directors of the Society shall be composed of an equal number of writers and publishers respectively, and that the royalties distributed by the Board of Directors shall be divided into two (2) equal sums, and one (1) each of such sums credited respectively to and for division amongst (a) the writer members, and (b) the publisher members, in accordance with the system of distribution and classification as determined by the Classification Committee of each group, in accordance with the Articles of

Association as they may be amended from time to time, except that the classification of the Owner within his class may be changed.

8. The Owner agrees that his classification in the Society as determined from time to time by the Classification Committee of his group and/or the Board of Directors of the Society, in case of appeal by him, shall be final, conclusive and binding upon him.

The Society shall have the right to transfer the right of review of any classification from the Board of Directors to any other agency or instrumentality that in its discretion and good judgment it deems best adapted to assuring to the Society's membership a just, fair, equitable and accurate classification.

The Society shall have the right to adopt from time to time such systems, means, methods and formulae for the establishment of a member's status in respect of classification as will assure a fair, just and equitable distribution of royalties among the membership.

9. "Public Performance" Defined. The term "public performance" shall be construed to mean vocal, instrumental and/or mechanical renditions and representations in any manner or by any method whatsoever, including transmissions by radio broadcasting stations, transmission by telephony and/or "wired wireless"; and/or reproductions of performances and renditions by means of devices for reproducing sound recorded in synchronism or timed relation with the taking of motion pictures.

10. "Musical Works" Defined. The phrase "musical works" shall be construed to mean musical compositions and dramatico-musical compositions, the words and music thereof, and the respective arrangements thereof, and the selections therefrom.

11. The powers, rights, authorities and privileges by this instrument vested in the Society, are deemed to include the World, provided, however, that such grant of rights for foreign countries shall be subject to any agreements now in effect, a list of which are noted on the reverse side hereof.

Signed, Sealed and Delivered, on this 25th day of June, 1935. Gene Buck, Owner; American Society of Composers, Authors and Publishers, Society, By Joseph Young, Secretary.

[fol. 64] EXHIBIT "D" TO COMPLAINT

Articles of Association

Article I

Objects

Section 1. We constitute ourselves a voluntary association under the name of "American Society of Composers, Authors and Publishers," for the following purposes, to-wit:

(a) To protect composers, authors and publishers of musical works against piracies of any kind;

(b) To promote reforms in the law respecting literary property;

(c) To Procure uniformity and certainty in the law respecting literary property in all countries;

(d) To facilitate the administration of the copyright laws for the protection of composers, authors and publishers of musical works;

(e) To abolish abuses and unfair practices and methods in connection with the reproduction of musical works;

(f) To promote and foster by all lawful means the interest of composers, authors and publishers of musical works;

(g) To grant licenses and collect royalties for the public representation of the works of its members by instrumentalists, singers, mechanical instruments, radio broadcasting stations, or any kind of combination of singers, instrumentalists and mechanical instruments, and to allot and distribute such royalties;

(h) To adjust and arbitrate differences and controversies between its members and between its members and others, and to represent its members in controversies, actions and proceedings, involving the right of public performance of any work of any member, or the question of authorship in any work of any member;

(i) To promote friendly intercourse and united action among composers, authors, publishers and producers of musical works;

(j) To acquire, own and sell real and personal property, and to accumulate and maintain a reserve fund to be used in carrying out any of the objects of the society.

(k) To enter into agreements with other similar associations in foreign countries, providing for the reciprocal protection of the rights of the members of each society.

(l) To do any and all other acts or things which may be found necessary or convenient in carrying out any of the objects of the Society or in protecting or furthering its interests or the interests of its members.

Section 2. The principal office of the Society is to be located in the City of New York.

Article II

Duration

The duration of the Society shall be ninety-nine years.

Article III

Membership

Section 1. The membership of this Society shall be divided into five classes, as follows:

Music Publishers

Any person, partnership, firm or corporation regularly engaged for a period of not less than one year in the music publishing business shall be eligible to membership in this class.

Composers and Authors

Any composer and/or author of musical works who regularly practices the profession of writing music and/or the text or lyrics of musical works, and who shall have had not less than five works of his composition or writing regularly published, shall be eligible to membership in this class.

Non-Participating

Each person, partnership, firm or corporation hereafter elected to membership shall be first assigned to this Class, and shall remain therein for a period not exceeding one year from election. At the termination of the said period

the Board of Directors shall, by two-thirds vote of those present, determine whether the membership in this class shall continue, and if so for what additional period, or shall be transferred to the appropriate one of the two preceding classes, or be discontinued. No such membership shall, however, be discontinued except after due notice to the member and an opportunity afforded him to appear before the Board of Directors and show cause why the same should not be discontinued.

[fol. 65] Members in this Class shall not be entitled to vote, hold office, or share in any of the rights, benefits, privileges, royalties or emoluments of the two preceding classes of members.

Honorary Membership

Any person, firm or corporation which has rendered to the art or industry of music, or to this Society, a notable or conspicuous service, may be eligible in this Class and elected thereto by unanimous vote of the Board of Directors. All nominations in respect of this class of membership shall, however, be tabled at the meeting first presented, and may not be acted upon until or after the next succeeding meeting.

Members in this Class shall not be entitled to vote, hold office, or share in any of the rights, benefits, privileges, royalties or emoluments of the first two Classes hereinabove described.

Successors of Deceased Composers and Authors

Any person who has acquired, by will or under any law, the right, title and interest of a deceased composer or author in any musical work, including the right of public performance thereof, may be elected to membership under this Class. Members of this Class shall not have voting power or be eligible to office.

Dues

Section 2. The annual dues, payable on the first day of January in each year, shall be as follows:

Music Publishers	$50.00
Composers and Authors	10.00
Successors to Deceased Composers and Authors	10.00

Upon election to either of the above Classes the member shall pay the pro-rata of annual rate to the first day of the

following January, and thereafter at the annual rate of his Class.

Non-Participating	None
Honorary	None

Unless otherwise directed by the Board of Directors, all sums received in payment of dues shall be for the use and benefit of the Relief Fund of the Society.

Upon the default in excess of ninety days in payment of any dues, after notice thereof to the member, the Board of Directors may suspend or expel the delinquent member.

Application for Membership

Section 3. Shall be made in writing upon a printed blank form prepared by the Committee on Membership. Every application shall be signed by an individual applicant in person, by a firm, through a co-partner, by an association or corporation through a duly authorized officer. The application shall be submitted to the Membership Committee and shall be accompanied by proof of eligibility to membership.

Intent of Application

Section 4. The signing and presentation of such an application to the Membership Committee, shall be deemed and construed to be an agreement on the part of the applicant to fulfill, duly perform, and abide by the Articles of Association, and all requirements herein contained; and to conform to, duly perform and abide by, all by-laws, rules, regulations or resolutions, whether expressed in the Articles of Association or otherwise, which may be in force at the time of such application or may thereafter from time to time be adopted, and to all amendments of and additions to the Articles of Association, by-laws, rules or regulations which after the time of such application may from time to time be adopted.

Election to Membership

Section 5. A majority vote of all members of the Board of Directors shall be necessary to elect an applicant to membership.

Obligation of Applicant

Section 6. Each member shall, upon election to Active Membership, execute an assignment in such form as the

Board of Directors shall approve, vesting in the Society the exclusive right to license the non-dramatic public performance of the members works for the period of any then existing agreement between the Society and its members.

Members' List of Works

Section 7. The applicant on being elected to membership shall, upon request, state upon a regular printed form furnished by the Secretary, a brief title, description and the [fol. 66] date of copyright, of each work published or written by him. Each member shall upon the publication of any work of which he is the author, composer or publisher, furnish to the Secretary, a brief title, description, and the date of copyright thereof.

Transfer of Non-Participating Member

Section 8. Upon the transfer of a non-participating member to either "Music Publisher" or "Composers and Authors" Class, and before the transfer shall be deemed as in effect, the member shall execute and deliver to the Society an assignment of non-dramatic public performing rights, in the form submitted by the Society, all of which rights so vested in the Society shall be known as the "performing rights" and are to be held and enjoyed by the Society from the date of election to expiration of any then existing agreement between the Society and its members.

Membership Roll

Section 9. It shall be the duty of the Membership Committee to prepare and keep a membership roll or list of members of the Society.

False Representation by Member

Section 10. Whenever it shall appear to a majority of the Membership Committee that a misstatement upon a material point has been made to it by a member, upon his application either for membership or reinstatement, it shall report the case to the Board of Directors, who by a two-thirds vote of all the members of the Board may expel the member after a trial as in these articles provided.

Failure of Member to Qualif-

Section 11. If within six weeks after the transfer of a "Non-Participating" member to either "Music Publishers"

or "Composers and Authors" Class, the members shall have failed to execute and deliver to the Society the assignment as provided by Section 8 preceding, and to comply with all other rules, regulations and requirements of the Society, the membership shall be discontinued.

Voting

Section 12. No co-partnership, firm, association or corporation shall have more than one vote or representative in the Society. In case of a co-partnership, a member thereof, and in case of an association or corporation, an officer thereof, shall be duly designated as its representative. Such designation shall be filed with the Secretary of the Society.

Article IV

Management

Board of Directors

Elections

Section 1. The government of the Society shall be vested in, and its affairs shall be managed by a Board of twenty-four directors. They shall be elected at each annual meeting of the Board of Directors by a two-thirds vote of the entire Board and shall continue until their successors are elected. They shall be divided into three divisions of equal number. At the first election hereafter held one division, consisting of four publishers, two authors and two composers, shall be elected for one year; one division similarly constituted for two years and one division similarly constituted for three years; but when the term of each division expires their successors shall be elected by the Board of Directors for three years.

At all times six of the members of the Board shall be composers, six authors and twelve publishers. Any vacancy in the Board shall be filled from the class of members in which the vacancy occurred and shall by nomination of the remaining Board members of such class, be elected by a two-thirds vote of the directors present.

Thirteen members shall be necessary to constitute a quorum, and the affirmative vote of two-thirds of such quorum shall be required and shall be sufficient to adopt or pass any motion or resolution authorizing or directing any

act or thing within the power of the Board. Any number less than a quorum may meet and adjourn from time to time until a quorum be present.

The Board may determine the rules of its procedure and make any and all regulations necessary for the carrying on of the business of the Board of Directors and the officers, agents and servants of the Society.

Any former President of the American Society of Composers, Authors and Publishers shall be ex-officio member of the Board of Directors, without the right to vote. Adopted—March 25, 1931.

[fol. 67] Meeting of Board

Section 2. The Board shall meet at least once in each month except in the months of July, August and September, and shall hold an annual meeting in the month of January of each year. Notices of regular or special meetings of the Board of Directors shall be given by mail by the Secretary to each director at his last known post office address at least two days previous to the time fixed for the meeting. Special meetings of the Board of Directors may be called by the President or Secretary, and shall be called by either of them on written request of any seven directors.

Report of Board at Meetings

Section 3. The Board of Directors shall keep a record of its proceedings which shall be submitted at the annual meeting of the Society, and shall report at such meeting, or at any special meeting of the Society, any business which in its judgment requires the action of the Society.

Article V

Powers of the Board of Directors

Management

Section 1. The Board of Directors shall have charge of and supervision over the general management of the business of the Society, and in addition to the powers by these articles expressly conferred upon it, may exercise all such powers and do all such acts and things as may be exercised or done by the Society.

Contracts

Section 2. Without prejudice to the general powers conferred by the last preceding section and the other powers

conferred by these articles, it is hereby expressly declared that the Board of Directors shall have the following powers, that is to say:

To make contracts or authorize contracts to be made by officers of the Society or by any of the committees provided for by these articles; to fix the rate, time and manner of payment of royalties for the performances of all works registered with the Society; to collect such royalties; to maintain all legal proceedings necessary to enforce payment of such royalties and compromise claims for damages and penalties for unlawful performances; to distribute among the members the royalties collected in the proportionate shares provided for in the scheme of allotment of royalties prescribed in these articles; to enforce the fulfillment of all contracts, both on the part of the members of the Society and third parties, that may have been made by the Society; to authorize the prosecution and defense of any matter, action or proceeding within the scope of the Society, or affecting its interests or involving the rights of public performance of any work of any member or the question of authorship in any work of any member.

To purchase or otherwise acquire for the Society any property, rights and privileges which the Society is authorized to acquire, at such prices and on such terms and conditions, and for such considerations, as it thinks fit.

To appoint and at its discretion remove or suspend, such assistant secretaries, assistant treasurers, managers, subordinates, assistants, clerks, agents and servants, permanently or temporarily, as it may from time to time think fit, and to determine their duties and fix and from time to time change their salaries or emoluments, and to require security in such instances and in such amounts as it may think fit.

To confer by resolution upon any committee or officer of the Society the right to choose, remove or suspend such subordinate officers, agents or servants.

To determine who shall be authorized to sign, on the Society's behalf, receipts, endorsements, checks, releases, contracts and documents.

From time to time to provide for the management of the affairs of the Society in such manner as it thinks fit, and in particular from time to time to delegate any of the powers of the Board of Directors to any Committees, officers or

agents, and to appoint any persons to be the agents of the Society, with such powers (including the power to sub-delegate) and upon such terms as may be thought fit.

To appoint and dissolve all committees; to define, alter and regulate the jurisdiction and exercise original and supervisory jurisdiction over any all subjects and matters referred to said committees; it may direct and control their actions or proceedings at any stage thereof, and shall try all charges against members and punish such as may be found guilty.

The Board of Directors shall have the power to make such regulations and to take such action not inconsistent with the articles of association and the by-laws, as it may deem ad-
[fol. 68] visable for the protection of the property and for the general objects of the Society. It shall adopt a seal of the Society.

The Board of Directors shall have the control over and power of disposition of all funds belonging to the Society. It shall determine the manner and form of their investment and the depositaries of such funds.

Salaries of Directors

Section 3. Directors as such shall not receive any salaries for their services except that the sum of $240 may be appropriated out of the treasury at each meeting of the Board of Directors for distribution as attendance fees among such directors of the 24 members of the Board as shall be present within five minutes after the meeting has been called to order.

In case a director shall be absent from three consecutive meetings of the Board of Directors, unless he shall have been by the President excused from attendance, his office as a Director, and any other office held, shall be declared vacant, and at the next regular meeting of the Board of Directors a successor shall be elected.

Section 4. That no resolution increasing salaries or granting emoluments to officers and employees receiving $5,000.00 yearly or more, or making unusual or extraordinary expenditure or financial committment may be passed by the Board of Directors until such resolution is first proposed at a regular or special meeting of the Board of Directors and laid upon the table for final action at its next succeeding meeting. Notice of the meeting at which such resolution is to be voted upon granting the same must be given to the

members of the Board in writing at least five days in advance.

Adopted—March 28th, 1929.

Vacancy in Board of Directors

Section 5. In case of the death, removal or resignation of a director, or of any vacancy in the Board of Directors, such vacancy shall be filled by the election of a director belonging to the same class of directors as the member of the Board whose place is to be filled, for the unexpired term, at the next regular meeting, in the manner provided for the election of directors by the Board of Directors at annual meetings.

Removal or Suspension of Director or Officer

Section 6. In case, at any regular or special meeting of the Board of Directors, two-thirds of those present shall be of the opinion that sufficient cause exists for the removal of any director or officer from such office, and that his removal is for the best interest of the Society, a special meeting of the Board of Directors shall be called, upon three days' written notice to each of the directors, specifying the charges against the director or officer against whom such are directed, and a copy of such charges shall be served upon the director or officer so charged, at least three days before such special meeting. In case, at such special meeting, the directors shall after hearing such director or officer, determine by an affirmative vote of two-thirds of all the directors in office, that sufficient cause exists for his removal, and that his removal is for the best interest of the Society, then such person shall immediately cease to be a director or officer as the case may be, and the resulting vacancy shall be filled as provided in Section 5 next above.

The Board of Directors may suspend from office any officer or director against whom charges have been preferred.

Disqualification of Member of Board of Directors

Section 7. No member of the Board of Directors shall be disqualified from participating in any meeting, action or proceeding of any kind whatever of said Board of Directors, by reason of being or having been a member of a Standing Committee or Special Committee which has made prior inquiry, examination or investigation of the matter under

consideration. Nor shall any member of any Standing or Special Committee be disqualified, by reason of such membership, from acting as a member of the Board of Directors upon any appeal from any decision of such Standing or Special Committee. But no member shall participate in the adjudication of any case in which he is personally interested.

Examination of Member

Section 8. The Board of Directors may, by a two-thirds vote of its members present, require that any member of the Society shall submit to the Board of Directors or any Standing or Special Committee, for examination, such portion of his books or papers as are material and relevant to any matter under investigation by said Board of Directors or by any Standing or Special Committee. Any member who [fol. 69] shall refuse or neglect to comply with such requirements, or shall wilfully destroy any such required evidence, or who, being duly summoned, in pursuance of a two-thirds vote of the members of the Board of Directors present, shall refuse or neglect to appear before the Board of Directors or any Standing or Special Committee, as a witness, or refuse to testify before any such Committee, may be adjudged guilty of an act detrimental to the interest or welfare of the Society.

Final Decision by Trial

Section 9. Any hearing or trial may be adjourned, from time to time, by the Board of Directors in its discretion; but no member thereof, who shall not have been present at every meeting of said Board of Directors at which evidence is taken, or at which an accused member, or a member whose conduct is involved in the hearing or trial, is heard, shall participate in the final decision.

Article VI

Officers

Section 1. Shall consist of a President, two Vice-Presidents, a Secretary, Assistant Secretary, a Treasurer and an Assistant Treasurer who shall be Directors of the Society, and a Counsel who need not be a member of the Society.

Election of Officers

Section 2. The President, the Vice-Presidents, the Secretary, Assistant Secretary, the Treasurer, and Assistant Treasurer, shall be elected annually by the Board of Directors by a two-thirds vote of the entire board, and such officers shall hold the same offices in the Board of Directors. Each officer, excepting the Counsel, shall serve for the term of one year and until the election and qualification of his successor.

Appointment of Counsel

Section 3. The Counsel shall be appointed by the Board of Directors for such term as may be decided by the Board.

Vacancy of Office

Section 4. In a case a vacancy shall occur in the office either of the President, Vice-Presidents, Secretary, Assistant Secretary, Treasurer or Assistant Treasurer, an election shall be held forthwith to fill vacancy for the unexpired term.

Expulsion or Suspenion of Officer

Section 5. The expulsion or suspension of a member holding any office or position, to which he has been either elected or appointed, shall create a vacancy therein which shall be filled as provided in these articles.

Article VII

The President

Section 1. The President shall be the chief executive officer of the Society. He shall preside at all meetings of the Board of Directors. He shall have general supervision over the business affairs and property of the Society and over its several officers.

He shall see that all orders and resolutions of the Board of Directors and of the Society are carried into effect and he shall sign all contracts and agreements authorized by the Board of Directors, unless the Board shall otherwise direct. The President shall submit to the Board of Directors, as soon as may be after the close of each fiscal year, and to the members at each annual meeting a complete report of the operations of the Society, or the preceding year,

and of the state of its affairs, making such recommendations as he thinks proper, and he shall from time to time report to the Board of Directors all matters within his knowledge which the interests of the members may require to be brought to its notice. The President shall be ex-officio a member of all standing committees.

Article VIII

The Vice-President

Section 1. The Vice-President shall have such powers and perform such duties as the Board of Directors may from time to time prescribe, and perform such other duties as may be prescribed in these by-laws. In case of the absence of the President or his inability to act, the Vice-President shall discharge the duties of the President.

[fol. 70]

Article IX

The Treasurer

Section 1. The Treasurer shall have charge of the funds, securities, receipts and disbursements of the Society. He shall deposit all moneys and other valuable effects in the name and to the credit of the Society in such depositories as the Board of Directors may from time to time designate. He shall disburse the funds of the Society as may be ordered by the Board, by checks or drafts upon the authorized depositaries of the Society, signed by the President or Vice-President and countersigned by himself or an assistant Treasurer. He shall take and preserve proper vouchers for all moneys disbursed. He shall render to the President or to the directors, at the regular meetings of the Board, whenever the President or said Board shall require him to do so, and at every annual meeting of the Society an account of the financial conditions of the Society and of all of his transactions as Treasurer; and as soon as may be after the close of each fiscal year he shall make and submit to the Board of Directors a like report for each fiscal year. He shall keep at the principal office of the Society full and correct books of account of all its business and transactions. He shall give to the Society a bond in such sum as the Board of Directors may from time to time designate conditioned for the faithful performance of the duties of

his office and the restoration to the Society at the expiration of the term of his office or in case of his death, resignation or removal from office, of all books, papers, vouchers, money or other property of whatever kind in his possession belonging to the Society. In the absence of the Treasurer or his inability to act, the Assistant Treasurer shall perform all the duties of the Treasurer. The Treasurer shall pay no bills unless they are properly certified by the officer or committee authorized by the Board of Directors to make the expenditures. The books and accounts of the Society shall be audited monthly in such manner as the Board of Directors may order.

Article X

The Secretary

Section 1. The Secretary shall be ex-officio Secretary of the Board of Directors and of all standing committees. He shall record all the votes and proceedings of the meetings of the Society, and of the Board of Directors, and of all committees, in a book or books. He shall record all the votes and proceedings of the meetings of the Society, and when authorized by the Board of Directors he shall affix such seal to any instrument requiring the same. He shall countersign all contracts and agreements signed by the President. The seal of the Society, so affixed, shall always be attested by the signature of the Secretary, or an Assistant Secretary. He shall give notice of all meetings of the Society, and of the Directors, and of all committees and of all calls for assessments to be paid by the members. The Secretary shall also have such other powers and perform such other duties as pertain to his office, or as the Board of Directors may from time to time prescribe. In the absence of the Secretary or his inability to act, the Assistant Secretary shall have all the foregoing duties.

Article XI

The Counsel

The Counsel shall be the legal adviser of the Society, the Board and the various committees. He shall have supervision of all matters involving legal questions, and shall appear for the Society in all actions or proceedings.

Article XII

Absence or Suspension of Officer

In case of the absence of the President, a Vice-President, the Secretary, Assistant Secretary, the Treasurer or Assistant Treasurer, or in case of the suspension of any such officer pending his trial on charges, the Board may delegate his powers and duties to any other officer, or to any Director for the time being.

Article XIII

Order of Business, Directors' Meetings

The order of business at the meetings of the Board shall be as follows:

1. A quorum of thirteen members being present the President shall call the Board to order.
2. The minutes of the last meeting shall be read and considered as approved, if there be no amendments.
3. Reports of officers of the Society.
4. Reports of Committees.

[fol. 71] 5. Unfinished business.
6. Miscellaneous business.
7. New business.

Article XIV

Standing Committees

Section 1. Finance Committee. There shall be a Finance Committee of three Directors appointed by the President, who shall attend to and supervise all the fiscal operations of the Society to the extent and in the manner directed by the Board, and this or such other committee as may be appointed by the President shall examine all accounts of the Society at the close of each fiscal year and at such other times as may be deemed necessary, and report thereon.

Section 2. Administrative Committee. The President may also appoint an Administrative Committee from the members, who shall advise with and aid the officers of the Society in all matters concerning its interests and the management of its business and generally perform such duties and exercise such powers as may be prescribed or delegated by the Board of Directors from time to time. This Committee

shall consist of such number as the President shall from time to time see fit. (See Section 5.)

Section 3. Membership Committee. The President shall appoint a Membership Committee consisting of five directors who shall pass upon the applications filed with the Committee and shall verify the statements therein contained, and may require of each applicant additional proof of eligibility to membership.

Section 4. Complaint Committee. The Complaint Committee shall consist of three members of the Board appointed by the President.

Any member against whom a complaint is made before this Committee of violation of the Articles of Association, the by-laws or any resolution of the Society, or of the Board of Directors, regulating the conduct of the members, or of any conduct or proceeding inconsistent with the Articles of Association, or of misconduct, fraud, fraudulent acts or acts derogatory to the welfare of or prejudicial to the Society, shall be notified thereof, and if he desires he shall be heard in his defense, and shall be afforded an opportunity to examine all charges, papers and evidence submitted to the Committee, and to make answer thereto. The Committee shall have power to make rules respecting hearings upon such complaints. Proceedings before the Committee shall be confidential, and shall be disclosed only as the Directors order, after the proceedings have been reported to them. Should the circumstances warrant, the complaint shall be referred to the Board of Directors with all evidence taken before the Committee, and the Board, after investigating said charges, shall summon before it the accused member where he shall have an opportunity to be again heard in person before final action in the case, and, if in the opinion of the Board, the charge or charges against said accused member be substantiated, it may by a vote of not less than two-thirds of the entire Board, censure, fine, suspend or expel said member, and the decision of the Board of Directors shall be conclusive and final.

Section 5. Term of Committees. All standing committees shall be appointed for a term of one year, and shall remain in office until successors are appointed, or until vacated or voided by the Board of Directors.

Except as to the Administrative Committee the member-

ship of Committees shall consist exclusively of members of the Society.

Section 6. Classification Committee. There shall be two Classification Committees for the allotment of royalties—one for the classification of "Music Publisher" members and one for the classification of "Composer and Author" members. The Classification Committee for the Music Publisher Members shall consist of the publisher members of the Board of Directors, and the Classification Committee for the composer and author *of* members shall consist of the composer and author members of the Board of Directors.

Each such committee shall meet not less than once in each quarter for the purpose of classifying the members over which it shall have jurisdiction.

It shall be the duty of the Classification Committee to determine the status of each member of the Society with respect to the share of the royalties to which he is entitled in the distribution of royalties directed to be made by the Board of Directors. Such Committees, in fixing the status of a member shall take into consideration the number, nature and character of works composed, written or published by such member, the popularity and vogue of such works, the length of time in which the works of the member have been a part of the catalogue of the Society and generally the prestige, reputation, qualifications, standing and service which such member has rendered to the Society. [fol. 72] Such Committee shall, before any distribution of royalties is ordered by the Board, review and revise the classification of the respective members, to the end that the allotment and apportionment of the royalties among the respective members shall be fair, just and equitable to the entire membership.

The Classification Committee shall create several classes, each such class to consist of a group of members having a like status; each member of such group to share equally in the distribution of royalties with the other members of such group. The Committees shall diligently and industriously make due and proper investigation, before each distribution, of the members' standing and advance or reduce a member, as the case may be, from one class to another as the facts and circumstances may warrant, based upon the standards hereinabove set forth.

Protest and Appeal from Classification

Any member, aggrieved by his classification may, after any distribution, file a protest in writing with the Classification Committee having jurisdiction over his classification. It shall be the duty of the Classification Committee to hear such member and to accept from him all papers in evidence submitted to the Committee. The Committee shall have the power to make rules respecting hearings upon such protests, with full power to appoint a sub-committee to investigate such protest.

The Committee shall make its decision within thirty days from the date of filing the protest. The member shall have the right to appeal from such decision to the Board of Directors by filing a notice of appeal in writing with the Secretary of the Society, in which case the protest, with all evidence taken before the Committee shall be referred to the Board of Directors. The Board, after investigating such protest, shall determine the classification of such member by a vote of not less than two-thirds of the directors present. The decision of the Board of Directors shall be conclusive and final. In case of a reclassification of a member, such reclassification shall not be retroactive but shall become effective on the succeeding distribution.

Writers' Board of Appeals

In addition to the composer and author Classification Committee, there shall be elected annually from the general membership (publisher members not voting) three committees, each to consist of three members, one committee of popular song composers and authors, one committee of production composers and authors, and one committee of standard composers and authors; these three committees shall constitute a composer and author board of appeals of nine men, and the personnel of said committees shall be made up as follows:

The Secretary of the Society shall, prior to ninety (90) days before the annual meeting, mail to the class AA members in the popular and production groups, a complete alphabetical list of all Class AA composer and author members of each group and to all standard members a complete alphabetical list of all Class AA composer and author members to BB (inclusive) without disclosing the classification

of any of those whose names appear on the list; he shall at the same time mail to Class A through B (inclusive), members in the popular and production groups, a complete and alphabetical list of all Class A through B members and each of these respective groups without disclosing the classification of any of the members whose names appear on the list; he shall, at the same time, mail to the standard and composer groups from Classes B through C (inclusive), without disclosing the classification of any of the members whose names appear on the list; he shall, at the same time, mail to Class CC through 3 (inclusive), members in the popular and production groups, a complete and alphabetical list of all Class CC through 3 (inclusive), members of each of these groups without disclosing the classification of any of the members whose names appear on the list, and mail to the standard group classes DD through 3, a complete alphabetical list of members of these groups without disclosing the classification of any of the members whose names appear on the list.

The members of each group shall vote to elect one member of said group to each of the three committees constituting the composer and author board of appeals; the person receiving the greatest number of votes in his respective group shall be deemed to be elected to said board of appeals; in the event such member is not available for service, then the person in the same group receiving the next greatest number of votes shall automatically take the place of the absentee as an alternate member of the Board of Appeals.

These nine men so elected shall constitute the Board of Appeals, and said Board shall consist of the following three committees taken from the following groups of classification:

1 member on the Popular Writers' Committee from Class AA.

[fol. 73] 1 member on the Popular Writers' Committee from Classes A through B (inclusive).

1 member on the Popular Writers' Committee from Classes CC through 3 (inclusive).

1 member on the Production Writers' Committee from Class AA.

1 member on the Production Writers' Committee from Classes A through B (inclusive).

1 member on the Production Writers' Committee from Classes CC through 3 (inclusive).

1 member on the Standard Writers' Committee from Classes AA through BB (inclusive).

1 member on the Standard Writers' Committee from Classes B through C (inclusive).

1 member on the Standard Writers' Committee from Classes DD through 3 (inclusive).

The procedure on appeals shall be as follows:

Any member who is dissatisfied with the decision of the Classification Committee may give notice in writing to the Secretary that he proposes to appeal to the Committee on the Board of Appeals which represents his particular group (popular, production or standard), the said Committee shall entertain his appeal and give him an opportunity to appear in person, if he so desires, or to present his appeal in writing, or both; if the said Committee decides against the member, its decision shall be deemed final; if said Committee decides in favor of the member, its decision shall likewise be deemed final, unless the Classification Committee feels that it is to the interest and welfare of the Society that a further appeal be allowed; in such case, the Classification Committee shall so state in writing, and an appeal may thereupon be taken by the Classification Committee, itself, to the entire Board of Appeals of the composers and authors, consisting of nine members; such appeal may be presented in writing or by oral hearing, or both; the decision of such Board of Appeals shall be considered final.

Members shall be given not less than five (5) days notice of the date when their appeal will be heard.

Appeals shall be heard in regular order, and the Board of Appeals shall meet at least once every three months, and until all appeals have been heard.

A majority vote of the Board of Appeals shall rule.

If a member of the Board of Appeals is dissatisfied with his classification and desires to make an appeal, he shall first do so to the Classification Committee and if not satisfied with its decision, then he shall have the right to appeal to the entire Board of Directors of the Society, whose decision shall be final.

The Classification Committee shall delegate one of its members to be at the disposal of the said Board of Appeals

at all times with the necessary data, cards and other information required, and shall supply all information required to said Board of Appeals whenever so requested; the counting and tally of ballots of election shall be under the direction and supervision of the General Manager and President of the Society; the election of the members of the Committees and Board of Appeals of the Composers and Authors, shall take place at least one month prior to the annual meeting of the Society, and the results thereof shall be announced at the annual meeting of the Society, each year, except that the first election shall take place not more than two (2) weeks after the passing of this amendment by the general body.

The decisions of the Board of Appeals, with respect to the proper classification of members, shall not be retroactive.

The Board of Directors of the Society shall make the rules of procedure by which the Board of Appeals shall be governed.

If any member of the Board of Appeals is advanced out of the class and group from which he is elected, then he shall immediately be replaced by his alternate in that particular class and group.

No member elected to serve on the Board of Directors of the Society shall be eligible to serve on the Board of Appeals.

The Board of Appeals must at all times adhere to the rules and regulations of classification as contained in the Articles of Association of the American Society of Composers, Authors and Publishers, under Article XIV, Section 6, and at all times take into consideration all data, etc., which from time to time are used by the Classification Committee in arriving at the just classification of members.

The Board of Directors shall, at its first regular meeting after this amendment is passed and put into effect, fix proper compensation to be paid to the members of the Board of Appeals, at such times as they are required to hold meetings.

The foregoing provisions shall apply only to Author and Composer members of the Society, and not to Publisher members.

This amendment is to take effect immediately.

[fol. 74] Publishers' Board of Appeals

In addition to the Classification Committee for the music publisher members, there shall be elected annually from the general membership (composer and author members not voting) two separate committees of three members each, to be known respectively as the

(1) "Popular Publishers' Board of Appeals"

(2) "Standard Publishers' Board of Appeals"

and the personnel of each of said committee shall be selected as follows:

(1) The Secretary of the Society shall, prior to ninety (90) days before the Annual Meeting, mail to each and every publisher-member a complete alphabetical list of all publisher-members of the Society, without disclosing the classification of any of such members; he shall also at the same time send to each publisher-member a ballot.

(2) The publisher-member shall, prior to the Annual Meeting, fill out said ballot, each "Popular" publisher-member voting for three members of the "Popular Publishers' Board of Appeals"; and each "Standard" publisher-member voting for three members of the "Standard Publishers' Board of Appeals".

Each such ballot shall be returned by mail to the Society and shall be opened and inspected jointly by the President and General Manager of the Society who shall make a record of each vote. The three persons receiving the highest number of votes in each class shall be deemed elected the members of the indicated ("Popular" or "Standard") Publishers' Board of Appeals and the three persons in each class receiving the second highest number of votes shall be deemed to be alternates to serve in place of those elected in any case and under all circumstances and with the full powers of the duly elected incumbent in the event of his inability or refusal for any reason to serve.

(3) Appeals of "Popular" publisher-members may be presented to and considered by the "Popular Publishers' Board of Appeals" only, and appeals of "Standard" publisher-members may be presented to and considered by the "Standard Publishers' Board of Appeals" only.

(4) The Publishers' Board of Appeals shall meet only in the City of New York, and their respective procedure on appeals presented to them shall be as follows:

(a) Any publisher-member who is dissatisfied with the decision of the Publishers' Classification Committee, may give notice in writing to the Secretary that he proposes to appeal to the appropriate Publishers' Board of Appeals; the said Publishers' Board of Appeals shall entertain his appeal and give appellant an opportunity to appear in person, if he so desires; or to present his appeal in writing or both; on such appeal a sub-committee appointed by the Publishers' Classification Committee may also appear and give evidence justifying its classification of said publisher member; if the said Publishers' Board of Appeals decides against the publisher-member, its decision shall be deemed final.

(b) If the said Publishers' Board of Appeals decides that the publisher-member has been improperly classified, said Board shall bring up such question for review before the Board of Directors as a whole, within thirty (30) days after the filing of the decision of the Board of Appeals and the Board of Directors shall proceed with the question in the manner provided for by these Articles of Association, and the decision of the Board of Directors shall be final.

(c) No member of the Publishers' Classification Committee nor of the Board of Directors shall be eligible to serve as a member of either Publishers' Board of Appeals, nor shall there be eligible to membership on said Board, more than one individual representative of a firm of publishers; such member is to be designated by the firm or corporation publisher-member and his name placed on file with the Secretary of the Society, prior to the annual vote; the expression—"Firm of Publishers" shall include not only publisher-members, corporate, partnership or individual, but all firms, whether corporate, partnership or individual allied with or subsidiary to such publisher-member. If a member of either Board of Appeals is dissatisfied with his classification and desires to make an appeal, he shall first do so to the Publishers' Classification Committee, and if not satisfied with its decision, then he shall have the right to appeal to the entire Board of Directors of the Society, whose decision shall be final.

(d) A majority of the Board of Appeals shall rule; publisher-members shall be given not less than ten (10) days' notice of the date when their appeal will be heard; appeals shall be heard in regular order.

(e) The Publishers' Classification Committee shall dele-

gate at least one of its members to be at the disposal of the said Publishers' Board of Appeals at all times with the necessary data, cards and other information required, and shall supply all information required to said Publishers' Board of Appeals whenever so requested.

[fol. 75] (f) The Publishers' Board of Appeals must at all times adhere to the rules and regulations of classification as contained in the Articles of Association of the American Society of Composers, Authors and Publishers under Article XIV, Section 6, and must at all times take into consideration all data, etc., which from time to time are used by the Publishers' Classification Committee in arriving at the just classification of members.

(g) The Board of Directors shall at its first regular meeting after this amendment is passed and put into effect, fix proper compensation to be paid to the members of the Publishers' Board of Appeals at such times as they are required to hold hearings.

(h) The General Manager shall, within ten (10) days after the adoption of this amendment send to each publisher-member a form upon which the said member shall be required to indicate into which class of membership, "Popular" or "Standard" he desires to be registered. Upon registration in such class a member may vote as provided in Paragraph 2 above only for members of the Publishers' Board Appeals of the class indicated.

Any appeal brought by such member shall be considered only by the Board of Appeals functioning in respect to that class. However, a member desiring to change his class may do so upon request in writing addressed to the Secretary of the Society and approval of such request by the Board of Directors.

(i) The foregoing provisions shall apply only to publisher-members, and not to author and composer members of the Society.

This amendment to take effect immediately.

Section 7. Relief Committee. There shall be a Relief Committee of three Directors, appointed by the President, consisting of one publisher, one author and one composer, who shall investigate requests or applications for relief on behalf of a sick, infirm, needy or deserving member or his widow, infant children or indigent parent. Upon the recommendation of such Committee the Board may direct the

payment of such sum or sums as in its judgment will satisfy the immediate necessities of such person or persons, and to make advances, from any royalties thereafter to accrue to the member, such advances to be repaid to the Society by deducting the whole or any part thereof from any subsequent distribution awarded to such member.

The Board of Directors shall annually devote a part of the proceeds derived from its operations to the purpose of giving financial aid to members of the Society, their widows, infant children or indigent parents. The giving of such assistance is optional and shall only be granted in cases of urgent necessity, and the Society does not vouchsafe to its members the right to receive assistance. Any moneys paid out on account of relief must always be entered in the books of the Society with a statement of the actual purpose for which they were disbursed, and not merely under the head of "Relief."

Article XV

Apportionment of Royalties

Section 1. All royalties and license fees collected by the Society shall be from time to time as ordered by the Board of Directors distributed among its members, provided, however:

(a) That all expenses of operation of the Society and sums payable to foreign affiliated Societies shall be deducted therefrom and duly paid; and

(b) That the Board of Directors, by two-thirds vote of those present at any regular meeting may add to the Reserve Fund any portion not exceeding 10% of the total amount available for distribution; and

(c) That the net amount remaining after such deduction for distribution shall be apportioned as follows: one-half (½) thereof to be distributed among the "Music Publisher" members, and one-half (½) among the "Composer and Author" members respectively.

Reserve Fund

Section 2. The Board of Directors, by a two-thirds vote of all those present, shall have the right to create and from time to time to add to the reserve fund, and may direct that a portion of the royalties as and when collected be placed in such reserve fund.

Unclaimed Royalties

Section 3. Royalties which have been apportioned and which have not been claimed by the owners shall remain in the General Fund of the Society for a period of six years. Three months prior to the expiration of said six years, notices shall be given to the parties lawfully entitled thereto, by registered mail, requiring them to receive said royalties within three months, and after the expiration of said three months, such royalties, if not claimed, shall become the absolute property of the Society.

[fol. 76]

Article XVI

General Powers and Duties of Committees

Quorum of Committees

Section 1. A majority of each committee shall constitute a quorum thereof.

Meetings of Committees

Section 2. Each Committee, unless otherwise voted by the Committee, shall meet at least monthly upon a date to be fixed by the Committee, except during the months of July, August and September. The Secretary shall send notices of each meeting to the members thereof at least three days in advance of the meeting.

Absence of Member of Committee

Section 3. If any member of any Committee is absent from two successive meetings without an excuse presented to the Committee, his place may be declared vacant by the President.

Minutes of Committee

Section 4. The standing committees shall keep regular minutes of their transactions and cause them to be recorded in a book kept in the office of the Society for that purpose, and report the same to the Board of Directors at its regular meetings.

Article XVII

Special Committee

Whenever any twenty-five members of the Society shall certify to the Board of Directors that they desire the So-

ciety to prosecute any matter within the scope of the Society, the President shall appoint a special committee to investigate the matter and report to the Board of Directors with its opinion thereon whether it is advantageous and for the best interest of the Society to undertake the prosecution of such matter. The Board of Directors shall carefully consider such report and a two-thirds vote of all the directors shall determine whether or not such prosecution shall be undertaken.

Article XVIII

General Meetings of the Society

Section 1. The General Annual Meeting shall be held each year during the month of March. An additional General Membership Meeting shall be held in the month of October of each year. Special meetings may be called at any time by the Board of Directors.

Business Transacted at General Meetings

Section 2. No business shall be submitted to the General Annual Meeting, unless it has been brought to the knowledge of the Board of Directors at least eight days in advance. The General Annual Meeting shall, however, be entitled in any event to lay aside any such business as it may consider inopportune.

Motion or Resolution in Writing

Section 3. Every motion or resolution which shall be made or offered at any meeting of the Society shall, at the request of the Secretary, be reduced to writing and furnished to the Secretary before the question shall be put.

Article XIX

Notices

Section 1. Whenever notice is required to be given to any member, such notice shall not be required to be given by personal service, but such notice shall be deemed to have been given from and at the time when said notice in writing shall have been deposited in the Post Office, or in any regular United States mailing box in the City of New York, enclosed in a post-paid wrapper, addressed to the member

at his last known place of residence, as the same shall appear upon the books of the Society, or if such address shall not appear upon the books of the Society, then to such address as may appear in any directory of the municipality in which he may reside or do business.

[fol. 77] Article XX

Expulsion and Termination of Rights of Membership

Suspension for Cause

Section 1. Any member who is expelled by the Board of Directors, or who is dropped for the non-payment of dues, fines or assessments, shall thereupon lose and forfeit any and all interest, right or claim in, to or under the Society, the property thereof, and the dues and assessments paid thereto. Upon expulsion, death, bankruptcy, insolvency or other severance of membership in or connection with the Society, all rights and interest of whatsoever character, sort or kind, to, of, in or concerning the Society by virtue of such membership, shall instantly cease and be of no further force and effect. Expulsion shall not relieve any member from his obligations to the Society up to the date of such expulsion.

Posthumous Membership

Section 2. On the death of any member his rights in the Society and membership shall cease, and neither his rights nor his membership nor any right therein shall at any time be, by voluntary assignment, operation of law, legal proceedings or otherwise, vested in any other person whomsoever; provided, however,

That in the sole discretion of the Board of Directors the heir, heirs, or next of kin of a deceased member may be awarded a share in royalty distributions not exceeding that which would, in the judgment of the proper Classification Committee, have been awarded to the deceased member had he been living at the time of such royalty distribution.

Bankruptcy of Member

Section 3. The Board of Directors shall have the right to suspend payments of royalties to any member in case of the filing of a petition in bankruptcy by or against him, and/or the adjudication of such member a bankrupt, or the execu-

tion by such member of an assignment for the benefit of creditors, or the taking advantage by him of the insolvency laws of any State, Territory or Country, or the appointment of a receiver, trustee or liquidator of the assets and property of the member, or the voluntary or involuntary dissolution of a member.

The representative of any member of "Music Publishers" class who shall be a member of the Board of Directors shall immediately upon the happening of any such contingencies be dropped from the Board of Directors.

The royalties, or the right to participate in the royalties, and the rights of the members in the Society, shall not be sold or otherwise disposed of by any member, and shall not be the subject of sale or other disposition by voluntary action, operation of law, legal proceedings or otherwise, and no member shall sell, otherwise dispose of, hypothecate or create a lien upon any royalties accruing, or that may thereafter accrue to him, by virtue of his membership, or any of the rights, privileges, benefits, royalties or emoluments to which he may be entitled by virtue of his membership.

Article XXI

Amendments

These Articles may be amended by a vote of two-thirds of the members present at any meeting of the Society held for the purpose of voting on such amendment.

[fol. 78] EXHIBIT "E" TO COMPLAINT

Legislature of Nebraska

Fifty-second Session

Legislative Bill No. 478

(Final Form on Third Reading)

A Bill

[fol. 79] Legislative Bill No. 478

Introduced by Frank J. Brady of Holt.

An Act relating to monopolies; declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which

fixes and determines the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit within this state copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composition copyright owners or their heirs, successors or assigns; to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of each other and of any combination as herein declared unlawful in determining license fees and other rights within this state; to require the author, composer, printer and publisher to specify upon the musical composition the selling price thereof for all uses that may be made thereof including public performance for profit within this state; to declare that any purchaser thereof, who pays such price therefor, shall have the right to render such music privately or publicly for profit within this state; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit within this state with any combination of persons, firms or corporations herein declared unlawful to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit within this state without interference by such unlawful combination; to provide for the appointment of a receiver and injunctive relief and the dissolution of such combination as herein declared unlawful; to determine in such action the legal owner of such copyrighted musical compositions; to adjust and fix in such action the license fee to be paid, if any, and the terms for the use of such musical compositions in this state; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting, radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside the State of Nebraska against the collection of license fees or other exactions by such out-of-the-state affiliates for or on account of any combination declared unlawful under Section 1 hereof; to provide that the responsibility and all liability for any infringement of copyrighted musical compositions conveyed by radio

broadcast, air, wire, electrical transcription, or sound [fol. 80] production apparatus, or by personal performance coming from outside this state, and used herein, to rest entirely with the out-of-the-state person, firm or corporation originally emanating or sending the same into this state for use herein; to provide penalties for the violation hereof; to empower the County Attorneys and the Attorney General, upon complaint of any party aggrieved by any violation hereof, to proceed to enforce the penalties hereof against such combination and any of its representatives, members or agents, and against the property of such unlawful combination within this state; to define the method of service of process upon such combination as herein declared illegal; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions hereof; to provide for the recovery of costs, expenses and attorney's fees; to provide for the filing of each said composition in the office of the Secretary of State before selling or disposing of the same, together with the amount of filing fee therefor; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof; and to declare an emergency.

Be it Enacted by the People of the State of Nebraska:

Section 1. It shall be unlawful for authors, composers, proprietors, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, club, firm, partnership, corporation, or other group or entity, called herein a combination, either within this state or outside thereof, when the members, stockholders, or interested parties therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when at least one of the objects of any such combination is the determination and the fixation of license fees or other exactions required by such combination for itself or its members, stockholders or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public

performance for profit within this state for the purpose of preventing free competition among or with different and competing copyright owners or among or with persons, firms, corporations or associations in this state using or [fol. 81] rendering such copyrighted matter by public performance for profit; or for the purpose of dividing among them the proceeds of the earnings of such copyright owners; or for the purpose of fixing the exactions and fees for the rendition or use of copyrighted matter which any copyright owner must charge; and the collection or attempted collection within this state of such license fee or other exaction so fixed and determined, by any member, agent or representative of any such combination herein declared unlawful, from any person, firm, corporation or association within this state, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, athletic associations, hotels, cafes, restaurants, clubs dance halls, recreation rooms, amusement parks, pavilions, churches, colleges, schools, universities, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered, or permit to be rendered, such copyrighted vocal or instrumental musical compositions privately or publicly for profit within this state through personal performance, or through radio, or any instrumentality or sound producing apparatus, shall be and the same is hereby declared unlawful and illegal; and such license fees or other exactions shall not be collected in any court within the boundaries of this state; and each collection or attempted collection of such license fee or other exaction by such combination or its agents, representatives, members, stockholders or interested parties shall be a separate offense hereunder; and any such combination of authors, composers, publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this state; and such fixing of prices for use or rendition of copyrighted musical compositions within this state by such unlawful combination and the collecting or attempting to collect such license fees or other exactions by it or for its stockholders, members or other interested parties within this state is hereby declared illegal and in restraint of trade, and such collection or attempted collection thereof is declared to be an illegal intrastate transaction within this state and shall be subject to the terms and penalties of this Act. In any action, civil or

[fol. 82] criminal, instituted under the provisions of this Act, it shall be prima facie evidence against any party to such action of the existence of such unlawful combination for the purposes in this Act enumerated, if a substantial number of all authors, composers, proprietors, publishers, owners or their heirs, successors or assigns of copyrighted vocal or instrumental musical compositions in the United States, are shown to be members of any society, association, club, firm, partnership, corporation, group or entity.

Sec. 2. (A). All authors and composers, and their heirs and assigns, shall have within this state all the benefits conferred by the Copyright Laws of the United States, being the act of March 4, 1909, c. 320 Section 1 (e). 35 Stat. 1073, Title 17, U. S. C. A. Each author, composer and publisher shall act independently of any and all substantial number or numbers of other authors, composers and publishers, and also independently of any such combination as in Section 1 hereof declared unlawful, in determining and fixing the price to be charged for the use or rendition of his copyrighted musical compositions within this state, and the author, composer or publisher, or his, her, or its heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition within this state, the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this state and pays the selling price so specified thereon to the seller or publisher of said copyrighted musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered within this state, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radios, loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, [fol. 83] sound apparatus or otherwise within this state, and the same may be so rendered either privately or publicly for profit when so purchased and paid for without further license fees or other exactions; and such copyright

owner or proprietor, in the event of such payment, shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private purposes or for public performance for profit by such purchaser within this state.

(B). In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private or public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state.

(C). Nothing in this section, or this Act, shall be construed to give to any purchaser of copyrighted music compositions, as herein provided, the right to resell, copy, print, publish, or vend the same.

(D). Any composer, author or publisher of vocal or instrumental copyrighted musical compositions, or any person, firm or corporation controlling the sale or distribution of said compositions, whether or not within the purview of the combination described in Section 1 of this Act, shall, before selling or disposing of any such composition in this state, file in the office of the Secretary of State a copy of each said composition upon which shall be written, printed or typed over his or its signature a statement to the effect that he or it controls the sale or disposition of such com-
[fol. 84] position; and provided further, said person, firm or corporation who shall make such filing shall accompany the same with a fee of Twenty-five Cents (25¢) with each copy of said composition so filed to reimburse the Secretary of State for keeping in current and convenient form, easily accessible to the public, the titles of said compositions and the names of the parsons, firm or corporations who shall file said copies from time to time; and provided further, said

Secretary of State shall deposit all the fees received hereunder weekly with the state Treasurer who shall credit said fees to the general fund of the state.

Sec. 3. All existing contracts, agreements, licenses or arrangements now existing within this state made by any person, firm or corporation with any combination, declared unlawful under Section 1 hereof, are hereby declared void and nonenforceable in any court within the boundaries of this state, and are hereby declared to have been entered into as intrastate transactions with such unlawful combination and in restraint of trade; and further, all such contracts, agreements, licenses, arrangements and the attempted enforcement thereof within this state, may be enjoined by any person, firm or corporation sought to be bound thereby; and any member, representative or agent of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, license or arrangement within this state shall be guilty of a violation of the terms of this Act, and for each such collection or attempted collection shall be subject to the penalties hereinafter provided.

Sec. 4. (A). Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this state, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions within this state, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, [fol. 85] of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

(B). When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing, or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this state, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this state, shall be and is hereby prohibited from in any

manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this state, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this state to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible within this state, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Sec. 5. (A). Any person, firm or corporation who owns, leases, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this state, shall be and is hereby authorized to receive, use and render, [fol. 86] or cause to be received, used and rendered within this state, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever within this state, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

(B). When such theatre or theatres, moving picture house or houses, or other places for amusement or performance within this state is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted

musical compositions from outside this state, or supply such persons, firms, or corporations in this state with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this state shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect within this state, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this state, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions within this state; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this state against such persons, firms or corporations within this state for [fol. 87] the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Sec. 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions within this state, and which radio stations and theatres, and other persons, firms or corporations, aforementioned, are affiliated with persons, firms or corporations outside this state from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such

music within this state, then any responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this state and thus rendered in this state shall rest with and be upon such affiliated person, firm or corporation from outside this state who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this state; and, if the owner of any copyrighted musical composition commences any action within this state on account of any use or rendition thereof in this state through such affiliate or affiliates, then any defendant in such action may interplead such affiliate or affiliates in such action; and any judgment which may be rendered in favor of the copyright owner shall be paid and satisfied by such affiliate or affiliates; and, if paid or satisfied by the defendant user in this state, such defendant shall be subrogated in said action or otherwise to all rights of the plaintiff in said judgment as against [fol. 88] said affiliate or affiliates, whether the latter is or are a party or parties in said action or not; and in any event such affiliate or affiliates shall be liable to such user to the full extent of his liability to such copyright owner, in the absence of any agreement to the contrary; and any combination declared unlawful by Section 1 of this Act which is the owner or proprietor of or controls the copyrighted vocal or instrumental musical compositions, its agents or representatives shall be and are hereby prohibited from suing for infringement, loss or damage within the boundaries of this state, for the use or rendition of such copyrighted vocal or instrumental musical compositions so originating or emanating because such persons, firms or corporations used, rendered or performed the same within this state; the use or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this state, or otherwise, of such copyrighted musical compositions within this state in the manner set forth in this section, shall be considered, for the purpose of this Act, as intrastate business of this state and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this state.

Sec. 7. (A). Any person, firm or corporation within this state who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this state, and service of any process against such combination may be had upon such representative or the agent of any such representative as herein defined within this state; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this state.

[fol. 89] (B). Furthermore, any person or persons who negotiates for, or collects within this state, or attempts to collect license fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Sec. 8. Any combination as in Section 1 hereof declared unlawful and any other person, firm or corporation, acting or attempting to act, within this state in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination, as defined in Section 1 hereof, in the violation of any of the terms of this Act in any manner whatsoever within this state, shall be deemed guilty of a misdemeanor and shall be fined in any sum not more than $5,000.00 or imprisoned for not more than one (1) year, or both, such fine and imprisonment for each and every violation of the terms hereof.

Sec. 9. (A). The County Attorney in each county in this state wherein a violation of any of the terms of this Act takes place, in whole or in part, is hereby authorized upon the complaint of any party aggrieved to institute a civil or criminal action, or both, under the terms hereof against any combination declared unlawful as defined in Section 1 hereof, and against any of its members, stockholders or other interested parties, and its agents or representatives as herein defined, and to enforce any of the rights herein conferred, and to impose any of the penalties herein provided.

(B.) The Attorney General of the State of Nebraska is hereby empowered to proceed upon the request of any County Attorney to aid and assist, or to take charge of, any prosecution or suit for any violations of any of the terms hereof.

[fol. 90] (C.) Or, the Attorney General, on the complaint of any party aggrieved, because of the violation of any of the terms of this Act anywhere within this state, shall proceed in the District Court in any county in which all or any part of the offense or violation was committed, to institute action against any combination defined as unlawful by Section 1 hereof, and against the representatives or agents of any such combination, either in a criminal action to enforce the penalties hereof, or in a civil action to enforce all rights hereunder, or to dissolve any such combination as declared unlawful by Section 1 hereof, or he may proceed by both civil and criminal actions; in such action or actions, the plaintiff shall be the State of Nebraska; and any interested party may, upon application, be granted leave to intervene in such a civil action.

(D). The District Court shall, in such dissolution or other civil suit, upon the application and intervention in said action of any member, stockholder or other interested party of said unlawful combination, adjudicate the ownership of any copyrighted vocal or instrumental musical composition theretofore owned or controlled by said unlawful combination; and furthermore, such District Court shall have and is hereby granted the power and authority to appoint a receiver and to issue injunctive and mandatory temporary and permanent orders in reference to any of the issues involved in such action; and any person, firm or corporation within this state who is a user in any manner of any copyrighted vocal or instrumental musical compositions theretofore owned or controlled by such unlawful combination may, upon application, intervene in such action and therein have adjusted, determined and adjudicated all rights for or against the person, firm or corporation whom the Court shall finally determine to be the owner or proprietor of such copyrighted vocal or instrumental musical compositions; and said parties shall be permitted no other remedy in any other court within the boundaries of this State, whether the same be for damages, infringement or otherwise, until final decree has been had in said action determin-

ing the ownership and terms for use of such copyrighted musical compositions.

[fol. 91] Sec. 10. (A). Any person, firm or corporation within this state aggrieved by any violation of the terms hereof by any unlawful combination, as defined in Section 1 hereof, or any of its representatives or agents, may proceed in his or its own name and right in the District Court in the county in which the violation, or a part thereof, took place, to recover any right, loss or damage that may have resulted from any violation of the terms hereof; the plaintiff in such action shall be entitled to recover his or its costs and expenses and a reasonable attorney's fee to be fixed by the court in such action.

(B). In the event of the failure or refusal of a County Attorney, or the Attorney General, to promptly act, as herein provided, when requested so to do by any aggrieved party, then such party may institute in his own behalf, or upon behalf of the plaintiff and all others similarly situated, the same civil action as such County Attorney or Attorney General might have instituted under the terms of this Act, and with like procedure, powers, authority, rights, privileges, effect and final decree as the said County Attorney or Attorney General might have done under the terms of this Act.

Sec. 11. (A). In any action, either civil or criminal, that may be had or instituted under the provisions hereof for any violation of the terms hereof, the plaintiff in any form of action brought hereunder, and in which action any combination declared unlawful, as defined in Section 1 hereof, or the members, stockholders, or other interested parties, or their agents or representatives of such unlawful combination, are defendants, any attorney of record for the plaintiff may file a request in writing with the Clerk of the District Court in which said action is pending, demanding that the defendant or defendants furnish plaintiff, or file with the Clerk of the Court, in which the action is pending, exact copies of all documentary evidence, facts and figures, records or data in the possession or under the control of the defendant or defendants pertaining to the issues as alleged by the plaintiff to establish or refute any issues in the case; [fol. 92] and the District Court, upon the presentation to it of such written demand by the plaintiff, shall thereupon de-

termine that part or all of such evidence which shall be produced, and shall enter an order fixing a time for the defendant or defendants to furnish and file such information as ordered. A copy of said order shall be mailed to each defendant at his or its last known address, which shall be deemed sufficient notice and service upon said defendant or defendants; or the same may be served by mail in the same manner upon each attorney of record for the defendant or defendants, and when so served, the same shall be deemed notice and service upon the defendant or defendants for whom said attorneys appear of record.

(B). If said defendant or defendants shall fail to furnish plaintiff or his or its attorney, or file with the Clerk of the Court in which the action is pending, said copy or copies of said documentary evidence, facts, figures, records, books and data as set forth in said order within the time specified in said order, the Court shall adjudge said defendant or defendants guilty of contempt of court, and the Court shall assess a fine of $100.00 against such of the defendants for each and every day that such defendant or defendants fails to comply with said order; and judgment shall from time to time be rendered therefor, and the plaintiff may collect the same against the defendant or defendants with 6% interest thereon and the costs, including expenses and attorney's fees to be fixed by the Court, in the same manner as other judgments are collected in this state. The Court shall find and determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs, expenses and any attorney's fees that may be allowed.

Sec. 12. If any section, sub-division, sentence or clause in this Act shall, for any reason, be held void or non-enforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act.

Sec. 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any [fol. 93] of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Nebraska.

Sec. 14. Whereas an emergency exists, this Act shall be in full force and take effect, from and after its passage and approval, according to law.

Approved, May 17, 1937.

(Act Construed in Buck v. Swanson, 33 Fed. Supp. 377.)

[fol. 94] EXHIBIT "F" TO COMPLAINT

January 20, 1936.

Omaha Grain Exchange, Radio Station W.A.A.W., Omaha, Nebraska.

GENTLEMEN:

It is mutually agreed that the certain license agreement between us, dated February 14, 1933, effective January 1, 1933, is hereby extended on the same terms and conditions as therein contained, from the date of its present expiration, up to and including December 31, 1940; except that Article 7 of such license is hereby amended so as to read:

"7. In case there shall be a substantial diminution in the quantity of musical numbers, the performing rights of which are licensed under this agreement, then the Licensee shall have the right to terminate this license upon three days' notice by registered mail, addressed to the Society, and this right shall be the sole and exclusive remedy.

The Society reserves the right, at any time, and from time to time, to withdraw from the operation of this license, any musical number or numbers. Upon any such withdrawal the Licensee may immediately terminate this license by giving written notice of its election so to do to the Society.

In the event of any such termination of this License, pursuant to Articles 5 and/or 7 hereof, the Society shall refund to the Licensee pro rata license fees, if any, paid for a period beyond the date of such termination."

and Article 8 is amended by striking out therefrom subdivision (a) and (b).

Very truly yours, American Society of Composers, Authors and Publishers. By ——— ———. Accepted: Omaha Grain Exchange. By ——— ———, Title.

Dated January 30, 1936.

[fol. 95] EXHIBIT "F"

Original
Operator's Broadcasting License

No.: 5

Call: W.A.A.W.

Memorandum of Agreement between American Society of Composers, Authors and Publishers, (hereinafter styled "Society"), and Omaha Grain Exchange (hereinafter styled "Licensee"), as follows:

1. Society grants to Licensee, its successors and assigns, and Licensee accepts for a period of two years and nine months from January 1, 1933, a license to publicly perform by broadcasting from Radio Station W.A.A.W. located at Omaha, Nebraska, non-dramatic renditions of the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society, or of which Society shall have the right to license such performing rights.

2. The within license does not extend to or include the public performance by broadcasting or otherwise of any rendition or performance of any opera, operetta, musical comedy, play or like production, as such, in whole or in part.

3. Nothing herein contained shall be construed as authorizing Licensee to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions coming within the purview of the within license performed pursuant hereto, or as authorizing any receiver of any such broadcast rendition to publicly perform or reproduce the same for profit by any means, method or process whatsoever.

4. The within license is limited to the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society, or of which Society shall have the right to license the performing rights hereinbefore granted, in programs rendered at or from said radio station, or at or from any other place duly licensed by Society to perform such works (unless the performance originates at a place or from a source which Society does not customarily license), from which place rendition of such works is transmitted to said radio station for the purpose of being broadcast from there.

It is understood, however, that Licensee shall be guilty of a breach under this Article (No. 4) only in the event that it continues to broadcast a program rendered at such places other than the said station after Licensee shall have received notice from Society that such other places are not licensed by Society to perform.

5. The within license is granted upon the express condition:

(a) That should the power input as at present authorized by the Federal Radio Commission for the said station (500 watts) be changed during the term hereof, the basic fee as provided in the first paragraph of Article No. 8 hereof shall be adjusted.

(b) That in event the license of said station from the Federal Radio Commission is terminated, cancelled, revoked or suspended, or in the event that radio broadcasting is supported from other sources or operated by other than private interests, than as now prevails, Licensee shall promptly notify Society thereof, and either Society or Licensee may then terminate this agreement; and in such event, Licensee shall be under no further liability to Society for the payment of any license fee hereunder; provided, however, that if the license of said station to broadcast is suspended for a period less than the term of the within license, then in such event Licensee shall be relieved from payment of the license fee hereunder only during such period of suspension.

[fol. 96] 6. Licensee agrees upon request to furnish to Society during the term of the within license a list of all musical compositions (or, at the option of Licensee, a list of all musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society or of which Society shall have the right to license the performing rights hereinbefore granted) broadcast from or through the said station, showing the title of each composition and the composer and/or author thereof; provided that Licensee shall not be obligated under this Article No. 6 to furnish such a list covering a period or periods in the aggregate during any one calendar year in excess of three months. The lists so furnished by Licensee to Society shall be strictly confidential and Society covenants that it will make no disclosure thereof or of the contents thereof.

7. Society agrees during the term hereof to maintain for the service of Licensee substantially its present catalogue of composition heretofore or hereafter during the term hereof copyrighted or composed by members of Society. Society reserves the right, however, at any time and from time to time to withdraw from its repertory and from operation of the within license any musical composition or compositions; and upon any such withdrawal, Licensee may immediately cancel the within agreement by giving written notice to Society of its election so to do.

In the event of any such cancellation by Licensee, or in the event of a termination of this agreement and the within license pursuant to the provisions of Article No. 5 hereof, or otherwise, Society shall refund to Licensee pro rata license fees, if any, paid for a period beyond the date of such cancellation or termination.

8. Under the terms and conditions hereinabove set forth, Licensee agrees to pay to Society, as compensation for the within license, the sum of Four Hundred Fifty and No/100 Dollars ($450.00) per annum, payable in equal monthly installments on or before the 10th of each month during the term hereof, plus

(a) For the first nine months of the term hereof, a sum equal to three percent (3%) of the net receipts (as hereinafter defined) of the Licensee from the sale of its broadcasting facilities; and,

(b) For the following twelve months of the term hereof, a sum equal to four percent (4%) of the net receipts (as hereinafter defined) of the Licensee from the sale of its broadcasting facilities; and,

(c) For the remaining twelve months of the term hereof, a sum equal to five percent (5%) of the net receipts (as hereinafter defined) of the Licensee from the sale of its broadcasting facilities.

(d) The term "net receipts" from the sale of its broadcasting facilities shall refer to the full amount charged by and actually paid to Licensee for the use of its broadcasting facilities (sometimes known as "time on the air"), after deducting commissions not exceeding fifteen percent (15%), if any, paid to the advertising agent or agency (not employed or owned in whole or in part by Licensee).

Licensee shall render monthly statements to Society on or before the 10th of each month covering the period of the preceding calendar month on forms supplied gratis by Society, and shall include in such statements all net receipts, without exception, during the said month from the sale of the broadcasting facilities ("time on the air") of the said station, which said statement shall be rendered under oath and accompanied by the remittance due Society under the terms hereof. Any such statement may also include a deduction by or credit to the Licensee for any amount reported by it as received during a prior month from the sale of its broadcasting facilities but which it has been compelled to refund as a "time discount." In the event that any such item shall be collected after it has been credited or deducted as aforesaid, it shall then be included again in the net receipts of Licensee on the monthly statement next succeeding the date of the actual collection.

9. Society shall have the right, by its duly authorized representative, at any time during customary business hours, to examine the books and records of account of Licensee only to such extent as may be necessary to verify any such [fol. 97] monthly statement of accounting as may be rendered pursuant hereto; provided that such examination does not interfere with the usual conduct of business by Licensee.

It is understood and agreed that Society shall consider all data and information coming to its attention as a result of any such examination of books and records as completely and entirely confidential.

10. Upon any breach or default of any terms herein contained, Society may give Licensee thirty (30) days notice in writing to repair or correct such breach or default and in the event that such breach or default has not been repaired or corrected within said thirty (30) days, Society may then forthwith cancel said license.

11. Society agrees to indemnify, save and hold Licensee harmless, and defend Licensee from and against any claim, demands, or suits that may be made or brought against the Licensee with respect to renditions given during the term hereof in accordance with this license of musical compositions contained in Society's repertory heretofore or hereafter during the term hereof copyrighted or composed by members of Society.

In the event of the service upon Licensee of any notice, process, paper or pleading, under which a claim, demand or action is made or begun against Licensee on account of any such matter as is hereinabove referred to, Licensee shall forthwith give Society written notice thereof and simultaneously therewith deliver to Society any such notice, process, paper or pleading, or a copy thereof, and Society shall have sole and complete charge of the defense of any action or proceeding in which any such notice, process, paper or pleading is served. Licensee, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for Society shall co-operate. Licensee shall cooperate with Society in every way in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of Society, that may be required in order properly to defend and resist any such action or proceeding, and properly to prosecute any appeals taken therein.

In the event of the service upon Licensee of any notice, process, paper or pleading, under which a claim, demand or action is made, or begun against Licensee on account of the rendition of any musical composition contained in the Society's repertory but Not heretofore or hereafter during the term hereof copyrighted or composed by members of Society, Society agrees at the request of Licensee to cooperate with and assist Licensee in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein.

12. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered United States mail addressed to such other party at its main office for the transaction of business.

In Witness Whereof, this agreement has been duly subscribed by Society and Licensee this 14th day of February, 1933.

American Society of Composers, Authors and Publishers. By ——— ———. Omaha Grain Exchange, Licensee. By ——— ———.

[fol. 98] EXHIBIT "G" TO COMPLAINT

B. #1—367E
(Theatres) Nebraska

Memorandum of agreement between American Society of Composers, Authors and Publishers, (hereinafter styled "Society"), and Ralph D. Goldberg Theatres Corporation (hereinafter styled "Licensee"), as follows:

1. Society grants and licensee accepts for a period of one (1) year commencing noon, June 18, 1936 a license to publicly perform at Military Theatre, 2216 Military Ave., Omaha, Nebraska, and not elsewhere, non-dramatic renditions of the separate musical compositions copyrighted by members of the Society.

2. This license is not assignable nor transferable by operation of law, devolution or otherwise, and is limited strictly to the Licensee and to the premises above named. The license fee herein provided to be paid is based upon the performance of such non-dramatic renditions for the entertainment solely of such persons as may be physically present on or in the premises described, and does not authorize the broadcasting by radio-telephone, transmission by wire or otherwise, of such performances or renditions to persons outside of such premises, and the same is hereby strictly prohibited unless consent of the Society in writing first be had.

3. This license shall not extend to or be deemed to include:

(a) Oratorios, choral, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments or instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

(b) Any work (or part thereof) whereof the stage presentation and singing rights are reserved.

4. Licensee warrants and represents to Society that the total seating capacity of the above named theatre is 900 seats, upon which warranty and representation the license fee herein is fixed.

5. Society reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work, and upon any such withdrawal Licensee may immediately cancel this agreement. Upon the termination of this agreement pursuant to any provision of this article "5", there shall be made to the Licensee a pro rata refund of any unearned license fees.

6. Licensee agrees, upon demand in writing of the Society, upon forms supplied by Society, whenever requested, to furnish a list of all music rendered at the premises hereby licensed, showing the title of each composition, and the publisher thereof.

7. Upon any breach or default of any term or condition herein contained Society may, upon notice in writing, cancel this license, and in event of such cancellation shall refund to Licensee any unearned fees paid in advance.

8. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year, unless either party, on or before thirty days next preceding the termination of any year, shall give notice in writing to the other by registered United States mail of the desire to terminate the same at the conclusion of such year.

9. Licensee agrees to pay Society for the license herein the sum of One Hundred and Thirty-Five and no/100 Dollars ($135.00) annually, payable quarterly in advance in installments of $33.75 each at the office of Society at Omaha, Nebraska, on June 18, September 18, December 18 and March 18 of each year, commencing on the 18th day of June, 1936.

In witness whereof, this agreement has been duly subscribed and sealed by Society and Licensee this 19th day of June, 1936.

American Society of Composers, Authors and Publishers. By —— ——, Agent and Attorney in Fact. Ralph D. Goldberg Theatres Corp. By —— ——.

[fol. 99] EXHIBIT "H" TO COMPLAINT

(General) #3-5N
Nebraska Hotel.

Memorandum of Agreement between American Society of Composers, Authors and Publishers (hereinafter styled "Society"), and Fontenelle Hotel (hereinafter styled "Licensee"), as follows:

1. Society grants and Licensee accepts for a period of one (1) year commencing Noon, June 8, 1935 a license to publicly perform at Fontenelle Hotel, 18th and Douglas St., Omaha, Nebr., and not elsewhere, non-dramatic renditions of the separate musical compositions copyrighted by members of the Society.

2. This license is not assignable nor transferable by operation of law, devolution or otherwise, and is limited strictly to the Licensee and to the premises above named. The license fee herein provided to be paid is based upon the performance of such non-dramatic renditions for the entertainment solely of such persons as may be physically present on or in the premises described, and does not authorize the broadcasting by radio-telephone, transmission by wire or otherwise, of such performances or renditions to persons outside of such premises, and the same is hereby strictly prohibited unless consent of the Society in writing first be had.

3. This license shall not extend to or be deemed to include:

(a) Oratorios, choral, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments or instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

(b) Any work (or part thereof) whereof the stage presentation and singing rights are reserved.

4. Society reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work, and upon any such withdrawal Licensee may immediately cancel this agreement. Either party to this agreement may, at any time, upon giving to the other party one day's prior notice in writing, by registered United States mail, terminate this agreement. Upon the termination of this agreement pursuant to any provision of this article "4", there shall be made to the Licensee a pro rata refund of any unearned license fees.

5. Licensee agrees, upon demand in writing of the Society, upon forms supplied by Society, whenever requested, to furnish a list of all music rendered at the p' mises hereby licensed, showing the title of each composition, and the publisher thereof.

6. Upon any breach or default of any term or condition herein contained Society may. upon notice in writing, cancel this license, and in event of such cancellation shall refund to Licensee any unearned fees paid in advance.

7. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year, unless either party, on or before thirty days next preceding the termination of any year, shall give notice in writing to the other by registered United States mail of the desire to terminate the same at the conclusion of such year.

8. Licensee agrees to pay Society for the license herein the sum of Three Hundred and Sixty and no/100 ($360.00) Dollars annually, payable monthly in advance at the office of Society at Omaha, Nebraska in installments of $30.00 each, payable on the 8th day of each and every month commencing on June 8th, 1935.

In Witness Whereof, this agreement has been duly subscribed and sealed by Society and Licensee this 10th day of June, 1935.

American Society of Composers, Authors and Publishers. By —— ——, Agent and Attorney in Fact. Fontenelle Hotel. By —— ——.

[fol. 100] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS

"Come now the defendants Harry R. Swanson, Secretary of State, Walter H. Jensen, State Treasurer, William H. Price, Auditor of Public Accounts, and Richard C. Hunter, Attorney General, original party defendants to this suit, and Roy L. Cochran, Governor of the State of Nebraska, upon whom service was made herein on behalf of the State of Nebraska, and file this their motion to dismiss the bill of complaint for the following reasons, to-wit:

1. That from the bill and the amplification thereof by the exhibits attached, and especially Exhibit "E," Nebraska Legislative Bill No. 478 (Pages 74 to 88), it clearly appears that the cause of action must be dismissed on final hearing.

2. That the bill does not state facts sufficient to constitute a cause of action against the defendants or any of them.

3. That the complainants have a plain, adequate and speedy remedy at law as clearly provided by the terms of said L. B. 478.

[fol. 101] 4. That the said Act in question (L. B. 478) seeks by Section 1 thereof to prevent activity within the State of Nebraska of any combination of a substantial number of the owners or proprietors of the copyrights of vocal and instrumental musical compositions when one of its objects is to fix prices, or to restrain trade and competition in such musical compositions, or to prevent free competition among the owners or proprietors thereof; that all the provisions contained in said L. B. 478 are within the powers of this state to enact into law.

5. That Section 2 of said L. B. 478 in no way conflicts with the provisions of the Copyright Laws of the United States (Mar. 4, 1909, c. 320, Sec. 1, 64, 35 Stat. 1075, 1088, Title 17, U. S. C. A.) but rather assures to the author, composer, publisher or proprietor the protection of the individual copyright monopoly; and said Section 2 likewise provides for the protection within the State of Nebraska of the users of copyrighted musical compositions by specifying definite methods whereby the citizens of this state

might learn with whom to negotiate for the use of such copyrighted music and learn the prices required by the owner or proprietor thereof for its use within this state for public performance.

6. That Section 3 of said L. B. 478 declares as unlawful the enforcement within this state only of contracts of the unlawful combination in reference to copyrighted musical compositions; that it is within the power of the Legislature of the State of Nebraska to so define, prohibit, and prevent.

7. That Sections 4, 5, and 6 of said L. B. 478 protect persons, firms, and corporations within the State of Nebraska from unlawful collections or exactions for royalties by the combination through itself or agencies or affiliates should the trust seek to enforce or compel alleged rights to copyrighted music within this state in violation of the statute; that the right to so legislate and anticipate circumvention of the law is within the power of the Legislature of the State of Nebraska to define and prohibit.

8. That Section 7 of said L. B. 478 defines what shall constitute agency and representation of such unlawful combi- [fol. 102] nation; that such definition and regulation is within the right of the Legislature of the State of Nebraska to enact into law.

9. That Section 8 of said L. B. 478 defines violations of the law in question as misdemeanors and provides reasonable penalties after trial instituted upon information or complaint, and with all due process of law afforded the accused by the terms of the Act.

10. That Sections 9, 10, and 11 of said L. B. 478 are within the legislative powers of the State of Nebraska to enact into law; that the Act in question sets forth the rights and duties of the County Attorneys and the Attorney General of the State of Nebraska, and specifically and definitely opens to the complainants all the safeguards of the courts of record of the State of Nebraska; that the Act grants to the complainants and all other persons full right to be heard in all matters, and with due process of law afforded in both the civil and criminal procedure provided in the Act.

11. That Sections 12, 13, and 14 of said L. B. 478 are the "saving clause," the "cumulative clause," and the "emer-

gency clause," respectively, and each of which the Legislature of the State of Nebraska enacted and passed into law, and which violate no constitutional rights of complainants or others.

12. That the bill of complaint should be dismissed so far as it relates to objection against the criminal liability imposed for violations (Section 8) because the constitutionality of the Act may be raised as a defense in said criminal proceedings, and due process of law, and equal protection, and all other constitutional defenses are thus afforded and nowhere denied.

13. That said entire bill of complaint should be dismissed because the complainants have a plain, adequate and complete remedy at law; that the Act guarantees to the complainants, and each of them, due process of law fully and completely, and no part of the Act deprives the complainants of their property without due process of law, nor the equal protection of the law, nor other constitutional guar- [fol. 103] antees, but on the contrary the statute in question is a plain; ordinary, simple regulation for the protection of users as well as copyright owners of all copyrighted vocal and instrumental musical compositions when used within the State of Nebraska; that said Act was ostensibly designed to prevent the exploitation of the Copyright Act by an unlawful combination of price-fixing owners or proprietors which might adopt methods in restraint of trade and eliminate free competition within this state for the users for public performance for profit of copyrighted vocal and instrumental musical compositions.

14. That the bill of complaint filed herein should be dismissed and the motion and showing in support of the temporary injunction should be denied because the allegations that are well plead in the bill of complaint, even if proven would exempt the complainants from all the provisions of the Act if they so wished, unless they were participants in the unlawful price-fixing combination prohibited or participated in a scheme to fix prices and exact the same and divide that fund as "dividends" or "earnings" among certain members of the unlawful combination.

15. That the bill of complaint should further be dismissed because there is a misjoinder of parties complainant, all of

whom are joined together contrary to the provisions of Rule No. 26 promulgated by the Supreme Court of the United States in accordance with the Equity Rules set forth in Title 28, Sec. 721-723, U. S. C. A., on page 17, for the reason that said bill of complaint alleges no joint cause of action in said complainants, all as shown by the bill itself and the various exhibits attached.

16. That the bill of complaint should be dismissed because it fails to set forth facts or law that would justify this Court in holding that complainants have been denied, or will be denied, jointly or severally, their constitutional rights in contravention of any of the following provisions [fol. 104] plead by complainants (page 44) as the basis for relief herein:

A. As to the Constitution of the United States

1. Art. I, Sec. 8 (To promote progress of science and arts)
2. Art. I, Sec. 9 (Ex post Facto)
3. Art. I, Sec. 10 (Impair obligation of contracts)
4. Art. III, Sec. 2 (Place of trial)
5. Art. IV, Sec. 2 (Citizen of each state entitled to all privileges and immunities)
6. Art. VI, Sec. 2 (Bound by treaties)
7. Amendment XIV (Due process and equal protection)

B. As to the Constitution of the State of Nebraska

1. Art. I, Sec. 1 (Equal rights)
2. Art. I, Sec. 3 (Due process)
3. Art. I, Sec. 7 (Search and seizure)
4. Art. I, Sec. 13 (Justice without delay)
5. Art. I, Sec. 15 (Severe penalties)
6. Art. I, Sec. 16 (Ex post Facto impairing obligations)
7. Art. I, Sec. 21 (Compensation for private property)
8. Art. I, Sec. 25 (Discrimination between citizens)

C. Present Copyright Law (Mar. 4, 1909, c. 320, Sec. 1, 64, 35 Stat. 1075, 1088, Title 17, U. S. C. A.);

that said references to said constitutional and statutory provisions above set forth and found on page 44 of the bill of complaint are conclusions, and no facts are alleged showing impending loss of property or rights sufficient to justify

granting any part of the prayer for relief, either by way of [fol. 105] temporary injunction or any relief upon final hearing.

William J. Hotz, Special Assistant to the Attorney General of Nebraska, 1530-5 City National Bank Building, Omaha, Nebraska.

Richard C. Hunter, Attorney General; Barlow Nye, Of Counsel, Administrative Assistant to Attorney General, State Capitol Building, Lincoln, Nebraska."

[fol. 106] STATEMENT RE TEMPORARY INJUNCTION

Plaintiffs on the 7th day of June, 1937, filed a motion for temporary injunction, with showing. Defendants filed answer thereto with showing. The temporary injunction was granted and opinion given as found at pages 98 and 99 hereof. No appeal was prosecuted from the temporary injunction; and therefore all proceedings in reference thereto, except the opinion and temporary order of injunction have been eliminated from the printed record.

IN UNITED STATES DISTRICT COURT

[fol. 107] DEFENDANTS' EXCEPTIONS—Filed November 18, 1937

Come now the defendants in the above entitled cause and file this objection to the orders and rulings of the court entered herein on November 13th, 1937, wherein the court granted the complainants a temporary injunction and denied the defendants' motion to dismiss, and request that exception be granted defendants to said rulings and orders.

Richard C. Hunter, Attorney General of Nebraska; Barlow Nye, Administrative Assistant; William J. Hotz, Special Assistant to the Attorney General of Nebraska, 1530-5 City National Bank Building, Omaha, Nebraska, Counsel for Defendants.

[fol. 108] IN UNITED STATES DISTRICT COURT

ANSWER—Filed November 18, 1937

Come now the defendants, who have been served with process, and file this their answer to the bill of complaint, and allege as follows:

I

That the defendants are without knowledge of the organization of the American Society of Composers, Authors and Publishers under the laws of the State of New York and require the pleading of those statutes of New York under which the said Society claims to exist; that the defendants have no knowledge that the purposes of said Society are actually as set forth throughout the bill of complaint, nor have the defendants knowledge of the reason that one of the plaintiffs, Gene Buck, brings the action as president of the organization of the said Society, if the Society is organized under the laws of New York as an entity; nor do the defendants have knowledge of the necessity for some of the members of said Society joining as plaintiffs, if it appears upon proof that the Society is properly incorporated under the laws of New York and has the right to sue and be sued; and if it so appears, then there is a misjoinder of parties complainant in that there exists no joint cause of action among them.

II

That the defendants have no knowledge of the individual status of the complainants, Gene Buck, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, as alleged in the bill of complaint, or that they have written, composed, or own the musical compositions in the bill of complaint referred to, or that said parties are citizens or residents of the places designated in the bill of complaint.

III

Defendants admit that the defendants in the action are as [fol. 109] set forth in Paragraph 5 of the bill of complaint and that Exhibit "E" attached to the bill of complaint is Legislative Bill No. 478 passed by the 52nd Session of the

Nebraska Legislature, and that the same properly became a law of the State of Nebraska by approval on May 17th, 1937, and is the act in question in these proceedings.

IV

The defendants specifically deny all the matters set forth in Paragraphs 7, 8, and 9 wherein the complainants allege that the Nebraska act seeks to deprive the complainants of their rights under the Copyright Laws of the United States Government, when, as a matter of fact, the act denies no rights to any individual composer, author, or publisher of copyrighted vocal or instrumental musical compositions but merely seeks to prevent an unlawful combination of authors, composers, and publishers who band themselves together to unlawfully fix and determine prices, and to stifle and prevent competition, and who seek to restrain trade; and further, the act nowhere denies due process of law but on the contrary gives full, complete, and equal protection of the law to all parties affected and provides for no summary action against any person, firm, or corporation in the enforcement of any of its provisions.

V

That the defendants have no knowledge of any of the matters set forth in Paragraphs 10 to 34 inclusive of said bill of complaint, and therefore must be denied.

VI

For further answer, the defendants admit Paragraph 35 so far as the defendants therein set forth are designated as the particular officials therein set forth, but specifically deny that any of the defendants have threatened to or will enforce the terms of the statute against any of the individual complainants, nor have they threatened to enforce the act against the complainant Society only in the event that the complainant Society would operate in the State of Nebraska in violation of the terms of the statute by conniv- [fol. 110] ing and conspiring to fix and determine prices for public performance of copyrighted musical compositions unlawfully controlled by it and to stifle competition and to restrain trade, and to unlawfully and illegally exact fees and licenses for such unlawful combination within the State of Nebraska.

VII

In answer to Paragraph 36 of the bill of complaint, the defendants allege that the penalties and other provisions for the enforcement of the Nebraska Act in question are far from unduly drastic but are only similar to the provisions of the Sherman Anti-Trust Act of the United States as well as the anti-monopoly and anti-discrimination statutes of the State of Nebraska in reference to all other styles and kinds of business where the laws are violated in reference to unlawful monopoly as shown by Chapter 59 of the Compiled Statutes of Nebraska for 1929 and the amendments thereto, which are hereby referred to and by reference made a part hereof; and further, that the act in question is merely a pronouncement of the economic policy and the legislative will of the State of Nebraska in reference to monopolies and unlawful combinations and price fixing organizations in reference to copyrighted musical compositions, which act generally follows the same provisions in reference to all other things and commodities that are the subject matter for acts relative to unlawful, price fixing combinations in restraint of trade within this state.

VIII

The defendants specifically deny that the law in question contravenes Article I, Sections 8, 9, and 10, Article III, Section 2, Article IV, Section 2 and Article VI, Section 2, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, and Article 1, Sections 1, 3, 7, 12, 13, 15, 16, 21 and 25, of the Constitution of the State of Nebraska; nor does the Ne- [fol. 111] braska act in question in any way violate any of the terms of the Copyright Statute of March 4, 1909, or any amendments thereto, but on the contrary assures to the individual copyright owners the exclusive right for which said Copyright Act was enacted, and nowhere does said Copyright Act authorize, sanction, or permit either expressly or impliedly a combination of copyright owners or their publishers or assigns or agents to combine for the purpose of indulging in unlawful monopolistic practices and the fixing, determination and controlling prices and stifling of competition and acting in restraint of trade within the State of Nebraska or elsewhere.

IX

For further answer, the defendants state that the complainants have a plain, adequate, and complete remedy at law as clearly set forth in Sections 9, 10, and 11 of the Nebraska act, which are the enforcement provisions thereof, and which provide for full and complete trial in courts of competent jurisdiction after notice and hearing and with all the protection given to litigants in similar matters within the State of Nebraska, and with the constitutional guarantees of trial by jury in cases and law and adequate equity rules in courts of equity.

X

The defendants have no knowledge whatever of the matters set forth in Paragraph 37 of the bill of complaint, and the defendants aver that in reference to the matters therein set forth that the act in no part thereof denies the individual copyright owner full right and complete protection and freedom of contract and right to deal freely and without restriction within the State of Nebraska in reference to his, her, or its copyrighted music within the State of Nebraska whether the same be for private performance or for public performance for profit.

[fol. 112]

XI

The defendants deny all the provisions of Paragraph 38 of the bill of complaint in reference to the alleged constitutional violations and allege that no contracts are impaired or sought to be impaired by the provisions of the Nebraska act in question, but full faith and credit is guaranteed under the laws of the State of Nebraska and under the legislative act in question of all contracts made and entered into by copyright owners for the enforcement of their rights, and that no threats have been made by any of the defendants that any attempt has been or will be made to impair or limit or curtail those rights under the provisions of the act in question or otherwise.

XII

Defendants further state in answer to the bill of complaint that the same fails to state a cause of action against the defendants; nor have the complainants shown that the respective provisions of the act in question are violative

of any of the constitutional provisions of the United States or of the State of Nebraska, while on the contrary said bill provides for an orderly procedure in reference to the announced legislative policy of the State of Nebraska in dealing with the evils set forth in the legislative bill in question in reference to the abuse that might be made by the unlawful control by a price fixing combination of dealers in the public performance rights of copyrighted vocal and instrumental musical compositions within the State of Nebraska, and for the protection of all the users thereof, including hotels, amusement parks, dance halls, radio stations, theatres, and all other users of such music for public performance for profit throughout the State of Nebraska.

XIII

The defendants are without knowledge of the matters set forth in the contracts, agreements and written instruments known as Exhibits "A", "B", "C", "D", "F", "G", and [fol. 113] "H", attached as exhibits to the bill of complaint, and therefore the same must be denied.

XIV

That the bill of complaint nowhere shows that the complainants are entitled to either temporary or perpetual injunction, and it is apparent that the complainants have a plain, adequate and speedy remedy at law as provided by the act itself in the event that any of the complainants are proceeded against under the terms and provisions of the act; that the act in question is directed against unlawful, price fixing combinations acting in restraint of trade and not against any of the complainants unless they themselves subject themselves to its provisions; that the bill of complaint fails to state a cause of action for the relief prayed therein, and because thereof the injunctions sought should be denied and the bill dismissed.

XV

For further answer, the defendants state that the complainant American Society of Composers, Authors and Publishers is an unlawful combination of a substantial number of the owners of copyrighted vocal and instrumental musical compositions within the United States; that said unlawful combination operates within the State of Ne-

braska by unlawfully and wrongfully fixing prices within the State of Nebraska in restraint of trade and contrary to all the provisions of the act; and that it does unlawfully and wrongfully exact fees and licenses within this state in violation of the terms of said act; that said Society does control substantially all the public performance rights of all the copyrighted vocal and instrumental musical compositions used within the State of Nebraska in violation of the terms of said act, and that it does through its publisher members actually own and control substantially all the copyrighted musical compositions for use within this state, and in violation of the terms of said act, and actually does fix and control prices for its use for all purposes within [fol. 114] Nebraska, contrary to the provisions of the act.

Wherefore, Defendants Pray that the prayer of the complainants' bill be denied in each and every particular; that the act in question, being Legislative Bill No. 478, be held by the court to be a valid exercise of the legislative authority of the State of Nebraska; and that the American Society of Composers, Authors and Publishers be adjudged to be an unlawful, price fixing monopoly that falls within the definitions and provisions of said act, and that by reason thereof that said complainant Society be adjudged to have no rights to interfere with the enforcement of said act within the State of Nebraska; that the defendants have such other and further relief as the court may deem just and equitable in the premises, and for their costs expended herein.

Richard C. Hunter, Attorney General of Nebraska. Barlow Nye, Administrative Assistant. William J. Hotz, Special Assistant to the Attorney General of Nebraska, 1530-5 City National Bank Building, Omaha, Nebraska, Counsel for Defendants.

(Duly verified by Harry R. Swanson, Secretary of State.)

[fol. 115] IN UNITED STATES DISTRICT COURT

ORDER GRANTING DEFENDANTS LEAVE TO FILE INTERROGATORIES

Now on this 9th day of December, 1937, this cause came on for hearing upon the application of the defendants in the above entitled cause for an order allowing them to file

herein the interrogatories submitted with said application to be answered by such officers of the complainants as are designated in said interrogatories; and

It appearing to the Court that three of the complainants are private corporations and one is a private association, and that said interrogatories are for the discovery of facts and the discovery of documents material to the defense of this cause;

It Is Therefore Ordered that the said defendants be and they hereby are allowed to file interrogatories herein forthwith and that Gene Buck, President of the American Society of Composers, Authors and Publishers, of 30 Rockefeller Plaza, New York, New York, and Walter S. Fischer, President of Carl Fischer, Inc., of Darien, in Fairfield County, State of Connecticut, and Gustave Schirmer, Secretary of G. Schirmer, Inc., of No. 812 Park Avenue, in the Borough of Manhattan, City and State of New York, and Saul H. Bornstein, Treasurer of Irving Berlin, Inc., of No. 14 East 75th Street, in the Borough of Manhattan, City and State of New York, shall separately and fully answer such of said interrogatories and furnish such of the documents therein requested as are designated in said interrogatories, and that said answers shall be in writing under oath and signed by each officer interrogated, and filed herein within fifteen (15) days of service of same upon the solicitors for complainants.

Archibald K. Gardner, United States Circuit Judge.
Thos. C. Munger, United States District Judge.
J. A. Donohoe, United States District Judge.

[fol. 116] IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE PARAGRAPH 15 OF ANSWER

At the time of the trial, the complainants made the following motion:

"The complainants move that Paragraph 15 of the Defendants' Answer be stricken for the reason that the allegations contained in said Paragraph 15 constitute no defense to any of the issues tendered in this case by plaintiffs' Bill of Complaint; and for the reason that said Paragraph 15, or the allegations in it contained, tender no issue

properly triable in this case." (O.R. Ev. 4. There was no ruling made upon this Motion.)

[fol. 117] IN SUPREME COURT OF THE UNITED STATES

PETITION FOR APPEAL

To the Honorable Archibald K. Gardner, United States Circuit Judge; Thomas C. Munger and James A. Donohoe, United States District Judges, sitting in equity and in pursuance of Section 266 of the Judicial Code:

(Buck v. Swanson, 33 Fed. Supp. 377)

1. The above captioned defendants and appellants petition Your Honors for an order allowing an appeal from the order over-ruling their motion for new trial and rehearing, and to correct the decree entered, in the United States District Court, for the District of Nebraska, Lincoln Division, on March 28, 1940. Theretofore, in the above cause, an opinion of Your Honors was filed and entered on De-
[fol. 118] cember 28, 1939; and thereafter, findings of fact, conclusions of law, and decree were filed and entered on the 25th day of January, 1940. The said motion for new trial and rehearing and to correct the decree had twenty-two (22) affidavits attached, and was filed on February 5, 1940. The final decision overruling the motion to correct the decree, as above stated, was entered on March 28, 1940.

2. Thus, this petition for appeal is presented for allowance within the three (3) calendar months provided by statute.

3. Copies of each of the aforementioned papers, pleadings, decree, and orders will be attached to the jurisdictional statement to be filed.

4. The assignment of errors accompanying this petition set forth the defendants' conclusion for the requested reversal and dismissal of the appellees' bill of complaint or to correct the decree, which Your Honors denied when the permanent injunction was granted restraining the enforcement of the Nebraska Legislative Act in question, known as Legislative Bill No. 478, Chapter 138, page 488, Session Laws of Nebraska for 1937, approved by the defendant governor on May 17, 1937.

5. This Act prohibited those who controlled the copyrights on vocal and instrumental musical compositions from combining to fix prices for public performance rights and from operating in restraint of trade in Nebraska.

6. The defendants are aggrieved by the decision and therefore petition Your Honors for the allowance of the appeal, principally because the Court, after finding that the plaintiffs were operating in Nebraska as a monopoly, held the entire act non-enforceable because parts of it were held to be in violation of the National Copyright Act (Title 17, U. S. C. A.); and that the said part of the Act [Sec. 2 (B)] was the inducing cause for its passage and inseparable from the remaining parts. To this ruling the appellants except and disagree with the final orders entered.

[fol. 119] 7. However, this petition for appeal is likewise based upon all the assignments of error and the legal points raised in the statement of jurisdiction and brief in support.

8. Because this case was heard before a three-judge federal court, sitting in equity under Section 266 of the Judicial Code (Title 28, U. S. C. A., Section 380), and by its decision has permanently restrained and enjoined the defendant state officials from enforcing the above mentioned state statute upon the grounds that the Act was repugnant to the laws of the United States and the Constitution, a direct appeal to the Supreme Court of the United States may be had herein, as provided in Section 238 (3) of the Judicial Code (Title 28, U. S. C. A., Sec. 345). The allowance of this appeal is requested accordingly.

9. The jurisdictional amount in controversy, both by stipulation of the parties of record and the finding of the Court upon the facts, has been established as sufficient.

10. All the above mentioned defendants and appellants are citizens and residents of the State of Nebraska, and all the plaintiffs and appellees are citizens and residents of the States of New York and Maine.

11. Defendants and appellants tender surety company cost bond in the amount of $250.00, as provided by Rules 72 and 73 of the Rules of Civil Procedure.

Wherefore, all the appellants pray:

1. That this petition for appeal may be granted.

2. That citation may issue to all the plaintiffs and appellees.

3. That said cause upon appeal be reversed and the permanent injunction denied, vacated, and set aside, and the appellees' cause of action dismissed at the appellees' costs, and

[fol. 120] 4. That they be granted such other and further relief as may be just and equitable in the premises.

William J. Hotz, Special Assistant to the Attorney General, 1530-5 City National Bank Bldg., Omaha, Nebraska.
Walter R. Johnson, Attorney General of the State of Nebraska, Lincoln, Nebraska.
John Riddell, Assistant to the Attorney General of the State of Nebraska, York, Nebraska.
Attorneys for Appellants.

William J. Hotz, Omaha, Nebr.

[fol. 121] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING APPEAL

The appellants in the above entitled cause, who were the defendants, and each of them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the opinion, findings of fact, conclusions of law and decree, and the order overruling the motion for new trial, rehearing and to correct said decree, made and entered on March 28, 1940, in the above entitled cause by the United States District Court, District of Nebraska, Lincoln Division, sitting as a three-judge federal court under Section 266 of the Judicial Code; and having presented their petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction, pursuant to the statute and rules of the Supreme Court of the United States in such cases made and provided;

It is now here ordered that an appeal be, and the same is, hereby allowed to the Supreme Court of the United States from the District Court of the United States, for the District of Nebraska, Lincoln Division.

It is further ordered that the Clerk of said court shall prepare and certify a transcript of the record, proceedings, and decree in this cause in accordance with the designation of record filed by the appellants and otherwise in accordance with the rules of the Supreme Court of the United States in such cases made and provided and of the Rules of Civil Procedure of this court in reference thereto; and [fol. 122] shall transmit the same, when so prepared, to the Clerk of the Supreme Court of the United States so that he shall have the same in said court within forty (40) days from this date.

It is further ordered that security for costs on appeal be fixed at $250.00.

Dated at Lincoln, Nebraska, this 27th day of June, 1940.

Thos. C. Munger, United States District Judge.

[fol. 123] Citation in usual form filed June 27, 1940, omitted in printing.

[fols. 124-125] Bond on Appeal for $250.00 approved June 27, 1940, omitted in printing.

[fol. 126] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 27, 1940

After a three-judge federal court, acting under Section 266 of the Judicial Code, had granted a temporary injunction and that same court, upon a hearing on the merits, granted an absolute, permanent injunction enjoining the appellant state officers from enforcing any of the provisions of a duly enacted state law, free from federal constitutional objections, and where no action on the state law had ever been had before any state court, the appellants claim that;—(Buck v. Swanson, 33 Fed. Supp. 377):

I

The Court erred in holding in its opinion of December 28, 1939, that Section 2 (B) of the Nebraska statute in

question (Session Laws 1937, Chap. 138, page 488) was the inducing cause for its passage and inseparable from the balance of the Act, and therefore the entire Act was non-enforceable, because it affirmatively appeared from the Act itself that said subsection might be stricken and the balance of the Act would be full, complete, enforceable, and independent of said alleged objectionable clause or cla-ses in Section 2.

II

The Court erred in refusing to correct its decree on rehearing when it then affirmatively appeared by the affidavits of a majority of all the legislators, each of whom voted for the Act, that the said objectionable section (Section 2 (B) together with Subsections 2 (A) and 2 (D) had no influence [fol. 127] whatever upon them in their affirmative vote; and that neither of said subsections were the inducing cause for the affirmative vote of any one of said legislators.

III

The Court erred in granting the permanent injunction after it had found in its opinion of December 28, 1939, that the following facts (a) to (n) had been established by competent evidence at the trial:

(a) That the appellee ASCAP was made up of 1,000 music composer members and 123 music publisher members; that these music publisher members constituted substantially all of the music publishers in the United States.

(b) That ASCAP was likewise affiliated with 44,000 foreign composer members throughout the world whose music was exclusively controlled in the United States by ASCAP.

(c) That ASCAP actually did control from 85% to 90% of the popular copyrighted vocal and instrumental musical compositions and from 50% to 75% of the standard or older music used in Nebraska and elsewhere throughout the United States.

(d) That the users of music in the State of Nebraska, including radio stations, dance halls, hotels, theaters, and places of amusement must necessarily, for the successful operation of their business, deal with ASCAP.

(e) That there was no place, or person, or agency to whom the users of music in Nebraska might go in order

to deal for the public performance rights in any substantial amount sufficient to meet the ordinary needs of users in the state, except ASCAP.

(f) That the appellees, and all other members of ASCAP had assigned in writing to it the exclusive right to all their public performance rights.

(g) That the collections were made in the State of Nebraska by ASCAP of at least $70,000 annually; that the same was distributed, after the expense of operation, one-half thereof to the publisher members and one-half thereof to the composer members, classified by a self-perpetuating board of directors of ASCAP, as shown by their articles of association attached to their bill of complaint and in evidence.

(h) That the public was interested because there were in Nebraska 350 dance pavilions and ballrooms independent of taverns, where dancing was carried on incidentally; that there were ten radio stations operating within the state, all dealing with ASCAP, and one of which stations was [fol. 128] affiliated with the Columbia Broadcasting Network and the other with the National Broadcasting Network; that there were a large number of theaters as users of ASCAP music, and 284,000 radio receiving sets in private homes that listened to ASCAP music from the ten radio stations; that about one-third of the population of the state at one time or another during the year attended dances and balls where ASCAP music was played.

(i) That the theaters paid to ASCAP approximately $12,000 per year at ten to fifteen cents per seat per year; that the largest radio stations each paid $22,000 or more per year to ASCAP; that there were 391 signed contracts in evidence with users in the state in which ASCAP, through its Nebraska representatives and agents, was the licensor and recipient of all the collections.

(j) That the exclusive right to make collections, to fix all prices, and to carry on all the public performance rights of all the copyrighted musical compositions of all its members was vested by each member in ASCAP under contracts in evidence.

(k) That throughout the nation some $6,000,000 was collected annually, of which approximately 20% was to pay the

overhead expense of ASCAP; and that Nebraska users paid their proportionate part of that sum.

(l) That the protection by ASCAP of the legal rights by infringement suits for the members of their copyrighted musical compositions, which the individuals could not as readily carry on or detect themselves, would not authorize the monopolistic practices nor curtail the exercise of the police power of the State of Nebraska to prevent the unlawful monopoly of ASCAP.

(m) That the National Copyright Act (Title 17 U. S. C. A.) gave no right to copyright owners to combine with other copyright holders to insure control of prices and the consequent power of monopoly of an entire field.

(n) That the necessity urged by the appellees as a justification or warrant for their organization was of no avail as a defense.

Explanation: (All the foregoing facts were found by the Court in its opinion of December 28, 1939, and also in the findings of fact of January 25, 1940.)

IV

The Court erred in finding in its opinion of December 28, 1939, that Section 2 (B) was the inducing cause for the passage of the entire Act and was inseparable from the balance thereof, when that issue was not pleaded and was not raised in any manner at the trial by either the appellees or [fol. 129] the Court upon its own motion during the trial.

V

The Court erred in granting a permanent injunction against the enforcement of Sections 1, (not 2), 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the Act in question, when said sections merely declared the announced rules of law universally applied in Nebraska against all unlawful monopolistic combinations (Chapter 59, Comp. St. Neb., 1929, and Amendments, Monopolies and Unlawful Combinations; Art. 1, Trusts Generally; Art. 2, Grain Dealers; Art. 3, Fire Insurance Companies; Art. 4, Lumber and Coal Dealers; Art. 5, Local Discrimination; Art. 6, Pooling by Bridge Contractors; Art. 7, Rebate Vouchers; Art. 8, Unlawful Restraint of Trade; Art. 9, Regulation of Public Markets;

Art. 10, Dairy Industry; 1937 Supp., Chap. 59, Art. 11, Protection of Trade Marks, Brands and Names).

VI

The Court erred in failing to apply the announced principle of law in Nebraska that:

"Although a statute may be invalid or unconstitutional in part, the other parts will be sustained, where they can be separated from the part which is void."

VII

Furthermore, the Court erred in holding in its opinion that Section 2 and its subdivisions (B) and (A) were in themselves violative of the National Copyright Act because the said sections and subsections were obviously enlargements to and permissive additions to the National Copyright Act, rather than in derogation thereof, and were enacted as a proper and legal exercise of the police power of the Legislature of the State of Nebraska to protect its citizens against fraud and unlawful practices of ASCAP when dealing in the public performance rights for copyrighted musical compositions.

[fol. 130]

VIII

The Court erred in granting the permanent injunction when the appellees had a plain, adequate, and speedy remedy at law, and especially so when the enforcement provisions of the Act, to-wit: Sections 9, 10, 11, and 13 provide for full and complete hearings in the regularly constituted courts of the state and no summary action was permitted under the terms of the Act.

IX

The Court erred in granting the permanent injunction because in doing so it violated the well-established principle of law announced by the Supreme Court of the United States that the limited individual monopolies granted to patent or copyright owners do not exempt them from the prohibitions of anti-trust legislation when it appears that the combining patent or copyright owners effectively dominate industry, because the power to fix royalties for licenses is tantamount to the power to fix prices in violation of the anti-trust legislation.

Explanation: (Only in the Court's opinion of December 28, 1939, was the entire Act held void because of the invalidity of Section 2 (B) as above set forth. In the findings of fact, conclusions of law, and decree of January 25, 1940, the entire Act was held invalid and non-enforceable although no part thereof was held repugnant to the copyright law, and no mention or reference was made to Section 2 (B), as the only invalid part, as was done in the opinion of December 28, 1939, and no determination of unconstitutionality made in said papers of 1/25/40.

Thus appellants now proceed with the following assignment of errors based upon omissions in the findings of fact, conclusions of law, and decree of January 25, 1940.)

(Buck *v.* Swanson, 33 Fed. Supp. 377.)

X

The Court erred in failing to find in its findings of fact of January 25, 1940, the following additional, definitely proven, material matters appearing of record because the omission thereof affected the material rights of the appellants on the issue of monopolistic practices amounting to fraudulent practices indulged in by ASCAP:

[fol. 131] (These facts are of necessity at this point indexed to the original record of the evidence and are referred to by original page number from the record of testimony taken at the trial.)

(1) That, contrary to its claim of being a protective association for its members, ASCAP is a very substantial business organization paying $30,000 a year rental for its New York office (O. R. 160).

(2) That it pays each of its officers Buck and Mills $50,000 annually together with large bonuses and other emoluments, and to its Secretary Pain $25,000 per year (O. R. 69-70; 500-501).

(3) That no fee or license is charged the radio networks dealing in interstate commerce but only the local radio station for such public performance as ASCAP compositions as are reproduced or presented originally in the Nebraska studios (O. R. 160-161).

(4) That the entire operations of ASCAP are so carried on as to be within the state as intra-state transactions

obviously and ostensibly to avoid, in the slightest degree, interference with interstate commerce (O. R. 385-391; O. Ex. 54).

(5) That over 100 infringement suits were instituted by ASCAP in the past ten years in the Nebraska Federal Courts, all of which were dismissed when and if contracts were signed by the users with ASCAP (Pl. Ex. 62 and Def. Ex. 56), on ASCAP's terms.

(6) That there has been a gradual enlargement in the fees charged year by year; and that the users of music are helpless and must pay the price dictated by ASCAP if they use music commercially in their business enterprises (O. R. 338; 329; 355).

(7) That many thousands of dollars are invested by the users of music in the State of Nebraska in theaters, broadcasting stations, hotels, amusement parks, halls, and pavilions; and that these investments would be adversely affected without the use of music of the type and kind controlled almost exclusively by ASCAP (O. R. 350; 404; 461-2).

(8) That the classification committee of ASCAP (Its Art. of Assoc. P. Ex. 3) divides one-half the net income to composer members, classifying them arbitrarily in groups so that approximately 100 to 150 of the composer members receive approximately all of the composer money; that these funds are annually paid as if dividends or earnings, and not as royalties to each composer on his music. (O. R. 62-8; 71-75; 173; Pl. Ex. 3, page 13).

[fol. 132] (9) That the radio broadcasting companies in Nebraska are compelled, in contracting with ASCAP, to pay it 5% of the station's entire gross receipts, no matter from what source received, together with a sustaining fee, irrespective of whether the radio station used ASCAP or any other music, or no music, on a particular program (O. R. 403-6; 478-9).

(10) That ASCAP refused to furnish the list of its compositions, the public performance rights of which it claimed to control, so that the user might protect himself against an innocent infringement in his establishment (O. R. 374; 468; 414; 393).

(11) That the facts admitted by appellees in their petition and by their exhibits attached and made a part thereof, when applied to the Act also set forth in the petition, were sufficient admissions of facts by appellees to legally ground an order of dismissal moved for by the appellants in August of 1937, but overruled on November 13, 1937, and to which exceptions were taken and filed on November 18, 1937.

XI

The Court erred in its opinion of December 28, 1939, when commenting upon Section 2 (B), which applied separately to the *individual* composer and his publisher, as specifically set forth, by holding:

"While the power reasonably to restrain unlawful monopolistic trade-restraining combinations from exercising any rights in the state may be conceded, an act which compels the owner of a copyright to offer it for sale in a certain way, and if he fails so to do to take it from him without compensation violates the due process and equal protection clauses of the Constitution, and it is also violative of the Federal Copyright Act",

because Section 2 (A) of the Act provides that the said individual composer and his publisher may, only if he or they wish, grant public performance rights, and when they do shall fix the price therefor upon their music when sold, and collect for it in the same manner as they do for their royalties on all sheet music; and because Section 2 (C) protects the individual copyright owner by prohibiting others from publishing, copying, vending, or selling the [fol. 133-140] composition containing the public performance rights to others when so purchased, with full protection of the National Copyright Law specifically provided in Section 2 (A).

XII

The Court erred in holding in reference to said Section 2 (B) in its findings of fact of January 25, 1940, that:

"The Statute can not possibly be complied with because, among other things, under their respective contracts with the authors and composers, the publisher-members of the Society (including publisher complainants) have the right

to and do give away and distribute free of charge, professional copies of the compositions copyrighted by said publisher-members within the State of Nebraska; this is a practice in the business and is done to create a desire for such compositions on the part of the public, make said compositions popular and give them commercial value",

because the statute in no way prohibits the giving away of copyrighted musical compositions with or without public performance rights; that such arrangement, if indulged in, would be a simple matter of contract between the composer and his publisher and is extraneous to the issues involved in this case, and in no manner violative of the Copyright Act or the Nebraska Act.

XIII

The Court erred in granting the permanent injunction when it did not directly or indirectly in any part of its findings of fact, conclusions of law, or decree of January 25, 1940, state, find, conclude, or decree that the Nebraska act in question was violative of any provisions of the Federal or State Constitution or of the National Copyright Act.

XIV

The Court erred in failing to correct its decree of January 25, 1940, for the additional reasons set forth in appellants' motion for rehearing filed February 5, 1940, which reasons and grounds are made a part of this assignment of error as if copied verbatim herein.

Respectfully submitted, Walter R. Johnson, Attorney General of Nebraska, Lincoln, Nebraska. John Riddell, Assistant to the Atty. Gen. of Nebraska, York, Nebraska. William J. Hotz, Special Assistant to the Atty. Gen. of Nebraska, 1530-5 City Nat'l. Bank Bldg., Omaha, Nebraska.

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[fol. 141] IN UNITED STATES DISTRICT COURT

No. 562 Eq.

MEMORANDUM OPINION—Filed November 13, 1937

PER CURIAM:

The plaintiff, Gene Buck, as an individual and as President of the American Society of Composers, Authors and

Publishers, brought suit against Harry R. Swanson, as Secretary of State of Nebraska and against certain other state and county officials, seeking to enjoin the defendants from enforcing the provisions of an act of the legislature of Nebraska, approved May 17, 1937 (Nebraska Session Laws 1937 page 488). That Act makes it unlawful for authors, composers, proprietors, publishers or owners of copyrighted musical compositions, when the members, stockholders or interested parties constitute a substantial number of persons, firms or corporations within the United States who own or control copyrighted musical compositions, to form any organization, either in Nebraska or elsewhere, if one of the objects of the organization is the determination of license fees required for the use of copyrighted musical compositions for profit in Nebraska, for the purpose of preventing free competition between different copyright owners. There are provisions penalizing any attempt to collect license fees by owners of copyright, and requiring any author, composer or publisher, to specify on any published musical composition prepared for use in Nebraska, the selling price of such composition. Many other provisions seek to limit the rights of copyright owners or licensees to control the sale, reproduction or use of their products in the state of Nebraska. The plaintiffs have alleged that the [fol. 142] enforcement of the Act will violate rights granted to them by the Copyright Act of Congress (17 U. S. Code, Section 1, et seq.) and that the Act is in violation of Section 8 of Article 1 of the Constitution of the United States, and also impairs the terms of existing contracts held by the plaintiff.

It is alleged that the defendants have threatened to and will enforce the provisions of this Act, to the great damage of the plaintiffs unless restrained by an order of this court. The application for a temporary injunction has been submitted upon the complainants' bill, and upon certain affidavits filed, and also upon the defendants' motion to dismiss the bill of complaint.

On consideration of the bill, it appears that there is a grave doubt of the constitutionality of the Act of the Legislature, and the plaintiffs have shown that serious and irreparable injury will be inflicted upon them if a preliminary injunction is not awarded to them and that the plaintiffs have no adequate remedy at law. A preliminary injunction, upon the usual terms, will protect both parties, pending a

final decision. An order will, therefore, be entered granting a preliminary injunction. The motion to dismiss the plaintiffs' bill will also be denied.

[fol. 143] IN UNITED STATES DISTRICT COURT

INJUNCTIONAL ORDER—Filed November 13, 1937

This cause came on to be heard at this term, under Section 380, Title 28 U. S. C. A. (Jud. Code Sec. 266), and the Court sat as provided therein, and the cause was argued by counsel; thereupon, upon consideration thereof, it was ordered and adjudged, as follows, viz.:

1. That the motion made by the complainants for temporary injunction, be, and the same is hereby, in all respects, granted.

2. That defendants, Harry R. Swanson, individually and as Secretary of the State of Nebraska, Walter H. Jensen, individually and as State Treasurer of the State of Nebraska, William H. Price, individually and as Auditor of Public Accounts of the State of Nebraska, Richard C. Hunter, individually and as Attorney General of the State of Nebraska, James T. English, individually and as County Attorney of Douglas County, State of Nebraska, Max G. Towle, individually and as County Attorney of Lancaster County, State of Nebraska, Grace Ballard, individually and as County Attorney of Washington County, State of Nebraska, S. S. Diedrichs, individually and as County Attorney of Lincoln County, State of Nebraska, Raymond B. Morrissey, individually and as County Attorney of Johnson County, State of Nebraska, Maynard N. Grossbaus, individually and as County Attorney of York County, State of Nebraska, Charles H. Hood, individually and as County Attorney of Saunders County, State of Nebraska, Alvin B. Lee, individually and as County Attorney of Valley County, State of Nebraska, Gerald J. McGinley, individually and as County Attorney of Keith County, State of Nebraska, Floyd Lundberg, individually and as County Attorney of Kearney County, State of Nebraska, Edwin Moran, individually and as County Attorney of Otoe County, State of Nebraska, and the respective agents, servants and employees of each

of them, and all other persons acting under or through the authority of each of them, or by virtue of the authority of the office of each of them, be, and they are, each of them, [fol. 144] severally, enjoined and restrained, pendente lite, and until the further order of this Court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding, at law or in equity, for the purpose of enforcing or executing the Statute of Nebraska, known as Legislative Bill No. 478, passed by the Fifty-second Session of the Legislature of Nebraska, and signed by the Governor on May 17, 1937, and made effective immediately (said Statute hereinafter referred to as the "State Statute") against the complainants and others similarly situated, their representatives, employees, agents or any of them, and from demanding that copies of musical compositions of complainants and others similarly situated, be filed, and from bringing any action or proceeding to adjudicate the ownership of copyrighted musical compositions owned by the corporate or individual complainants or others similarly situated, and from attempting to appoint or take any steps leading to the appointment of a receiver, and from interfering with any and all existing contracts heretofore entered into between complainants and citizens and residents of the State of Nebraska, and between the American Society of Composers, Authors and Publishers and the other complainants, or any of said Society's members, and between the American Society of Composers, Authors and Publishers and similar societies located in foreign countries, and between the complainant composers and authors and their respective publishers, and between the complainant publishers and their respective authors and composers, and from threatening to enforce against any citizens or residents of the State of Nebraska, the penalties of such State Statute, in the event such citizens and residents desire to carry out their contracts with the said American Society or other complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Nebraska, or elsewhere, and gen- [fol. 145] erally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

3. That the motion made by the defendants herein to dismiss the bill of complaint herein, be, and the same is hereby, in all respects denied.

4. That the defendants be given thirty days from the date hereof to answer herein.

5. The court finds that unless an injunctional order of this nature be issued, the plaintiffs would be irreparably damaged and that plaintiffs have no adequate remedy at law. This order is made conditional upon the filing herein within 30 days of an approved bond by the plaintiff, in the penal sum of Five Thousand ($5,000) Dollars conditioned upon the payment to the defendants of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined by this order, such damages to be ascertained as the court may direct.

Archibald K. Gardner, United States Circuit Judge.
Dated Nov. 10, 1937.

Thos. C. Munger, United States District Judge.
Dated Nov. 13, 1937.

J. A. Donohoe, United States District Judge.

[File endorsement omitted.]

[fol. 146] IN UNITED STATES DISTRICT COURT

DISTRICT OF NEBRASKA—LINCOLN DIVISION

[File endorsement omitted.]

Before Archibald K. Gardner, Circuit Judge, Thomas C. Munger, District Judge, and James A. Donohoe, District Judge, sitting pursuant to Section 266 of the Judicial Code.

OPINION—Filed December 28, 1939

GARDNER, Circuit Judge, delivered the opinion of the Court:

This is a suit in equity in which plaintiffs seek to enjoin the enforcement of Legislative Bill 478 of the State of Nebraska, and which by its terms became effective May 17, 1937.

The American Society of Composers, Authors and Publishers, a voluntary unincorporated association under the

General Associations Law of New York, consisting of a large number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions, as authors, composers and publishers, through Gene Buck, its president, and certain individuals and corporations interested in copyrighted musical compositions are the plaintiffs. The secretary of state, the state treasurer, the auditor of public accounts, and the attorney general, all of the State of Nebraska, as well as the county attorneys of various counties of Nebraska, are the defendants.

The statute, the enforcement of which is sought to be enjoined, is too voluminous to be set out herein in haec verba, but it will be found in the subjoined note.

(Here follows Legislative Bill No. 478 Final Form on Third Reading.)

[fol. 147] There are approximately 1000 composer members of the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, in the United States, and 123 publisher members who constitute the principal publishers of the country. Each member has assigned to the society the conclusive right of public performance for profit of his copyrighted musical compositions for periods of five years at a time, the present contracts between the society and its members expiring December 31, 1940. The society has issued blank licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing such licenses.

In Nebraska there are some 350 dance pavilions and ballrooms of a class that are independent of taverns where dancing is carried on incidentally. There are ten radio stations operating within the State, of which one is affiliated with the Columbia Broadcasting Network and one with

the National Broadcasting Network. The other stations initiate their own vocal and instrumental musical programs. A large number of theaters are users of music. There are 284,000 radio receiving sets in private homes, and about one-third of the population of the state at some time during the year attend dances and balls where music is played. In 1938 approximately $12,000.00 was collected by ASCAP from the theaters in the state. The largest radio station in Nebraska pays about $26,000.00 to the society annually. Another group of stations paid the society about $27,000.00 in 1938. There are 391 signed contracts with users of music in Nebraska introduced in evidence, upon which an aggregate of approximately $20,000.00 was paid ASCAP during 1938. The society is given, by its members, the exclusive right to make collections, fix prices, and otherwise carry [fol. 148] on the public performance of all the musical compositions it controls. Some $6,000,000.00 was taken in for public performance rights by the society in the United States during 1938. Fifty per cent of its net commissions was divided among the composer members and the other fifty per cent was divided among the publisher members. These groups are classified, but the classification does not seem to have any material bearing upon the issues presented. Of the popular music necessary for the successful operation of radio stations, dance halls, hotels, and theaters, the society has control of about 85% or 90% and also has control of from 50% to 75% of the standard or older music that is played occasionally. All of the large and more influential publishers of music in the United States are members of the society. The users of music in Nebraska can not successfully carry on their business except they deal with the plaintiff society because there is no place where nor person or agency to whom users of music in Nebraska may go in order to deal for public performance rights and negotiate for music in any substantial amount sufficient to meet the ordinary needs of music users in the state, except the society.

All the contentions of plaintiffs, as well as those of the defendants, go to the constitutional validity of the statute involved. Whether or not, under the common law of Nebraska the contracts between ASCAP and its members, and between it and the users of music in Nebraska, are valid or not, we need not consider. That issue is not before us, but

the single question is the constitutional validity of the challenged statute.

It appears from the evidence that prior to the organization of the plaintiff society, an author or composer who had obtained a copyright for his production had no practical means of enforcing the exclusive right given him by the Copyright Act. He was not so equipped nor organized to discover violations of his rights, and it would require much time and a large amount of money to enforce his rights by means of litigation. Users of music, on the other hand, who wished to buy the rights of public performance for profit, [fol. 149] were unable to ascertain who the copyright owner was and to whom to go. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit that the society was organized.

The control or prohibition of combinations in restraint of trade and the prohibition of monopolistic practices is recognized as a proper exercise of the police power of the state. Nebbia v. New York, 291 U. S. 502; Waters-Pierce Oil Co. v. Texas, 197 U. S. 115; Dayside Fish Flour Co. v. Gentry, 297 U. S. 422; Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129; Central Lumber Co. v. South Dakota 226 U. S. 157; Paramount Pictures v. Langer 23 Fed. Supp. 890. While regulation of such public practices as are deemed to be contrary to the public policy of the state is a proper exercise of its police power, yet the exercising of such power is subject to the restrictions imposed by the Federal Constitution, which must, of course, be recognized as the supreme law of the land. A State Statute, though enacted in pursuance of the police power, is void if in contravention of any express provision of the Federal Constitution or of a valid federal statute, or if it constitutes an interference with matters that are within the exclusive scope of federal power.

The Act of March 4, 1909, Chap. 320, Sec. 1 (E), 35 Stat. 1073, Title 17 U. S. C. A. Secs. 1-63, enacted pursuant to the grant of power in Article I, Section 8 of the Constitution, was intended to grant valuable enforcible rights to authors and publishers without burdensome requirements, in order to afford greater encouragement to the production of literary works of lasting benefit to the world. Washingtonian Pub. Co. v. Pearson 306 U. S. 30. The policy and purpose of the statute is to grant to the individual the right

to control the use of the production covered by the copyright. Of course, the Act gives him no right to combine with others to insure control of prices and the consequent power of monopoly of an entire field by combination. Plaintiffs urge necessity as a justification or warrant for their organization. It is urged that without some such means of [fol. 150] protection, the individual copyright owner is helpless to protect his rights, but if the statute violates no rights guaranteed to the plaintiffs by the Constitution or laws of the United States, the motive for the organization or acts of ASCAP, however, impelling, is not material.

It is contended that the state statute deprives copyright owners of the right to control public performance for profit of their copyrighted musical compositions, apart from the sale of sheet music. The copyright is distinct from the material object copyrighted. It is an intangible incorporeal right in the nature of a privilege or franchise quite independent of any material substance such as the manuscript or the plate used for printing. King Feature Syndicate v. Fleischer (CCA2) 299 Fed. 533. The owner of the copyright has the right to dispose of it on such terms as he may see fit, or he may decline to dispose of it on any terms. He has an individual right of exclusive enjoyment similar to that of a patentee of an invention. United States v. Dubilier Condenser Corp. 289 U. S. 178; United States v. American Bell Telephone Co. 167 U. S. 224; Burrow-Giles Lithograph Co. v. Sarony 111 U. S. 53; American Tobacco Co. v. Werckmeister 207 U. S. 284; Caliga v. Inter Ocean Newspaper Co. 215 U. S. 182; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. (CCA7) 154 Fed. 358. The society as an assignee of the rights of each author is a representative of that individual right. There are too, individual plaintiffs before the courts, and they are interested individually in the public performance rights of particular musical compositions. In American Tobacco Co. v. Werckmeister, supra, it is said:

"* * * the law recognizes the artistic or literary productions of intellect or genius, not only to the extent which is involved in dominion over and ownership of the thing created, but also the intangible estate in such property which arises from the privilege of publishing and selling to others copies of the thing produced."

While the Copyright Act may not enhance the right of proprietorship, it certainly does not lessen that right. As said by the Supreme Court in Caliga v. Inter Ocean Newspaper Co., supra,

[fol. 151] "The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period."

The right of an author in his intellectual production is similar to any other personal property right. It is assignable and it may be sold and transferred in its entirety, or a limited interest therein, less than the whole property, may be sold and assigned, and the various rights included in the entire ownership may be split up and assigned to different persons. Sales may be absolute or conditional and they may be with or without qualifications, limitations or restrictions, Atlantic Monthly Co. v. Post Pub. Co. (D. C. Mass.) 27 Fed. (2d) 556; American Tobacco Co. v. Werckmeister, supra.

Section 2 (a) of the state statute requires the author, composer or publisher to specify legibly upon the musical composition, in whatever form it may be published, "the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes."

The right of public performance in connection with the composition includes separate and distinct rights, among them being: (1) the right of publication; (2) the motion picture rights; (3) the stage rights; (4) the recording rights; and (5) the radio reproduction rights. The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing.

Section 2 (b) of the Statute provides that,

"In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private and public performance for

profit within this state without further license fee or other exaction; and such person, firm or corporation, so using or rendering the same shall be free from any and all liabil- [fol. 152] ity in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state."

Under this subsection, the copyright owner in effect must offer the public performance rights of his copyrighted composition for sale and use in Nebraska, and if he does not choose so to do any person purchasing the composition may use it in the state for public performance without any liability to the copyright owner. This provision, we think, clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act. As observed, his rights of ownership entitled him to sell or offer to sell, or to withhold from sale, as he may choose.

The state statute cannot be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use. Panhandle Eastern Pipe Line Co. v. State Highway Commission 294 U. S. 613.

While the power reasonably to restrain unlawful monopolistic trade-restraining combinations from exercising any rights in the state may be conceded, an act which compels the owner of a copyright to offer it for sale in a certain way, and if he fails so to do to take it from him without compensation, violates the due process and equal protection clauses of the Constitution, and it is also violative of the Federal Copyright Act.

The state statute contains a separability provision (Section 12), which provides that,

"If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or non-enforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act."

The Supreme Court of Nebraska has held that a statutory expression of the separability of various sections or provisions of a statute is an aid merely to judicial interpretation. First Trust Co. v. Smith (Neb.) 277 N. W. 762; Laverty v. Cochran (Neb.) 271 N. W. 334; Hubble Bank v. [fol. 153] Bryan (Neb.) 245 N. W. 20. In Laverty v. Coch-

ran, supra, the court in speaking of a severance clause contained in a statute said:

"The rule is that, although a statute may be invalid or unconstitutional in part, the other parts will be sustained where they can be separated from the part which is void. Muldoon v. Levi, 25 Neb. 457, 41 N. W. 280. But the parts of the statute which are invalid must be capable of being executed independently of the invalid parts in order to be operative. State v. Ure, 91 Neb. 31, 135 N. W. 224. The statutory provision expressing legislative intent as to the separability of the various parts of a statute is merely an aid to judicial interpretation."

But where the connection between the invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative. The provision of the statute which we are here considering is such an essential part of the statute as not to be separable.

In view of our conclusion on this phase of the case, it is unnecessary to consider the other contentions that have been ably argued and elaborately briefed by counsel for the respective parties.

We conclude that permanent injunction restraining the enforcement of this statute must be granted. Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion.

[fol. 154] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 562 Eq.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 25, 1940

This suit have been duly commenced on June 8, 1937, by filing a subpoena and bill of complaint in this Court, and personal service of copies thereof having been made on said date upon all the defendants, except the defendants John Havekost, Ray C. Johnson, Walter R. Johnson, Wil-

liam T. Gleason, Zelma Derry, Rush C. Clarke, "John Doe" and "Richard Roe," (Said John Havekost having been substituted by stipulation in place and stead of Walter H. Jensen, said Ray C. Johnson having been substituted by stipulation in place and stead of William H. Price, said Walter R. Johnson having been substituted by stipulation in place and stead of Richard C. Hunter, William T. Gleason having been substituted by stipulation in place and stead of Charles H. Hood, Zelma Derry having been substituted by stipulation in place and stead of Gerald J. McGinley) and this Court having duly granted a temporary injunction on November 13, 1937, and defendants thereafter having duly filed their answer on November 18, 1937, and this cause having come on for trial on the 18th, 19th, [fol. 155] 20th and 21st days of September, 1939, at the District Court of the United States, District of Nebraska, Lincoln Division, in the Federal Post Office Building, City of Lincoln, Nebraska, and complainants having appeared by L. J. TePoel, Esq. (Louis D. Frohlich, L. J. TePoel and Herman Finkelstein, of Counsel), and defendants having appeared by W. R. Johnson, Attorney General (William J. Hotz, John Riddell and Andrew Bennett, of Counsel), and evidence having been adduced upon the merits of this case, and due deliberation having been had, and the Court having filed its opinion, hereby makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. The State of Nebraska enacted Legislative Bill No. 478 which became effective May 17, 1937. Said Statute is hereinafter referred to as the "Statute."

2. The plaintiff American Society of Composers, Authors and Publishers, is a voluntary unincorporated association organized in 1914 under the General Associations Law of New York. Its membership consists of a substantial number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions as authors, composers and publishers. It brings this suit through Gene Buck, its President, who has been duly authorized to bring this suit on behalf of the Society and all its members. Other plaintiffs are certain individuals and corporations who are members of the Society and are interested in copyrighted musical compositions. They are all citizens and residents of States other than Nebraska.

3. The Secretary of State, the State Treasurer, the Auditor of Public Accounts, and the Attorney General, all of the State of Nebraska, as well as the County Attorneys of various Counties of Nebraska, all citizens and residents of Nebraska, are the defendants.

4. There are approximately 1,000 composer-members of the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, in the United States, and 123 publisher-members who constitute some of the principal publishers of the country. Each member has as- [fol. 156] signed to the Society the exclusive right of public performance for profit of his copyrighted musical compositions for periods of five years at a time, the present contracts between the Society and its members expiring December 31, 1940. The Society has issued blanket licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the Society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing ASCAP to grant such licenses.

5. At the time the Statute was enacted, there were in existence 391 signed contracts between the Society and establishments in the State of Nebraska, engaged in the business of publicly performing copyrighted musical compositions for profit. During the year 1938, these licensees paid the Society $68,789.54 pursuant to such contracts (Ex. 17). Among such licensees of the Society were the owners of 250 motion picture theatres, 107 dance halls and miscellaneous establishments, 10 radio broadcasting stations, and 24 hotels and restaurants. Among the 10 radio stations in Nebraska licensed by the Society, one is affiliated with the Columbia Broadcasting System and one with the National Broadcasting Corporation. Part of the program broadcast by the two affiliated stations emanate from point outside of the State and the remaining part initiate in the studios of such Nebraska broadcasters or elsewhere within the State. The other eight stations initiate all their own

vocal and instrumental musical programs. There are 284,000 radio receiving sets in private homes in the State of Nebraska. No license fees are paid by the owners of these receiving sets inasmuch as they do not engage in public performances for profit. About one-third of the population of the State at some time during the year attend dances and balls where music is played. In 1938, approximately $12,000 was collected by ASCAP from 250 motion picture theatres in the State. In 1938, all the radio broadcasting stations in the State of Nebraska paid the Society approxi- [fol. 157] mately $48,700. The largest radio station in the State pays about $22,800 to the Society annually. Another group consisting of three stations, paid the Society an aggregate of about $31,700 in 1938. The costs of operation of the Society is approximately 20% of the gross amount received (Ex. 17 and 18).

6. The Society is given by its members the exclusive right to make collections, fix prices for blanket licenses, and otherwise carry on the licensing of the right of public performance for profit of all the musical compositions copyrighted by its members. Some $6,000,000 was received for public performance rights by the Society from such licensing in the entire United States during 1938, of which approximately 20% was used to defray all expenses, the balance being distributed among its members. 50% of such net income was divided among the composer- and author-members and the other 50% was divided among the publisher-members, in accordance with a method of classification defined in the Articles of Association of the Society.

7. Prior to the organization of the plaintiff Society, authors, composers and publishers who had obtained copyrights for their productions had no practical means of enforcing the exclusive right given them by the Copyright Act. They were not so equipped nor organized to discover violations of their rights, and it would require much time and a large amount of money to detect infringement and to enforce their rights by means of litigation. Few of them secured any substantial revenue from the public performance for profit of their copyrighted musical compositions. Users of music, on the other hand, who wished to obtain the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go and could not economically obtain individual licenses

for the separate performance of the large numbers of works required by them daily. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit and to give users ready access to a substantial repertoire of music for such purposes that the Society was organized.

[fol. 158] 8. The Society and its members, including the other complainants, come within the purview, terms, conditions, penalties, forfeitures, prohibitions, restrictions and regulative provisions of the Statute, and the members of the Society including complainants are affected in their rights by the terms and provisions thereof.

9. Complainants are jointly interested in the subject of the action and in obtaining the relief demanded; the questions raised by the Bill of complaint are of common and general interest to all the members of the Society who constitute a class so numerous to make it impracticable to bring them before the Court; complainants herein are suing on their own behalf and on behalf of all the members of the Society.

10. The value of the matter in dispute herein between each of complainants and defendants is in excess of the sum of $3,000.00, exclusive of interest and costs, as appears from the evidence in this case and the stipulation of the parties entered into in open Court.

11. The Society has control of from 85 to 90% of the popular music necessary for the successful operation of radio stations, dance halls, hotels and theaters, and has control of from 50 to 75% of the standard or older music that is played occasionally at such places.

12. The contracts between the individual composer and author members of the Society, including the individual plaintiffs, and their respective publishers do not give the publisher the right to dispose of the right of public performance for profit, nor do they have any provision for payment by the publisher to the writers of any royalties secured from issuing such licenses. Before the Society was formed, there were no substantial royalties from this source and since the formation of the Society, both writers and publishers have relied upon the Society to collect royalties

from this field on behalf of both and to distribute it equitably for the equal benefit of writers and publishers.

13. The Society's practice has been to grant blanket licenses to theaters according to their seating capacity, to radio broadcasting stations according to their income, power and coverage, and to hotels, cabarets and dance halls according to their respective size, business done, number and size of orchestras, methods of performance, income and standing. Certain of such users have for many years [fol. 159] consistently refused to pay license fees to the Society or its members, until investigations were made by the Society, infringements ascertained and suits brought.

14. The radio broadcasting stations in the State of Nebraska are members of the National Association of Broadcasters, which association on behalf of its members, for many years last past, has acted and presently acts collectively in dealing with the Society.

15. Under the contracts between the Society and said foreign societies, the latter are not required to, and never have, filed with the Society or with any State Authority, copies of the respective compositions copyrights by their respective members.

16. Many thousand of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded under the compulsory license provision of Section 1 (e) of the Copyright Act by manufacturers of phonograph records, music rolls and electrical transcriptions. Such manufacturers have paid to copyright owners not more than two cents for each record and said copyright owners have no right to demand any further sums from such manufacturers; complainants and others similarly situated have no control over the sale or disposition of such phonograph records, music rolls or electrical transcriptions and they can not compel the manufacturers thereof to affix any price upon them or to collect a price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected respectively for the public performance for profit thereof. Such manufacturers have no right, title or interest in the public performance for profit of such copyrighted compositions.

17. Complainants and other similarly situated are not willing to permit their musical compositions to be performed within the State of Nebraska publicly for profit on any basis wherein the price for such performance would be included in the price paid for a copy of the sheet music, phonograph record, music roll, e--ctrical transcription or sound track thereof.

18. The musical compositions of the Society's members and complainants have been for many years last past, and are presently being performed within the State of Nebraska in hotels, dance halls, taverns, motion picture theaters and [fol. 160] broadcasting stations.

19. The Statute can not possibly be complied with because among other things, under their respective contracts with the authors and composers, the publisher-members of the Society (including publisher-complainants) have the right to and do give away and distribute free of charge, professional copies of the compositions copyrighted by said publisher-members within the State of Nebraska; this is a practice in the business and is done to create a desire for such compositions on the part of the public, make said compositions popular and give them commercial value.

20. Defendants have threatened to and will enforce such Statute against these complainants and others similarly situated in the event that such complainants and others similarly situated refuse to comply with said Statute or do any of the acts made unlawful by said Statute.

21. Said Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great, that complainants have no adequate means of testing the validity of the Statute by violating the same and defending against a criminal or civil prosecution in the courts of the State of Nebraska; if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in the 93 counties of the State of Nebraska where their works are being publicly performed for profit, they will be subjected to a multiplicity of suits and prosecutions; unless defendants are restrained, complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions within the State of Nebraska.

22. Complainants have no adequate remedy at law and are relievable only in this court of equity.

[fol. 161] Conclusions of Law

1. On the Findings of Fact, the court concludes as a matter of law that complainants are entitled to a decree permanently enjoining the defendants, their deputies, their successors in office, and all persons acting for or on behalf of them, or either of them, and each of them, from bringing or permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said statute against complainants and others similarly situated, their representatives, employees, agents, or any of them, and from prosecuting criminally any members of the said American Society of Composers, Authors and Publishers, including complainants, their representatives or agents, or any of them, for violating any provision of said statute.

II. That complainants recover of the defendants their costs and disbursements to be taxed, as provided by law.

Let decree be entered accordingly.
Dated January 25, 1940.
By the Court:
(S.) Archibald K. Gardner, U. S. Circuit Judge. (S.) Thos. C. Munger, U. S. District Judge. (S.) J. A. Donohoe, U. S. District Judge.

[fol. 162] [File endorsement omitted]

In United States District Court

No. 562 Eq.

Final Decree—Filed January 25, 1940

This cause came on to be heard at this term, under Section 380 Title 28, U. S. C. A. (Jud. Code Sec. 266), on the 18th, 19th, 20th and 21st days of September, 1939, and the Court sat as provided therein; and the cause was tried and testimony taken and argument heard; thereupon, the court

having made its Findings of Fact and Conclusions of Law, upon consideration thereof, it is Ordered, Adjudged and Decreed, as follows, viz.:

1. The temporary injunction order awarded and entered herein on the 13th day of November, 1937 be and the same is hereby made permanent and perpetual.

[fol. 163] 2. That defendants, Harry R. Swanson, individually and as Secretary of the State of Nebraska, John Havekost, individually and as State Treasurer of the State of Nebraska, Ray C. Johnson, individually and as Auditor of Public Accounts of the State of Nebraska, Walter R. Johnson, individually and as Attorney General of the State of Nebraska, James T. English, individually and as County Attorney of Douglas County of the State of Nebraska, Max G. Towl, individually and as County Attorney of Lancaster County of the State of Nebraska, Grace Ballard, individually and as County Attorney of Washingon County of the State of Nebraska, S. S. Diedrichs, individually and as County Attorney of Lincoln County of the State of Nebraska, Raymond B. Morrissey, individually and as County Attorney of Johnson County of the State of Nebraska, Maynard N. Grosshaus, individually and as County Attorney of York County of the State of Nebraska, William T. Gleason, individually and as County Attorney of Saunders County of the State of Nebraska, Alvin B. Lee, individually and as County Attorney of Valley County of the State of Nebraska, Zelma Derry, individually and as County Attorney of Keith County of the State of Nebraska, Floyd Lundberg, individually and as County Attorney of Kearney County of the State of Nebraska, Edwin Moran, individually and as County Attorney of Otoe County of the State of Nebraska, Rush C. Clarke, individually and as County Attorney of Scotts-Bluff County of the State of Nebraska, and the respective agents, servants and employees of each of them, and all other persons acting under or through the authority of each of them, or by virtue of the authority of the office of each of them, be and they are, each of them, severally, enjoined and restrained permanently from bringing, directly or indirectly and from permitting to be brought, directly or indirectly, any proceeding at law or in equity, for the purpose of enforcing or executing the statute of Nebraska, known as Legislative Bill No. 478, passed by the Fifty-second Session of the Legislature

of Nebraska, and signed by the Governor on May 17, 1937, and made effective immediately (said statute hereinafter referred to as the "State Statute") against the complainants and others similarly situated, their representatives, employees, agents or any of them, and from threatening to enforce against any citizens or residents of the State of Nebraska, the penalties of such State Statute, in the event such citizens and residents desire to carry out their [fol. 164] contracts with the said American Society or other complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives, or agents, or any of them, or others similarly situated, for doing any legal act to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Nebraska or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

3. That the defendants pay to the Complainants their proper costs herein as taxed by the Clerk of this Court, amounting to the sum of $———, and now here decreed to the complainants, and that if the same be not paid within thirty days from this date, then at the request of the complainants or their counsel, an execution shall issue for the enforcement of the payment of the said costs.

Dated January 25, 1940.

By the Court: (S.) Archibald K. Gardner, United States Circuit Judge. (S.) Thos. C. Munger, United States District Judge. (S.) J. A. Donohoe, United States District Judge.

[fols. 165-166] Clerk's Certificate to foregoing papers omitted in printing.

[fol. 167] IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL—Filed February 5, 1940

I

The defendants move the Court to grant a new trial in pursuance of Rule 59; or, instead of a new trial, to:

(1) Set aside certain Findings of Fact because clearly erroneous, as provided in Rule 52; and

(2) In pursuance of said Rule 59,

(a) Amend the Findings of Fact; and
(b) Make additional Findings of Fact; and
(c) Amend the Conclusions of Law; and
(d) Amend and direct the entry of a new Decree; and

(3) Remedy the inconsistencies in the directory opinion of this Court, dated and filed 12/28/39, with the final Findings of Fact, Conclusions of Law, and Decree, dated and filed 1/25/40; and

(4) Grant partial retrial of the factual issue in reference to the inducing cause for passage of the Act in question, referred to in the opinion of 12/28/39; or

(a) Accept the affidavits of a majority of the legislators, filed herewith, and as a part hereof; as Exhibits 1 to 22, and served on the plaintiffs with this motion, as conclusive of the question of what was the inducing cause for the passage of the Act and the separability of the various parts thereof; and

[fol. 168] (5) Grant a partial retrial of the factual issue in reference to public performance rights by one deposition or one short set of interrogatories because the facts in reference to public performance rights are erroneously set forth by the Court and yet are made the dominating basis for the defeat of the entire Act.

(6) Correct all errors in the Court's final Findings, legal Conclusions, and Decree dated 1/25/40, and enter new final papers based upon

(a) The record as made; and
(b) The showing accompanying this motion; and
(c) The law applicable to the issues involved; and
(d) The new evidence by deposition or interrogatories adduced upon order of this Court under Rule 59 and Rule 52.

[fol. 169] II

Regarding defendants' lack of opportunity to object to the final Opinion, Findings, Conclusions and Decree.

The defendants state that the opinion of the Court of 12/38/39, as well as the final Findings of Fact, Conclusions of Law, and Decree entered 1/25/40, were filed with no opportunity for the defendants to object, at the time of the

said rulings and orders, and no opportunity was given to defendants to make known their objections to the action of the Court and their grounds therefor; and consequently, as permitted by Rule 46, the defendants move the Court for a specific order ruling that the absence of such objections shall not constitute a waiver by the defendants, nor prejudice the defendants in raising at this time, or in any future proceedings herein, any objection to the said opinion, Findings of Fact, Conclusions of Law, or Decree now on file herein; and that the matters herein set forth as grounds for new trial may constitute the objections, the same and in all particulars as if made known to the Court with the defendants' desires in reference thereto at the time of the rulings of the Court on each of the matters in the motion declared objectionable to defndants' cause.

[fol. 170] III

Defendants' more specific statements of the grounds set forth in Paragraph I above for setting aside certain Findings of Fact, and amending others, and making different Conclusions of Law and Decree.

1. In the opinion of 12/28/39, on Page 3 thereof, appears the following, which should be stricken:

"Whether or not, under the common law of Nebraska the contracts between ASCAP and its members, and between it and the users of music in Nebraska, are valid or not, we need not consider. That issue is not before us, * * *"

the question of the alleged illegal ASCAP contracts as defined, and the authorities cited to sustain the same, on Page 23 and 31 in the Conclusions of Law, found in defendants' proposed Conclusions filed 10/4/39, and which are hereby referred to and made a part hereof, should be followed.

2. On Page 5 of the opinion of 12/28/39, appears:

"The Society as an assignee of the rights of each author is a representative of that individual right."

The same should be stricken unless the Court modifies its findings by declaring that the individual monopolistic rights under the Copyright Law do not permit a monopolistic combination as defined in Section 1 of the Act.

3. On Page 6 of the opinion of 12/28/39, the Court attempts to define five (5) separate public performance rights. These definitions do not coincide with those set forth in the Federal Copyright Law, Title 17, U. S. C. A., and therefore should be stricken or corrected to read properly in accordance with the law and evidence. More specific corrective facts should be required by the Court, or the erroneous statement stricken.

4. Strike from the paragraph on Page 6, the following:

"The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing."

The Act specifically provides, Section 2 (A), that the National Copyright Act is in full force and effect in Ne- [fol. 171] braska. The defendants admit herein that the interpretation that should be placed upon said Section 2 (A) is that the individual copyright owner may either grant or withhold such of his public performance rights, or all his public performance rights, as he so desires. He may make known the price he wishes for any one or all of the public performance rights he wishes to grant or sell, and make his rights known if he desires to do so. Such requirement is not an interference with the National Copyright Act, and the same only applies to the individual.

Section 2 (C) specifically provides that nothing in the Act shall be construed to give to any purchaser of copyrighted musical compositions the right to "resell, copy, print, publish, or vend the same", which language is copied verbatim from the National Copyright Act, Title 17, U .S. C. A.

5. Strike from Page 7 of the opinion of 12/28/39, the following language:

"Under this subsection, the copyright owner in effect must offer the public performance rights of his copyrighted composition for sale and use in Nebraska, and if he does not choose so to do any person purchasing the composition may use it in the state for public performance without any liability to the copyright owner. This provision, we think clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act."

This finding is clearly erroneous as the Act does just the opposite and complies with the Court's finding, in reference to the National Copyright Law, which is as follows:

"As observed, his rights of ownership entitled him to sell or offer to sell, or to withhold from sale, as he may choose."

This last above worded portion of the opinion of this Court of 12/28/39, is precisely the proper interpretation to be placed upon the Nebraska Act in reference to the individual as it specifically provides, and the defendants admit, that the individual copyright owner may withhold from sale, or from offering for sale, as he may choose, or may grant, or withhold any part or all public performance rights, and may do so without any penalty whatever.

[fol. 172] 6. Strike from Page 7 of the opinion the following:

"The state statute cannot be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use."

Said wording is in contravention of, and in direct opposition to, the announced findings of the Court on 12/28/39 that ASCAP is an unlawful monopoly acting in restraint of trade; and that it is within the purview of the Nebraska Legislature to bar such an unlawful combination, even though the subject matter is copyrighted musical compositions. Defendants' Conclusions of Law dated 10/4/39, last part of Page 31 to 34, fully confirm the facts and law in opposition to the portion of the opinion above quoted.

7. Strike the reference to Section 2 (B) on Page 6 of the opinion of 12/28/39, and on through to the end of the opinion on Page 8, for the reason that said Section 2 (B) may readily be blue-penciled and eliminated from the Act, and because entirely separable from the balance of the section and from the balance of the Act, and held unconstitutional; that the said Section 2 (B) was not the inducing cause for the passage of the Act, as conclusively appears from the 22 affidavits of the legislators submitted with this motion and attached hereto as Exhibits 1 to 22 and made a part hereof. If said Section 2 (B) is unconstitutional, the same may be so held by the Court and stricken without interference with the main and important features

of L. B. 478, as defined in Section 1 of said Act, because Section 1 is the main feature of said Act in that it deals with the unlawful combination of copyright owners acting in restraint of trade, while Section 2 (A) and Section 2 (B) deal with the individual composer and publisher, and all of Section 2 is separable from the entire balance of the Act. Either Section 2 (A), or 2 (B), or 2 (D), or all three (3) parts, might be stricken from the Act as unconstitutional without in any way interfering with the workability, or the obvious and ostensible purposes of the anti-monopolistic legislation, which is the main title and gist of [fol. 173] the Act.

It is, therefore, inequitable and a denial of the defendants' rights for the Court to hold:

"The invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts."

and therefore

"the whole act must be held inoperative."

The contrary now appears of record by said affidavits of the legislators attached. Furthermore, said issue was not presented by the plaintiffs in the form of evidence; and the Federal Courts should not surmise at the factual questions involved in the passage of state legislation. The plaintiffs introduced no evidence whatever that would justify this Court in holding, but for Section 2 (B) or Section 2 (A) the Act would not have been passed. The affidavits submitted are proof positive to the contrary, and defendants are entitled to a clear finding of fact and conclusion of law accordingly.

8. The defendants have made the foregoing criticisms in reference to the opinion of 12/28/39, rather than the Findings of Fact of 1/25/40, because the Court stated in the concluding paragraphs of the opinion of 12/28/39, as follows:

"Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion."

This was not accurately done by plaintiffs. While the defendants recognize that final Findings of Fact, Conclusions

of Law, and Decree as filed become the Court's when signed by it, nevertheless, as filed on 1/25/40, they are hopelessly inconsistent with said opinion of 12/28/39.

IV

The following should be stricken from the final Findings of Fact and Conclusions of Law filed 1/25/40.

1. The introductory paragraph on Pages 1 and 2 is not an accurate statement of the appearances of the respective counsel and does not contain, as in said opinion, reference [fol. 174] to L. B. 478 to be printed in the footnotes. The entire Act should be copied in the footnotes verbatim in the same way as provided in the opinion of 12/28/39, and the appearances of counsel listed as shown by the court reporter's record.

2. There should be inserted the word "the" before "person" in Line 4 of Paragraph 2 of the Findings of Fact, and "in the United States" added after the word "corporations", and the words "authors, composers, and publishers" stricken, so that the same shall properly read:

"Its membership consist of a substantial number of the persons, firms and corporations in the United States who own or control copyrighted vocal or instrumental musical compositions."

3. In the last line of Page 2 of Paragraph 4 of the Findings of Fact, the words "some of" should be stricken because the 123 publisher members constitute all of the principal publishers of the country; there should be added to said paragraph the following:

"The publisher members of the Society in almost every instance are the owners of the copyrights, including the rights of public performance for profit."

This is a material finding, and the contracts in evidence (and attached to Bill of Complaint) existing between the composer and the publisher show that the composer transfers to the publisher his public performance rights; in view of the fact that no composer is able to publish his music without the aid and assistance of a publisher, and substantially all the publishing houses in the United States being members of ASCAP, that fact becomes the power of ASCAP's vast control.

The publishers are, in effect, ASCAP; no music can be published by any composer or author of lyrics without a music publisher. The publishers are all in ASCAP. Therefore, no composer can function without ASCAP's consent. The organization thus controls the prices and terms for both the supply (composer) and the demand (user). A finding of these important facts should be made. There is no evidence to the contrary and ample evidence to sustain this feature.

[fol. 175] 4. The Findings of Fact referred to on Pages 18, 19, and 20 of defendants' proposed Findings of Fact of 10/4/39, on file herein, give the proper resume of the important line of evidence last above referred to and which should be so found as an important factor in the case.

5. There should be stricken from Paragraph 5, the seven lines from the bottom of the page, reading as follows:

"No license fees are paid by the owners of these receiving sets inasmuch as they do not engage in public performances for profit."

That was not an issue in the case; no evidence was heard on the subject, and the same is an attempt to have adjudicated by a court "sales talk". ASCAP may be engaging the Court in attempting to lay the ground work for the extension of its monopolistic practices to include private radios, if played, so that they may be heard by the public gathered in the vicinity. A Belgian case (citation will be furnished on request) by an ASCAP foreign affiliate is now so attempting.

6. In the Findings of Fact of 1/25/40, at the end of Paragraph 5 on Page 4, there should be stricken:

"The cost of operation of the Society is approximately 20% of the gross amount received."

The evidence clearly showed that it was at least 22%. It was not a proper subject for a special finding because the interrogatories propounded before trial in that regard were not answered by the plaintiffs. There should be no binding findings or conclusion that 20% is accurate for cost of operation. The same was not gone into by the plaintiffs or defendants, excepting as a conclusion based on an estimate of plaintiffs. It has no material bearing in the case, and the same should be eliminated as prejudicial to the rights

of the defendants; or, the Court, under permissive Rule 52 and 59, should permit that subject to be further gone into by deposition or the questions answered by ASCAP, its books examined, and a proper conclusion reached. However, the pleadings make no issue of cost of operation.

[fol. 176] 7. There should be stricken from Paragraph 7 on Page 4 of the Findings of 1/25/40, the following:

"Few of them secured any substantial revenue from the public performance for profit of their copyrighted musical compositions."

Further on in the paragraph, there should be stricken:

"and could not economically obtain individual licenses for the separate performance of the large number of works required by them daily."

and also, there should be stricken:

"and to give users ready access to a substantial repertoire of music for such purposes that the Society was organized."

There was no evidence introduced on this subject of any probative force, or of evidentiary value; the same was only casually referred to and is not a material issue in the case. It is manifestly unfair to defendants to permit plaintiffs to build sales propaganda in a Court's Findings of Fact.

8. Pararaphs 9, 12, 13, 14, 15, 16, 17, 19, and 21 on Pages 5, 6, and 7 of the Findings of Fact of 1/25/40, should be stricken for the reason that the matters therein are likewise "sales talk" and ASCAP propaganda placed in the findings; the same are baseless conclusions, with no material evidence to support them, and are contrary to the Court's instructions in the opinion of 12/28/39. That said paragraphs are more in the nature of a pleading or bill of complaint and are not, as a matter of practice, in proper language for findings, nor do the paragraphs contain proper matter for findings of fact and can therefore serve no useful purpose. On the contrary, the same are all harmful to the rights of the defendants when it is considered that Findings of Fact of a Trial Court are final truths.

9. Paragraph 22 should be stricken from the Findings of Fact of 1/25/40, for the reason that the plaintiffs do have an adequate remedy at law, as the facts and the evidence

clearly show. The Act in question gives to the plaintiffs full and complete protection in the courts of the State of Nebraska in defense of any charge, civil or criminal, that [fol. 177] may or might be instituted in the enforcement of the Act. No summary proceedings are permitted by the Act. Sections 9, 10, and 11 of the Act give full and adequate protection and due process of law, and equal protection to all.

V

The Conclusions of Law of the Court, filed on 1/25/40, should be stricken because they are not properly drawn, nor are they compiled as defined in the decisions and rules; nor do they contain the supporting authorities and decisions to sustain them. In this regard, the defendants respectfully urge the Court to review the defendants' proposed Conclusions of Law, set forth on Pages 30 to 43, and submitted to the Court, and filed on 10/4/39. Said Conclusions of Law are respectfully referred to and made a part hereof, as if incorporated herein.

VI

The Decree should be stricken and redrawn so as to provide that the Act is enforceable, unless the Court should continue its decision, after further facts on the actual operation of all public performance rights, that Section 2 (B) is non-enforceable because its provisions contravene the Copyright Act; then this Court should amend its Decree so that particular section is non-enforceable. The same might be true of other sections, such as certain parts of Section 2 (A) or Section 2 (D), as well as Section 2 (B). However, the Court should hold that such provisions were not the inducing causes for the passage of the Act; that each one of such subsections as may be invalid may be entirely separated from the main and important features of the Act in reference to the monopolistic control in restraint of trade by ASCAP of the copyrighted musical compositions used in the State of Nebraska.

VII

The defendants move the Court to amend its Findings of Fact to include the following important and material matters clearly and unmistakably in the record:

[fol. 178] 1. That radio stations are charged 5% of their gross receipts exclusive of political speeches and advertising commissions paid, and must be paid irrespective of the kind and form of program and whether ASCAP music is used or not; that blanket licenses only are demanded by and acceptable to ASCAP; that ASCAP refuses radio users a per-piece or per-program charged based upon the ASCAP musical numbers used, excepting in the one instance of the newspaper contract found among the 391 contracts introduced in evidence pertaining to the newspaper owned radio station at Norfolk; that such conduct is discriminatory and unfair to music users; that repeated demands for per-piece or per-progam rates have been demanded by radio stations especially, as the evidence clearly shows (J. J. Gillin Testimony), but ASCAP insists, and enforces through its monopolistic control, the blanket license which it demands and which is based upon percentage of gross business done plus a sustaining fee, irrespective of the program (Radio station contracts in evidence).

2. That in the past ten (10) years one hundred (100) lawsuits for copyright infringement were instituted in Nebraska and terminated in dismissals by ASCAP, or the release of judgments by ASCAP, when the defendants signed the blanket license contracts demanded by it and paid the rates therein fixed and determined by ASCAP.

3. That the radio stations in Nebraska are required to enter into contracts with the national networks, which compel the stations in Nebraska to enter into contracts with ASCAP to save them (networks) harmless from infringement. (See Columbia and National contracts in evidence.)

4. That theaters pay ASCAP on the basis of seat capacity and not on whether ASCAP music is used or not used, or how much of it is used in the theater. (See theater contracts in evidence.)

5. That hotels pay on any sort of a basis that the agent of ASCAP in Nebraska can arrange; and the same is true with dance halls, taverns, amusement parks, and similar places, with each of the same at the complete mercy of [fol. 179] ASCAP. (Malec, Hedlin testimony and contracts in evidence.)

6. That the users of music have large investments in Nebraska and must have the music controlled by ASCAP

to protect the same or go out of existence as music users at great inconvenience and loss. (Malec, Gillin, Hedlin, and Searle testimony.)

7. That the National Association of Broadcasters does not speak for the radio stations in Nebraska (Gillin), nor does the National Hotel Association speak for the hotels (Hedlin) in Nebraska. The negotiations for prices are actually accepted in Nebraska, and the contracts signed in Nebraska by the agent of ASCAP operating within the state. (Blazer testimony.)

8. That the composers of music have entered into contracts with their publishers and ASCAP, after which they have no further control in reference to public performance rights that are thus given to ASCAP by the composers and publisher, and are placed in a classification in which the first group, of about 50 composers, receive as much as $17,500 per year, and the publisher members in the first group $150,000 per year (Buck, Mills, Paine testimony; all depositions); that the classification is scaled down so that the vast majority of composers belonging to ASCAP receive virtually nothing (Irving Ceasar Deposition); and through the scheme of the publisher members taking one-half of the profits and the selected classification (By-Laws —Complaint) of the upper groups, by the self-perpetuating board of directors, all the income for public performance rights is thus taken and controlled and distributed among a comparative few composers and publishers, and the officers named in the evidence in charge for years back.

9. That the officers receive $50,000 a year salary and bonuses of $5,000 to $8,000; that $30,000 a year rent is paid in New York for the headquarters (Buck); that ASCAP is a substantial business organization doing business in the State of Nebraska through a local agent known as an attorney at law and in fact (Blazer) and whose name ap- [fol. 180] pears on all the contracts for ASCAP.

10. That the purpose of showing that there were 284,000 (Gillin) radio sets in Nebraska and 24 hotels (contracts) and 10 radio stations, and that a third of the population at sometime during the year entertained itself in dancing; and that there are 350 dance halls (Malec) and music rooms in the State of Nebraska, is to prove the matter of the public interest in the matter of copyrighted music within

the State of Nebraska; and defendants are entitled to such finding because the evidence so shows.

11. That it is clear from the evidence that there is no interference with commerce because the networks pay nothing to ASCAP (Contracts) (Mills); that the public performances are all within the State of Nebraska; and that which comes over the wire, sent by the networks, has no usable value whatever until it is reformed by machinery and apparatus and equipment located and operated within the State of Nebraska (Gillin, Searle), and at which time, and only at such time, do the public performance rights attach within the State of Nebraska. Interstate commerce is in no way affected. A Finding of Fact should be made accordingly.

12. The foregoing suggestions in reference to commerce require additional Findings of Fact, and which may be found in the proposed Findings of Fact set out on Pages 13 to 29 inclusive of the defendants' findings submitted 10/4/39, and which are hereby referred to and made a part hereof the same and in all particulars as if copied at length herein.

VIII

As a further grounds for this motion for new trial, the defendants move the reconsideration and adoption by the Court of the Conclusions of Law and the authorities in support set forth on Pages 30 to 43 inclusive of the defendants' proposed conclusions dated 10/4/39.

IX

In reference to the interference of the Nebraska Act with [fol. 181] the National Copyright Law, and therefore unconstitutional, the defendants move for the correction and additions to the Findings of Fact, Conclusions of Law, and Decree in the following manner and for the following reasons, either at this time or after some additional evidence asked for herein above on public performance rights has been furnished.

1. The National Copyright Act was passed in 1909. At that time, radio had not developed, and the use of music in the manner it is used today by hotels, in their rooms, by

taverns, cafes, etc. had not been developed, nor even known. Consequently, the National Copyright Act does not cover many of the new phases of the business. Thus the Act does not prevent a state from passing reasonable regulations for the use of copyrighted material within the State of Nebraska so long as it does not interfere with the free use by the individual. Defendants contend that a monopolistic organization such as ASCAP has no rights under the Copyright Act to combine unlawfully.

2. The deposition of Ella Herbert Bartlett shows that she and her publisher deal in reference to dramatico musical rights by making special deals and special transactions with the moving picture houses, producers, theaters, and others. ASCAP is not interested therein, and those rights are separate and distinct and have no bearing upon or concern in this case; nor are such rights limited or curtailed in any way by the Nebraska Act. Ella Herbert Bartlett, for example (Refer to her deposition), received $50,000 for one of her father's rights for dramatico musical purposes. That music for that purpose was sold and concluded. ASCAP admittedly has no interest directly or indirectly in that transaction. The Nebraska Act conforms to that right and does not interfere with such transactions.

3. The Copyright Act specifically provides that there shall be collected upon all mechanical reproductions 2¢ per [fol. 182] each part (17 U. S. C. A., page 5), and which must be collected by the manufacturer when he sells the mechanical parts, rolls, discs, etc., including coin operated machines. The composer receives that sum direct from the manufacturer. ASCAP admittedly has no interest in such transactions. It is one of the separate rights that the composer and his publisher have, and which they handle independently of ASCAP and independently of all else, and all other publishers and composers. Consequently, there is no conflict with that provision of the National Act and the Nebraska Act, as the matter of price at 2¢ per roll must be collected and fixed by the composer by the National law.

4. With electrical transcriptions and other mechanical devices, ASCAP is not interested. The National Act provides that others who use the same must pay that price so fixed, and each must pay it. There is no interference by the Nebraska Act in reference to mechanical reproductions,

including electrical or otherwise. That, too, is a matter for accounting between the composer and his publisher, and the manufacturer. The Nebraska Act in no way interferes with that right because the same agreement for price that might be made with a manufacturer in New York could likewise be made with a manufacturer (if there were one) in the State of Nebraska, and the price for such manufacturing right to all mechanical devices is thus fixed and determined. Nothing in the Nebraska Act conflicts with this provision of the National Copyright Act.

5. As far as the sale of sheet music is concerned, that is admittedly an item upon which the evidence clearly shows that ASCAP is in no way interested. That is a matter purely between the composer and his publisher, and the evidence shows (See each deposition of composer and publisher on file) that they collect three cents per piece when the sheet music is sold at the music stores, and that three cents is remitted as a part of the purchase price, and the publisher gives one-half or all of it to the composer as his royalty on each piece of sheet music that is sold, as they might agree. In most instances, however, the evidence [fol. 183] clearly shows that the publisher is the owner of the copyright and thus that three cents for each copy of sheet music is collected for the publisher. That is immaterial to this case, ASCAP not being interested therein, and that transaction is in no way interfered with by the Nebraska Act.

6. It then becomes only a question of what is known as the "small public performance rights". That is what ASCAP owns; that is what ASCAP completely controls and dominates free from interference by the composer or publisher under the terms of the contracts in evidence. Consequently the Court erred in its opinion of 12/28/39, and the same in its Findings of Fact of 1/25/40, when the Court erroneously found that Section 2 (B) or 2 (A) interfered with these respective rights. It does not. In fact, the enactment of Section 2 was evidently for the purpose of protecting the individual composer and his publisher in the State of Nebraska after ASCAP was dissolved by permitting or requiring the composers to handle their own small public performance rights in Nebraska by selling the same if they wished. The stamping on the music sold in Nebraska could read specifically to include or exclude any

one or all of the rights above granted—and so far as public performance rights are concerned, why is it not a reasonable regulation and a good one to require the composer to make known the price for his public performance rights and collected at the source? Wherein does the Copyright Act restrict state legislation on that score? That merely requires the composer to make his wants known. Repeated public performance—is that the objecton? How is it handled now? Outside the scope of the National Copyright Law is the method now used by ASCAP in collecting for public performance rights. The National Act gives no such right as ASCAP is exercising, in the State of Nebraska, in the matter of its monopolistic practices in restraint of trade. Nor, does the National Copyright Act, by its terms, provide for any such means or methods of arriving at fees and licenses, and the distribution thereof, as ASCAP has invented.

[fol. 184] 7. The Copyright Act does not define the means and the methods of the collection of what is known as the small public performance rights that have been given to ASCAP and which amount in the nation to some $6,000,000 per year, and in the State of Nebraska to $70,000 per year or more.

8. The Nebraska Act, Section 2 (A), does not require those public performance rights to be given or granted when the sheet music is sold. The publisher may stamp thereon, if he desires to do so, all limitations of and the prices for public performance.

9. ASCAP only being interested in the small public performance rights, the material feature is whether or not there is interference with the Copyright Act in requiring the composer and his publisher, when they sell music in the State of Nebraska, to sell the small public performance rights with it, if they wish—and if they wish—then and only then to state the terms on the music, and what parts are granted and what parts withheld and what uses are granted by the sale. Defendants admit that interpretation of Section 2. For example, in the deposition of Ella Herbert Bartlett, she stated that in 1937, her publisher sold 300,000 copies of her father's copyrighted music; she received three cents a copy directly from her publisher for the ordinary sheet music royalty, which she and her publisher fixed and

determined ahead of time. The Nebraska Act would not stop that. She received $50,000 for one piece for the dramatico-musical rights, and she received large sums of money on the basis of 2¢ per roll for mechanical reproductions. The Nebraska Act would not stop that. This she collected at 2¢ per part from the manufacturer through her publisher acting as her agent or under contract with her. Therefore, on some of the sheet music that she sold—if she stamped public performance rights, defining its limitations, if she collected one dollar per copy for public performance rights copies so sold for that purpose, on 10,000 of the 300,000 sold, she would have received $10,000 directly [fol. 185] from the music houses for small public performance rights. There is nothing in the Nebraska Act (Section 2 A) to prevent her from estimating what her public performance rights were worth for these small public performance rights for the music that was sold for public performance purposes within the State of Nebraska. She received from ASCAP in 1937 $7500 for those rights. If she wished to charge $5.00, or $10.00, or $1.00 per copy for those sold in Nebraska for that purpose, she could so do; or, she could withhold that right completely and sell only the sheet music that would carry with it, as now, no public performance rights. This is not an interference with the Copyright Act, but is a legitimate exercise of the rights of the State to remedy a situation which Congress has not remedied in the Copyright Act, and which is not within the exclusive purview of the Copyright Act. It gives the right, but not how it shall be performed. If the right is in no way curtailed, the method of collection is not violative of the provision of the National Copyright Law.

10. The cases cited on Pages 36 and 37 of the defendants' proposed Conclusions of Law, filed on 10/4/39, are respectfully referred to because in some of those cases the Supreme Court of the United States has held, as shown in those cases, that it was not the intention of Congress to curtail states in a matter similar to Section 2 (A).

X

In reference to additional testimony under Rule 59 and 52, to bring out all phases of the various public performance rights, defendants move the Court:

1. To grant a partial retrial by receiving additional evidence in the form of either affidavits, or depositions, or the answering of interrogatories by the plaintiffs to establish exactly in what manner the respective parts of public performance rights of the National Copyright Act are dealt in by composers and publishers, because the Court in its opinion of 12/28/39 and in its finding of 1/25/40, er- [fol. 186] roneously defines those rights, and then finds an interference therewith as the dominating issue in the case, and thereby defeats the whole Act. One or two short depositions, or the answering of a short set of interrogatories, in addition to the evidence of record, should rectify the erroneous findings of the Court.

2. The reference to public performance rights in the last half of Page 6 and all of Pages 7 and 8 of the opinion of 12/28/39, and Paragraphs 16 and 19 on Pages 6 and 7 of the Findings of Fact of 1/25/40, are the objectionable findings and are erroneous, and should be stricken or clarified to speak the truth by some new evidence.

3. It was the duty of the plaintiffs to have given the Court complete and adequate evidence on all phases of public performance rights; they have not done so, and yet the Court has held, without adequate evidence to support its findings, upon the request of ASCAP a quite complete resume of public performance definitions and how applicable. These findings, defendants claim, are in error. In justice to the defendants, the same should be corrected, and amended findings, conclusions, and decree granted, upon new evidence, or the same entirely stricken from the consideration of the case. As it now stands, it is the controlling finding.

XI

The attitude taken by the defendants is that Section 2 (B) and Section 2 (D) as well as Section 2 (A), might readily be blue-penciled from the Act and held non-enforceable without in any way curtailing or hampering the other main features of the Act in reference to monopoly.

1. The defendants state that in connection with Section 2 (A), while they believe the same to be a proper exercise of the legislative function of Nebraska and believe in its constitutionality, and that it is not a violation of the National Copyright Act, still if the Court should hold, as to

Section 2 (A) that it is unconstitutional, the whole Act should not fail. That is manifestly unjust to defendants. [fol. 187] All of Section 2 is easily separable. The main monopolistic features of the Act will stand after the separation.

XII

Elimination of the finding that the Nebraska Act is drastic in its provisions.

In the Findings of Fact and Conclusions of Law of 1/25/40, it has been stated that the Act is too drastic in its penalties. We respectfully urge the Court to read the cases from Nebraska on Pages 33 and 34 of defendants' proposals of 10/4/39, and the other penalties provided for monopolistic practices in other lines in the State of Nebraska, as well as the Sherman Act, and it will be readily seen that the penalties are not any more severe than in other similar acts held valid. A Finding of Fact on that matter should be entered, or the "drastic" reference in the Findings (Par. 12, Page 7, Findings of 1/25/40) should be stricken.

XIII

In reference to the separability of Section 2 from the balance of the Act.

1. A careful reading or the Nebraska cases cited in the opinion of 12/28/39, in reference to the inseparability of parts of an act, will convince the Court that those cases are in themselves adequate authority to sustain the defendants' contention herein that Sections 2 (A), 2 (B), and 2 (D) of L.B. 478 might readily be stricken and still the Act be enforceable and proper in all its other phases.

2. The objectionable parts of the Nebraska Act, being Section 2, pertain to the individual composer and his publisher. Section 1 and all the balance of the Act, except said Section 2, pertains to the unlawful combination. If Section 1 and its enforcing provisions are held constitutional, and Section 2 (A), 2 (B) and 2 (D) are held unconstitutional, we respectfully submit that the main and important feature of the Nebraska Act will be left entirely intact and enforceable. A reading of the Act, with Section 2 eliminated, should convince the Court. Certainly there was [fol. 188] no ulterior motive of the Nebraska Legislature in its attempt to give the individual composer and his pub-

lisher the right to collect themselves for public performance rights if they wished. If the Legislature in so doing overstepped its limitation in the Sections 2 (B) and 2 (D), those two might be stricken, and Section 2 (A) would be perhaps more clear. This is what defendants wish the Court to reconsider. But, even if all of Section 2, including 2 (A), is classified as non-enforceable with 2 (B) and 2 (D), defendants submit that the Act, L.B. 478, shorn of all those parts, or some of them, must stand as a proper exercise of the state legislative power to prohibit unlawful combinations from carrying on their business in Nebraska.

Respectfully submitted, William J. Hotz, of Omaha, Nebraska; John Riddell, Assistant to Attorney General Walter R. Johnson of the State of Nebraska, Lincoln, Nebraska; Andrew Bennett, for Defendant Groshaus, of Washington, D. C.; and Gordon Diesing, of Omaha, Nebraska, Assisting William J. Hotz on Brief, Attorneys for Defendants. (S.) William J. Hotz, 1530-5 City National Bank Building, Omaha, Nebraska, for Defendants.

February 5, 1940.

[fol. 189] IN UNITED STATES DISTRICT COURT

[Title omitted]

Equity No. 562

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR NEW TRIAL

STATE OF NEBRASKA,
County of Douglas, ss:

Amos Thomas, being first duly sworn upon oath, deposes and says that he was a member of the Nebraska Legislature on May 13, 1937, and was present and voted for the final passage of L. B. 478; that the title to said bill shows that the main features of the same were an act relating to unlawful monopolies in copyrighted vocal or instrumental musical compositions and prohibiting combinations composed of copyright owners, their heirs, successors, or assigns; that said bill had been debated on the floor repeatedly previous to its passage and was reported

out by the Judiciary Committee; that the Nebraska Legislature at said time was a Unicameral Legislature consisting of 43 members; that the roll call of record on final passage showed 32 votes for the bill, 7 against the bill, and 4 not voting.

Affiant further states that he is familiar with Section 2-B, relating to the rights given to users in the event the individual composer refused to fix upon the music the selling price for public performance and other uses; and also is familiar with Section 2-D, which required the filing of the copies of the musical composition with the Secretary of State at 25¢ per copy; and is also familiar with Section 2-A that required the individual composer to fix the selling price for public performance rights and stamp it upon the musical composition if the composer or publisher desired to grant or sell his public performance rights.

[Penciled in margin:] 20-A

Affiant further states that none of said parts of Section 2 were the inducing causes for the passage of the bill, nor for the affirmative vote of this affiant; that there was incorporated in the said act the saving clause, known as Section 12, in reference to the enforcement of the balance of the act in the event any part was held non-enforceable; and furthermore, the act specifically provided that all benefits of the national copyright law would be granted to all authors and composers, and their heirs and assigns, within the State of Nebraska.

Affiant further states that the inducing cause, and the legislative intent, and this affiant's affirmative vote, in passing L. B. 478, were fundamentally and mainly to prohibit the operation of an unlawful combination of copyright owners acting in restraint of trade and in the fixing of prices within the State of Nebraska; and that Sections 2-B and 2-D, as well as Section 2-A, were not the main or the inducing reasons for the passage of the bill, nor for this affiant's affirmative vote, but said sections were merely incidental to the main issue in reference to monopoly, and separable therefrom.

Amos Thomas.

Subscribed in my presence and sworn to before me this 30th day of January, 1940. Harold A. Moore, Notary Public. (Seal.) My commission expires January 28, 1943.

(Copy). Ex. 19. Exh. 1 to 22 exact copies hereof.

[fol. 190] CERTIFICATE

I, GRACE A. BOWEN, a notary public, do hereby certify that the following named persons, in the following named counties, and on the following named dates, and before the following named notaries public, signed and acknowledged affidavits in the exact wording of the affidavit of Amos Thomas attached hereto; and that all the said original affidavits, being 22 in number, were filed with the Clerk of the United States District Court at Lincoln, Nebraska, in said cause, Equity No. 562, and attached to the Motion for New Trial; that said affidavits were drawn, and copies thereof made, by the undersigned.

(SEAL) (S) Grace A. Bowen
Notary Public

Dated: February 3, 1940

Name	Date Signed and Acknowledged	County	Notary
Armstrong, Robert M. Exh. 1	1/30/40	Nemaha, Nebr.	Oscar A. Flau
Ashmore, Hugh B. Exh. 2	1/30/40	Hitchcock, Nebr.	J. E. Blum
Brady, Frank J. Exh. 3	1/29/40	Holt, Nebr.	J. B. Nickerson
Brodecky, Emil E. Exh. 4	1/31/40	Colfax, Nebr.	James A. Fiala
Cady, P. L. Exh. 5	1/31/40	Washington, Nebr.	Tom Dowell
Carlson, Swan Exh. 6	1/30/40	Phelps, Nebr.	J. M. Larson
Frost, Tracy T. Exh. 7	1/30/40	Howard, Nebr.	Pearl Dobry
Howard, R. M. Exh. 8	1/31/40	McPherson, Nebr.	Clay Wright
Knickrehm, John Exh. 9	1/30/40	Douglas, Nebr.	Grace A. Bowen
Murphy, L. B. Exh. 10	1/30/40	Scottsbluff, Nebr.	Maude Glover
Neubauer, E. M. Exh. 11	1/31/40	Orleans, Nebr.	Geo. S. Austin
Norton, J. N. Exh. 12	1/31/40	Washington, D. C.	Helen A. Bonord
Peterson, Carl H. Exh. 13	1/29/40	Madison, Nebr.	Kathleen Kulp
Peterson, John B. Exh. 14	1/30/40	Saunders, Nebr.	C. N. Walton
Regan, R. C. Exh. 15	1/30/40	Platte, Nebr.	Carl N. Hoge
Reynolds, John D. Exh. 16	1/30/40	Knox, Nebr.	E. A. Houston
Schultz, Edwin Exh. 17	1/31/40	Antelope, Nebr.	Rosa Martin
Slepicka, Alois Exh. 18	2/ 1/40	Saline, Nebr.	J. J. Grimm
Thomas, Amos Exh. 19	1/30/40	Douglas, Nebr.	Harold A. Moore
Tvrdik, Charles F. Exh. 20	1/31/40	Douglas, Nebr.	Otto Smolek
—on Seggern, E. M. Exh. 21	1/31/40	Douglas, Nebr.	Grace A. Bowen
Wells, Franklin S. Exh. 22	1/31/40	Jefferson, Nebr.	E. R. Bee

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[fol. 191] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR NEW TRIAL—Filed March 28, 1940

The Defendants' Motion for a New Trial, and for other relief, filed on February 5, 1940, in the above entitled case,

which has heretofore been submitted to the Court, consisting of Archibald K. Gardner, Circuit Judge, Thomas C. Munger, District Judge, and J. A. Donohoe, District Judge, is hereby overruled.

(S.) Archibald K. Gardner, United States Circuit Judge; Thomas C. Munger, United States District Judge; J. A. Donohoe, United States District Judge.

[fol. 192] ACKNOWLEDGMENT OF SERVICE

The undersigned, one of the attorneys for the plaintiffs in the above entitled cause, hereby acknowledges receipt of copy of the Defendants' Motion for New Trial and the Affidavits Attached, the same being served upon the undersigned this 5th day of February, 1940.

Dated at Omaha, Nebraska, this 5th day of February, 1940.

L. J. TePoel, One of the Attorneys of Record for the Plaintiffs.

[File endorsement omitted.]

[fol. 193] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed July 27, 1940

To the Honorable Clerk of the United States District Court, District of Nebraska, Lincoln Division:

In the above entitled cause, an appeal is to be taken to the Supreme Court of the United States; all of the plaintiffs or complainants above mentioned on this appeal shall be designated as appellees, and all the defendants as appellants, as shown by your records and files, in the caption of said cause.

Heretofore and on June 27, 1940, there has been filed in your office all the appeal papers required by Rules 7, 9, 10, 11, 12, and 13 of the Supreme Court of the United States and Rules 72 and 75 of the Code of Civil Procedure. These papers together with all pleadings and decisions of the United States District Court in said cause, together with appellees' motion to dismiss or affirm, and the appellants' answer and brief in support, together with this praecipe and proof of service hereof upon the appellees, together with

your certificate of authentication, shall be incorporated by you and shall constitute Volume I of the Transcript of Record on Appeal.

For the purpose of aiding and assisting you in compiling this record, we file this day Transcript of Record, Volume I, containing the aforementioned papers, and as more particularly set forth in the index to said Volume I, which is [fol. 194] submitted to you herewith, and an exact copy of which has this day been duly served upon the appellees.

As a further aid and assistance to you in preparing the necessary record on appeal, we have prepared under the aforementioned rules of the Supreme Court of the United States and of the Code of Civil Procedure a condensed statement of the evidence of the witnesses given at the trial, in the depositions, and in the interrogatories. This condensed statement has been made up from the certified copy of the stenographic reports of said testimony on file in your office and an extra copy of said stenographic notes of the evidence taken at said trial, duly certified by the reporter, has been likewise lodged with you. Therefore, we request that you certify the said Volume II, being the said condensed statement of the evidence of all the witnesses given at the trial, in the depositions, and in the interrogatories as the designation of the record of said evidence prepared and filed with you by the appellants, and an exact copy thereof has been served upon the appellees, as shown by the proof of the return of the service filed herewith.

Also to aid and assist you in preparing the record on appeal, we are herewith tendering for filing in your office Volume III, which is a transcript of record of all the exhibits offered by all parties to the case at the trial, in the depositions, and in the interrogatories; that these exhibits have been condensed and duplications eliminated, and unnecessary parts thereof omitted; that the exhibits in said Volume III are more particularly set forth in the index attached to said Volume III; that an exact copy of the transcript of evidence of said exhibits has been duly served upon the appellees as shown by the return and proof thereof, which is submitted to you for filing herewith and shall be incorporation by you as a part of Volume I. You are requested to certify the said Volume III, being the said condensed record of the exhibits offered by all parties to the case at the trial, in the depositions, and in the interrogatories as the designation of the record of said exhibits

served upon the appellees and filed with you for the purpose of completing the transcript of the record on appeal.

[fol. 195] That a copy of this praecipe together with an exact copy of Volumes I, II, and III of the above designated record on appeal, have this day, July 27th, 1940, been duly served upon the appellees and proof and return thereof duly submitted herewith.

You are requested to forward said Volumes I, II, and III so certified by you and as this day filed with you, together with the proof of service upon the appellees, to the Clerk of the Supreme Court of the United States so that the same shall be on file in said office in Washington, D. C. on or before forty (40) days from and after the 27th day of June, 1940.

Dated at Omaha, Nebraska, this 27th day of July, 1940.

William J. Hotz, Special Assistant to the Attorney General, 1530-5 City National Bank Bldg., Omaha, Nebraska; Walter R. Johnson, Attorney General of the State of Nebraska, Lincoln, Nebraska; John Riddell, Assistant to the Attorney General of the State of Nebraska, York, Nebraska, Attorneys for Appellants.

Served on appellees and filed with Clerk U. S. D. C., July 27, 1940.

[fol. 196] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF SERVICE OF THE TRANSCRIPT OF RECORD AND DESIGNATION OF RECORD ON APPEAL AND PRAECIPE—Filed July 27, 1940

UNITED STATES OF AMERICA,
State of Nebraska,
County of Douglas, ss:

William J. Hotz, being first duly sworn upon oath, deposes and says that he is one of the attorneys appearing for the appellants in the above entitled matter and duly authorized to make service herein under order of Court; that on Saturday, the 27th day of July, 1940, at five o'clock P. M., he served the praecipe for appeal and designation of record, to which this affidavit is attached, upon Mr. L. J. TePoel, one of the attorneys of record for the appellees, by deposit-

ing a copy of this praecipe together with the transcript of the record, Volume I containing all the pleadings and decision of the lower court, all the appeal papers required in accordance with Rules 7, 9, 10, 11, 12, and 13 of the Supreme Court of the United States and Rules 74 and 75 of the Code of Civil Procedure, and the appellees' motion to dismiss or affirm and the appellants' answer and brief in support, as set forth in the index to said Volume I and attached thereto; Volume II being a transcript of the record and condensed statement of the evidence of the witnesses given at the trial, in the depositions, and in the interrogatories, together with the index attached thereto, the same being the appellants' [fol. 197] designation of the condensed record of the evidence for the appeal.

Also there was served upon the attorney for the appellees at said time Volume III Transcript of the Record of the exhibits introduced at the trial of said cause, at the taking of the depositions, and in the interrogatories; that said exhibits have been classified and condensed, duplications eliminated, and the unnecessary parts omitted, and said exhibits indexed as shown in said Volume III, and an exact copy of which was so duly served upon the attorney for the appellees.

That the service of said foregoing papers and documents upon the said L. J. TePoel, attorney of record for the appellees, was so made by this affiant personally depositing the same at the office of the said L. J. TePoel, 605 Farnam Building, in the City of Omaha, Nebraska, which is the office of the said L. J. TePoel; that prior to so depositing the above mentioned papers on the desk of the said L. J. TePoel at said time and place, this affiant notified personally the said TePoel at 3:30 P. M. of said day that he would make delivery of said papers at the office of the said TePoel at 5:00 P. M. on July 27, 1940; that at said time, the said TePoel was absent from his office; that there was no clerk or other person in charge, and therefore in accordance with Rule 5, Sub-division B of the Code of Civil Procedure the same was so left in a conspicuous place in said office, to-wit: Upon the desk of the said L. J. TePoel.

William J. Hotz. (Seal.)

Subscribed in my presence and sworn to before me this 27th day of July, 1940. Grace A. Bowen, Notary Public. My commission expires: September 3, 1943.

[fols. 198-200] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 201-206] In United States District Court, District of Nebraska, Lincoln Division

562—Equity

Gene Buck, Individually, and as President of the American Society of Composers, Authors and Publishers, et al., Complainants,

vs.

Harry R. Swanson, as Secretary of State of Nebraska, et al., Defendants

Statement of Evidence

Appearances:

Mr. Louis D. Frohlich, of the firm of Schwartz & Frohlich, New York, New York;

Mr. Herman Finkelstein of New York, New York; and

Mr. L. J. TePoel of Omaha, Nebraska,—For Complainants.

Mr. William J. Hotz, of Omaha, Nebraska;

Mr. John Riddell, Assistant Attorney General of the State of Nebraska, Lincoln, Nebraska; and

Mr. Andrew Bennett, of Washington, D. C.—For Defendants.

[fol. 207] Be It Remembered, that commencing on the 18th day of September, 1939, at ten o'clock A. M., the above entitled cause was tried before the Court, the Honorable A. K. Gardner, Honorable James A. Donohoe, and Honorable T. C. Munger, Judges Presiding; that on the trial of said cause, the complainants and defendants, to maintain the issues joined on their respective parts, introduced and offered before the said Court the following oral and documentary evidence and interposed the objections and took the exceptions herewith noted:

[fol. 208] Stipulation re Amount Involved

Mr. Te Poel: May it be stipulated for the purpose of the record that the jurisdictional amount is a matter of fact

that is involved in this case and is sufficient to sustain the jurisdiction.

Mr. Frohlich: We so approve.

The Court: In other words, it exceeds the amount of $3000.00, plus interest and costs.

Mr. Hotz: The defendant, Richard Hunter, is no longer in the case and Walter R. Johnson is now substituted as a party defendant by agreement. It is stipulated and the order of the Court that Mr. Barlow Nye, Administrative Assistant to the Attorney General, is succeeded by Mr. John Riddell. The rest of the defendants remain the same. Mr. Andrew Bennett will appear as special counsel for Mr. Grosshaus, who is one of the county attorneys made party defendant.

Mr. Frohlich: May I ask the Court, please, who Mr. Hotz appears for?

Mr. Hotz: I appear for the defendant, Harry Swanson, and for the Attorney General's office.

Motion to Strike from Answer

Mr. Te Poel: The complainants move that Paragraph 15 of the Defendants' Answer be stricken for the reason that the allegations contained in said Paragraph 15 constitute no defense to any of the issues tendered in this case by plaintiffs' Bill of Complaint; and for the reason that said Paragraph 15, or the allegations in it contained, tender no issue properly triable in this case.

[fol. 209] Gene Buck, called as a witness on behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. What is your full name?
A. Gene Buck.
Q. Where do you reside?
A. Great Neck, New York.
Q. Are you a citizen and resident of the State of New York?
A. Yes, sir.

Q. How long have you lived in that state?

A. Thirty-three years.

Q. Where did you originally come from?

A. From Detroit, Michigan.

Q. How old were you when you came to New York?

A. Twenty-one.

Q. And what profession or business did you pursue?

A. I was originally an artist for three years, and then started to write songs.

Q. The words or the muisc?

A. Mostly the lyrics—the words, and also some music; and from that, the writing of songs, which I am primarily interested in, into the writing of musical plays and the [fol. 210] production of musical plays.

Q. Were your musical compositions published from time to time?

A. Over five hundred of them.

Q. I hand you this list of musical compositions, Mr. Buck, and ask you whether this list accurately and truly represents musical compositions composed and published by you?

A. Yes, those are the numbers. I wrote forty productions for the late Florenz Ziegfeld and his Follies.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 1.

Q. You say you were associated with the late Florenz Ziegfeld for many years?

A. Yes, sir.

Q. Did he produce plays known as the Ziegfeld Follies?

A. Yes, sir.

Q. Were they highly successful plays?

A. I believe the most successful reviews ever produced in America.

Q. Did you have anything to do with the writing of any part of those plays?

A. Yes.

Q. For how many years were you connected with him?

A. Twenty-three years.

Q. Did you become a member of the American Society of Composers, Authors and Publishers at one time?

A. I was one of its original founding members in 1914.

[fol. 211] Q. Can you give us the names of the other gentlemen who helped found that organization?

A. The real founder, the instigator of this society, was the late Victor Herbert, who called us together. It also consisted of Louis Hirsch, composer, Raymond Hubbel, Glenn McDonough, Silvio Hein, and Henry Blossom. This was part of a small group of composers and authors.

Q. Are you familiar with the conferences and talks between these various persons you have just named with reference to the incorporation or organization of the Society?

A. I was with them when it was brought into being.

Q. Do you know what brought about the organization of the Society?

A. Yes, sir.

Q. Will you please tell us briefly?

A. There was in this country at this time authors and composers who were confronted with a situation that had never happened before. That is, large companies, corporations and users of music were taking their works without asking the men who created it or their publishers, and started to build industries in this country on the productions of their brains. At first it started with the phonograph companies, who without paying George M. Cohan or Victor Herbert or Phillip Sousa or the man who created the songs in this country, a nickel, took their works and put them on phonograph records and built one of the great [fol. 212] businesses of the world, and up to that time the man who created that song—the words and music—and his publisher never received a nickel in royalty. In 1909 Mr. Nathan Burkan, since dead, the attorney for Victor Herbert, marched to Washington and said that something should be done about this situation. Theodore Roosevelt was President of the United States at that time, and he also had a gift for writing. When this situation was brought before him he said that the law should be changed and that the composers and authors should receive some recognition for their compositions and writings being violated. These records were made and sent all over the world and this terrific injustice existed. He made a recommendation to Congress, and the Act of 1909, or revision of the Copyright Act, was put into the Copyright Act. It was the first fundamental protection, which is going to flow through this case, this recognition of the rights of creative workers. I merely highlight this so that you get some of the atmosphere that's in this case, which is good

for the record and good for your minds in addressing yourself to it.

The author and composer prior to 1909, such as Cohan, Sousa or Herbert, contributors of musical works in this country, never received a cent from the phonograph companies, and they were springing up throughout this nation, taking their works, engaging orchestras and stars, and putting them on wax, and sending them throughout the world. The phonograph companies were very powerful in Wash- [fol. 213] ington, to such an extent that there came into this fight Charles K. Harris, who, I believe, wrote "After the Ball", since gone; Harry Von Tilzer, and also into the fight came Augustus Thomas, Robert Underwood Johnson, all creators banded together, men who had a gift for writing songs, a book or play or novel or article. What was involved in this question? It was the first intrusion of the mechanization into taking and holding creative works without asking the man who created it if they could go ahead and use it, and they built up gigantic interests. There were a handful of writers, and the opponents were very, very powerful. Out of it came one of the most insidious things in American law—the price fixing provision which was set out in the Act of 1909—a provision that the author and composer and his publisher by law could only get two cents for the creation of his brain on a phonograph record, but a phonograph company could pay Enrico Caruso $150,000 a year, and the leading bands and orchestras of the United States had a free right to bargain. The phonograph companies put it in there that two cents was all an author and composer and his publisher could derive from the sale of the record. At that time, and it is very important here, the phonograph record was confined to the home. This magic instrumentality called radio was not conceived at that time, and in the deliberations of Congress, inasmuch as this was a record, that phonograph record at that time was part of an instrument to mechanically reproduce. No per- [fol. 214] son living could read a phonograph record. These indentions would only speak when a needle was put on, and it was part of a machine. That was the start of the mechanization and of the utilizing of the works of creators of songs. Naturally those who wrote the songs of the country felt terribly. They were perfectly willing in those days, and they were the first to step forward to take this two cents, and that was the only compulsory license provision, I be-

lieve, up until a year or so ago, when it was put into some agricultural act. It was the first time in the history of this nation that price fixing was recognized in any part of our government, and it was an amazing commentary that it should be tacked on men and women who created the songs of the country.

Q. What happened, Mr. Buck, in 1914?

A. And from 1909 on——

Mr. Hotz: Go ahead with what you were saying.

A. In 1912 there started in this country the so-called cabaret. In 1913 it increased in volume and it broke out like a prairie fire throughout this country. You would go into a restaurant to eat and out in front of you would step a girl or a man or a quartet or a band in competition to the legitimate shows and enterprises in theatres built for such a purpose. Into this restaurant to lure patrons would come artists singing songs, and they would take the songs of mine from the Ziegfeld Follies, take the Victor [fol. 215] Herbert songs out of his repertoire, take the popular songs created by Irving Berlin and George Cohan, take Sousa's marches without ever asking anyone, just like the phonograph boys did. This new enterprise started in the restaurant business to lure customers into their establishments. There wasn't an author or composer in the United States, and the same condition exists today, who could engage an attorney, nor did he have the funds.

Q. Did you have a fund and were you able to do anything about it in 1914?

A. I could do nothing. I am going to answer the question you asked me. Victor Herbert had a sensational success on Broadway. This great, open-hearted, generous man called us together and said something should be done about this. They are taking the greatest songs of the country now, and it was a very insidious technique. They didn't charge admission at the door, but this was their creation, and one of the toughest things in this country, the so-called couvert charge. Performers appeared on the floor and sang songs that they had pirated and which were created for musical play, and some of them cost $200,000.

Mr. Hotz: We desire to object to the immateriality of the statements that have been made by the witness, and make this objection in this form, and request counsel to kindly

put your questions to the witness and let him answer them [fol. 216] as nearly as he can by questions and answers. We feel that much that has been said is immaterial, and that we could go on here and show the trials and tribulations many, many years ago, without getting down to what we are confronted with today.

Mr. Frohlich: I have tried to save time by not asking a lot of questions.

The Court: I think the witness is inclined to indulge in argument. Confine yourselves to the facts.

Q. Well, now, with reference to the American Society of Composers, Authors and Publishers, that was formed, you say in 1914?

A. I was just reaching that point.

Q. That was an unincorporated society under the laws of the State of New York?

A. I think the Court is entitled to know why it came into existence.

Mr. Frohlich: We will get to that in a minute.

I offer in evidence plaintiffs' Exhibit Number 2, Chapter 609 of the General Associations Law of the State of New York.

Mr. Hotz: No objection.

Q. Mr. Buck, I show you this document and ask you what it is?

A. That is Articles of Association of the American So- [fol. 217] ciety of Composers, Authors and Publishers.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 3.

Mr. Hotz: No objection.

Q. I show you two documents, Mr. Buck, and ask you what these represent?

A. They represent the membership list of the American Society of Composers, Authors and Publishers, affiliated societies, and the Board of Directors and Officers and all representatives in the States of the Union.

Q. Is this a blue document?

A. The blue one is for the year 1937, and the last issue is 1939, August 1st. That is most pertinent in this case.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibits Numbers 4 and 5.

Q. Mr. Buck, prior to 1914 did any of the users of American music, to your knowledge, pay any author or composer for the public performance for profit with respect to those compositions?

A. No, sir.

Q. And was that one of the motivating reasons for organizing the American Society of Composers, Authors and Publishers?

A. Yes, sir.

Q. After the organization of that Society in 1914 was the Society able to get money from the users for the public performance for profit of these compositions?

[fol. 218] A. The history is we didn't get the person in court. When we went in with the violation we met the restaurant owners of the United States.

Q. Were the restaurant owners organized into a trade association?

A. They were.

Q. What was the name of it?

A. I think it was—I would have to get a book; I can't recall. The record is there. The court records show it, with the opponents that confronted us.

Q. In other words, you say a test suit was brought of some kind?

A. Yes, sir.

Q. Were the restaurant owners represented by one counsel?

A. Yes.

Q. And who represented the group?

A. Yes.

Q. Was this case carried to the United States Supreme Court?

A. We lost the case in the lower court and it took three years and eventually it went to the United States Supreme Court, and the late Justice Oliver Wendell Holmes rendered a decision construing the Shanley case. That was the performance for purposes of profit, although there was an admission charge at the door by the indirect charge of the couvert charge, and they put this charge on your check.

Q. That was the case of Herbert against Shanley?

A. Yes.

Q. After that decision came down in 1917 did you meet [fol. 219] any other further opposition on the part of the users with respect to payment for these performing rights?

A. In the interim during these three years the picture houses throughout the United States utilized the same way of taking the music works of authors.

Q. Were these picture houses organizing trade associations?

A. They were.

Q. Do you recall the names of some of the associations?

A. The Motion Picture Exhibitors of America and the Motion Picture Exhibitors of New York—they were organized in every state, and now they have a national organization and a state organization.

Q. A national and a state organization?

A. Yes, sir. Whom were we confronted with? We never met Mr. Shanley and never met the individual infringers. We were always confronted with an attorney like today, by the representatives of an association.

Mr. Riddell: Just a minute. I move to strike out the answer as not responsive to the question, and wholly argumentative.

The Court: Overruled. Part of the answer is clearly responsive.

Q. In the years 1917 on was the litigation between the American Society and users with respect to the attempt by the American Society to enforce the rights of its members?

A. It is continual right up to this moment; it never ceased.

[fol. 220] Q. Did the motion picture theatre owners pay anything to the American Society for the use of the compositions in the theatres?

A. Not until forced to by the court action.

Q. How long did that take?

A. That took two years, I think.

Q. Did the motion picture owners pay anything to any of the individual authors, composers and publishers, members of the Society, during that period?

A. Never in their history.

Q. Did they pay anything to any author for performing rights, do you know?

A. Never in their history.

Q. Well, did the time come when the American Society on behalf of its members, entered into license agreements with the owners of motion picture theatres in the United States?

A. Yes. When our rights were upheld by the court, then we negotiated with them.

Q. Now, in 1923 was radio the coming factor?

A. It started in 1921, yes.

Q. By 1923 had it reached any proportion?

A. Yes, very much of a proportion.

Q. There were a number of radio stations in existence in 1923?

A. Yes.

Q. Were these radio stations operating throughout the United States?

[fol. 221] A. They were.

Q. Were they utilizing musical compositions for the purpose of public performance at profit?

A. They were.

Q. Were they utilizing the compositions of the members of the American Society?

A. They were.

Q. Did they offer to pay to the American Society, or to any individual members of the Society, any compensation for the public performance for profit?

A. No, they did not. The picture owners resisted.

Q. Did the Society demand of them that they pay compensation for these performing rights?

A. They did.

Q. Was that demand acquiesced in?

A. No.

Q. Was there litigation on the subject?

A. The first case brought by the American Society of Composers, Authors and Publishers was in the State of New Jersey and tried before Federal Judge Lynch, who upheld the Society. That was constituted a public performance for profit. The broadcasters said, like everybody else, "We are not infringing here."

Mr. Riddell: I move to strike out that portion of the answer beginning, "The broadcasters, just like everybody [fol. 222] else", from there on, as not responsive.

The Court: It may be stricken out.

Q. Were the broadcasters organized in any groups in 1923 and subsequent years?

A. Yes.

Q. Can you give us the names of the groups?

A. The original association was the National Association of Broadcasters which is in existence today, and the first president was Gene McDonald of Chicago, and then there was Paul Klugh, executive chairman, who now works in Chicago. I happen to know the gentlemen met in Washington, where they went down to change the law, to have the two cents compulsory apply to broadcasters.

Mr. Hotz: Objected to as hearsay, and as not responsive. I suggest that counsel confine Mr. Buck to his specific questions.

The Court: The volunteer part may be stricken out. Overruled as to the rest.

Q. Now, Mr. Buck, you said there was litigation between the Society and the broadcasters after 1923?

A. That is right.

Q. Was the National Association of Broadcasters represented by its own counsel?

A. Yes.

Q. What form of opposition did the Broadcasters take with respect to the Society, in addition to litigating their [fol. 223] rights in others?

A. Well, some of them first didn't use the American Society works on their broadcasting stations, namely, the R. C. A., headed by Mr. David Sarnoff, for some time. He operated WJZ and some of his stations, without utilizing the works of the American Society.

Q. But now did a time come when the activities of the Broadcasters took other shape?

A. I didn't hear the last.

Q. Did the time come when the activities of the Broadcasters were extended and took other shape? Did they do anything else?

A. We took the Broadcasters to court and were upheld by the courts, and they did the next thing to change the law.

Q. You mean with respect to the copyright law?

A. To change the basic copyright law by a bill introduced by Senator Dill of Washington.

Q. What year was that?

A. In 1924.

Q. Were hearings held before committees in Washington?

A. Yes; numerous committees in the Senate and House, and one joint hearing.

Q. Did you attend those hearings?

A. I did.

Q. Who appeared in favor of the bill which would affect the copyright law?

[fol. 224] Mr. Hotz: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. The National Association of Broadcasters.

Q. Are you able to tell us without looking at any document, from your own memory, what particular bills were introduced and who appeared in favor of those bills against the interest of the American Society?

A. The first bill was the so-called Dill bill introduced by the Broadcasters in 1923. There was the introduction in Congress of a revision of the Copyright Act known as the Vestal bill, and there were long extensive hearings that lasted a year and a half. Vestal of Indiana happened to be chairman of the committee. The Broadcasters appeared then as the National Association of Broadcasters. And if it is so desired, I will put the counsels' names in the record.

Q. I want you to tell us. Are you able to do it from memory?

A. The next important bill that the users of music presented was the Duffy bill, introduced in the United States Senate by Senator Duffy of Wisconsin, for revision of the Copyright Act. It was known in Washington as the users bill.

Q. Mr. Buck, who prepared this document here, do you know?

A. This was prepared by our legal staff, and is a record from 1924 on of appearances at all hearings in Washington, on every bill pertaining to the change of the Copyright Act.

[fol. 225] Q. Will you refresh your memory from that document and tell us who appeared in 1924?

A. The first bill down there to change the Act from 1909 was brought down there by the original president, Gene McDonald of Chicago, and Paul Klugh, executive chairman. The bill was introduced by Senator Dill on the 9th day of April before the United States Committee on Patents, and

the appearance there was Mr. McDonald, Mr. Klugh and Mr. Charles Tuttle.

Q. He is a well known lawyer in New York City?

A. He is a very distinguished attorney, and at one time Federal District Attorney.

Q. Will you look at the other sections of this document, which refer to hotels and motion picture people with reference to these communication bills, and tell us who appeared on behalf of any other organization?

A. On the same Dill bill introduced, which would eliminate from the Act the all-important line, "public performance for profit", which the Society operates under for the protection of its members, Mr. Frank Boland for the Hotel Men's Association appeared at the same time.

Q. Did anyone else appear at that hearing?

A. At that hearing for the motion picture industry there appeared Mr. Sidney Cohen, who was at that time the head of the Motion Picture Theatre Owners Association, and Mr. Samuel Handy of the Motion Picture Exhibitors of [fol. 226] America, in the 68th Congress, in the first session.

Q. By the way, that bill didn't pass, did it?

A. It didn't; it was defeated.

Q. Did that bill affect the minimum damage clause of the act?

A. Yes; it attempted to strike it out.

Q. What was the clause?

A. Provision of $250.00 as a damage clause which is in the act.

Q. After 1924 were any other bills introduced in Congress?

Mr. Hotz: Just a minute. We object to that as incompetent, irrelevant and immaterial. We have no objection to the present Copyright Act being referred to or introduced in evidence. I can't see the necessity nor the materiality for the various attempts they have made in Washington, D. C. to change the Copyright Act, and take it up year by year. It stands today on the statute books. The courts have universally held what the rights of the various authors and composers are under that act. There is no doubt about it, and there is no controversy here. This is not an infringement suit. There is nothing about infringement in this action. This is an action for a plain, ordinary, simple injunction to restrain the enforcement of a certain

bill for unlawful monopoly in the State of Nebraska. I [fol. 227] think, therefore, I will have to insist that they do not encumber the record, and permit this immaterial testimony to go in.

The Court: Overruled.

A. Yes.

Q. After 1924 were any other bills proposed to Congress which affected the Copyright Act?

A. Yes, sir.

Q. Will you be able to refresh your recollection, Mr. Buck, from looking at this document and tell us when the next bill was introduced?

A. The next important bill was introduced by Senator Duffy in the United States Senate. Numerous bills were dropped into the basket in 1924, but they didn't arrive at a crystallization to the extent that a committee gave a hearing to either side. The basket was filled with bills, but the patent committees of the House or Senate did not hold extensive hearings until the Duffy bill was introduced by Senator Duffy—the extensive hearings were held then.

Q. Did you attend the hearings?

A. Every one of them.

Q. Who appeared in favor of that Duffy bill?

A. The same gentlemen; the National Broadcasters, the Hotel Owners of America, and the Motion Picture Exhibitors of America.

Q. Did the Duffy bill affect the provisions of the Copy- [fol. 228] right Act with respect to minimum damage?

A. It did; it moved to strike out the $250.00 clause, it moved to strike out the extension, more or less. An admission was charged at the door of a cabaret or restaurant. It was an entire user bill. I trust the Court will understand when I say "user", I mean our opponents again, who created it.

Q. Did the time come when legislation was introduced in the various states throughout the country which affected the rights of the composers, authors and publishers of musical compositions?

A. Yes, sir.

Q. Can you tell us the first bill that was proposed or passed with respect to such legislation?

A. The first bill introduced was in the State of Washington three years ago.

Q. Prior to the introduction of a bill which affected the copyright, did the State of Washington or the officials of that state take any action with respect to copyright owners who were members of the American Society of Composers, Authors and Publishers?

Mr. Hotz: Just a minute. Object to that as incompetent, irrelevant and immaterial, and not within the issues of this case. I am not prepared to go into what happened in Washington.

Mr. Frohlich: I have a decree of the State Court of [fol. 229] Washington, and the American Society was affected by this decree. I have a certified copy of it, by Judge Wright, in which he adjudicated the rights of the Society. Its nature and character had been attacked within that state.

I want to show by this witness what was the nature of this attack culminated in this decree. I want to show here that when this bill was passed, the bill now seeking to be enacted in the Statutes of the State of Nebraska, it wasn't the first bill of its kind and there was reason for having had that bill proposed in the State of Nebraska. There were some people who were interested in that bill. It was the culmination along the line of attack, first in the courts in the east and then in the halls of Congress, and when there was failure in the halls of Congress there was an attempt to introduce bills in the forty-eight States of the Union to emasculate the rights of these composers, authors and publishers, and this is one of the bills. I think the history of this bill or the reason for its passage is of some interest to the Court. The Court is not expected to sit in the dark and view things in a vacuum. They say this is affected with public interest, and I say it is a private in- [fol. 230] terest of users. I think it is revealing, your Honors, on that point.

Mr. Hotz: If counsel has a decision of the court he wants to cite, it seems to me it is a matter for argument as to what other courts might have held under similar bills and similar circumstances. That isn't a matter for the witness to testify to. Of course, the American Society has had litigation. In fact, the name Gene Buck appeared before the court more than any other individual. They have got records here to show eighty-eight suits pending in Nebraska in the two jurisdictions we have here. I can't see the

materiality of that. I don't see why we have to go into the fights they had in Washington and Florida and Montana, and different things. Our Nebraska bill, we can show it is materially different.

The Court: Sustained for the present.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 6, being the decree of Judge Wright, a certified copy of it.

Mr. Hotz: We object to it as incompetent, irrelevant and immaterial, and not within the issues of this case. It merely purports, your Honors please, to be a decree in a case.

[fol. 231] The Court: Sustained.

Mr. Frohlich: I offer in evidence at this time, your Honors, two laws of the State of Montana, one passed in 1937 and one in 1939, very much similar to the statute in suit here. I merely want to offer certified copies of these laws in evidence.

Mr. Hotz: We object to those as incompetent, irrelevant and immaterial, having no bearing on the issues in this case, and encumbering this record. The laws of Montana are in their statute books.

The Court: This Court will take judicial notice of all these laws. Objection sustained.

Mr. Frohlich: They will be marked plaintiffs' Exhibits Numbers 7 and 8.

I also offer in evidence similar laws in the State of Washington, the State of Tennessee and the State of Florida, being Exhibits Numbers 9, 10, 11 and 12.

Mr. Hotz: Let the record show the same objection.

The Court: Objection sustained.

Q. Are you an officer of the American Society of Composers, Authors and Publishers?

A. I am the president.

[fol. 232] Q. And how long have you been president?

A. Sixteen years.

Q. I show you this document and ask you whether you recognize the signatures?

A. I do. That is a contract for agreement between myself and the American Society as a member.

Q. What is the date of that contract?

A. The date of that is June 25, 1935. That is a renewal agreement.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 14.

Mr. Hotz: No objection.

Mr. Frohlich: May I substitute a photostatic copy of that?

The Court: Yes, and the original may be withdrawn.

Q. Roughly, about how many publisher members are there in this Society?

A. About one hundred and twenty-three or one hundred and twenty-four.

Q. How many writer and composer members?

A. About one thousand and sixty or seventy.

Q. For each and every one of those publisher members, author and composer members, have executed similar contracts to Exhibit Number 14?

A. Exact contracts.

[fol. 233] Q. Now in force and effect?

A. The same contract between the publisher member and composer, and they all sign the same kind of a contract.

Q. When in point of time do they expire?

A. That contract expires December 31, 1940.

The Court: The other contracts also expire at the same time?

The Witness: They all do. They have been renewed for five-year periods all through the Society's history.

The Court: And the same period? They date from the same day and renewed at the same time?

The Witness: Yes.

The Court: Not each one has a five-year period, has it?

The Witness: All of them up to the year 1921. From 1914 we just had one contract. We had one contract at that time, and it had a continuity from 1914 to 1921. Then starting at the year 1921, from then on, it was for every five years. At the end of that five years all members in the Society signed a renewal agreement for a period of five years.

Q. Mr. Buck, has the American Society of Composers, Authors and Publishers any contractual relations with other societies elsewhere in other countries?

[fol. 234] A. It has some thirty-six nations.

Q. Among them is there one society in France?

A. The French Society and British perform the rights of the Society. Every country in Europe, with the exception of Russia.

Q. Now, I show you photostats of contracts between the American Society and European societies, and ask you whether these photostats are true and correct copies of the originals, and whether these contracts are presently in existence?

Mr. Frohlich: For the information of the Court, I have the originals in court, but I would like very much to take them back.

A. These are the photostat copies.
Q. Are the contracts all in force at this time?
A. Yes. I signed them.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 15 as a group and as one exhibit.
Mr. Hotz: You have them in once in your depositions.
Mr. Frohlich: I believe so, somewhere in the depositions.
Mr. Hotz: Let us not get them in here twice. We have no objection to them.

Q. Now, Mr. Buck, does the Society deal in any sheet music?
A. No, sir.
[fol. 235] Q. Does it have any interests whatever with reference to the publication of musical compositions?
A. No, sir.
Q. Does it purchase or sell any sheet music?
A. No, sir.
Q. Does it print or publish any musical composition?
A. No, sir.
Q. Does the Society own any copyright?
A. No, sir.
Q. Has it ever owned any?
A. Never in its history.
Q. Has it ever traded in any shape, manner or form in sheet music?
A. It has not.
Q. In what is the Society interested?
A. The author, composer and publisher vests in the Society the so-called "small performing right"—the right to publicly perform for profit.
Q. Is that the only right in which the Society is interested?
A. That is the only right they have.

The Court: Why have somebody testify about this if it is already in? It will probably speak more accurately than the witness' recollection.

Q. How does the Society license the compositions of its members to users of these compositions for the purpose of public performance for profit? Tell us the procedure.
[fol. 236] A. It issues a blanket license. If a theatre license, is predicated on the seating capacity of the house, it is so much per seat per year. The broadcasting station license is predicated, first, on the wave length of the station, the location of the station, the sum area of its listening public, and the power granted to them by the United States Government.

Q. As to a dance hall, what is done?

A. If a dance hall, it depends on its location and the size of it; if a restaurant, also its location and the size of it.

Q. Now, on September 1, 1937, did the Society have in force various contracts in the State of Nebraska with users of music in that state?

A. They did.

Q. I show you this group of contracts—photostats of these contracts, and ask you whether those are the contracts that were in force with the users of musical compositions in the State of Nebraska, May 17, 1937?

A. Without going into detail with every one of them, yes, they are the photostatic copies.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 16.

Mr. Hotz: While we have no objection as to the materiality and relevancy of this bunch of photostatic copies of the contracts in the State of Nebraska, it encumbers the record [fol. 237] unduly. They have set out in their complaint the users they have in their respective counties, and then attached to the bill of complaint a typical contract, and that so far as we are concerned, even though we have denied it, would be sufficient, except one contract we have called for, and that is with the radio station coupled up with the newspaper at Norfolk.

Mr. Frohlich: My reason for offering them is primarily that these contracts are very vitally affected by the statute. This statute abrogates each and every one of those contracts.

The Court: The question is whether they are already in the record.

Mr. Frohlich: They are not, your Honors. We simply attached one typical contract, a radio contract, a hotel contract. I think all the records ought to be in evidence.

Q. Mr. Buck, did you at my request have your office tabulate the revenue that was taken in by the American Society of Composers, Authors and Publishers from the users of music for the purpose of public performance for profit within the State of Nebraska from the year 1928 down to June 30, 1939?

A. I did.

Q. I show you this document and ask you whether that is the tabulation that was made?

[fol. 238] A. It is.

Q. Is that a true and correct tabulation from the books of the American Society?

A. It is.

Q. And accurately and truly represents the money that came in for the years indicated, in the manner indicated, is that right?

A. That is right.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 17.

Mr. Hotz: No objection.

Q. Did you also prepare at my request a schedule of the actual cost of operation and commissions paid by the Society within the State of Nebraska from the year 1932 to 1937?

A. I did.

Q. I show you this tabulation and ask you whether that is a true and correct tabulation taken from the books of the American Society?

A. Yes, sir, that is accurate.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 18.

Mr. Hotz: No objection.

Q. Mr. Buck, could you furnish the figures for 1938 and the first half of 1939?

A. I would be very glad to do it.

Mr. Frohlich: We will furnish it and bring it up to date.

[fol. 239] Mr. Hotz: Would you just as a matter of sim-

plification add that onto Exhibit Number 18? You could do it by pencil. And you will state, Mr. Frohlich, that will be the accurate records of your Society?

Mr. Frohlich: That is correct.

Q. Now, Mr. Buck, were you in 1914 able to protect your rights with respect to public performance for profit of your compositions throughout the United States?

A. No, sir.

Q. Were you financially in a position to hire investigators and lawyers to seek out infringement and so on?

A. No, sir.

Q. Have you ever been able yourself personally to protect yourself with respect to public performance for profit of your rights?

A. Not without an association.

Q. Does that same situation hold true with the other members of the Society?

A. All of the members.

Q. Now, if you attempted to protect your own rights without the help of any organization or association within the State of Nebraska, what would you have to do as a practical matter, and with your knowledge of the entertainment profession, to safeguard and protect your rights for public per-

[fol. 240] formance for profit?

Mr. Hotz: We object to that as not within the issues of this case. This bill has nothing in it nor has the complaint raised any issue, nor is there anything in our answer or the state law to cover the object of any organization for the purpose of policing their rights covering infringement. They can institute any sort of procedure they wish in connection with that. It is not within the bill and not within the issues. The Society operates in this state without any handicap on the matters which the attorney has directed to the attention of the witness.

The Court: I think the witness may state briefly.

Q. You may state, Mr. Buck, what you would have to do to go about it?

A. The first thing you would have to do is to hire an investigator in the State of Nebraska to investigate all establishments.

Q. Would one investigator be sufficient for 391 establishments?

A. It couldn't be done.

Q. How many investigators would you have to have for 391 establishments?

A. Conservatively three or four.

Q. And what salary would you have to pay a man to go [fol. 241] around and investigate these establishments?

Mr. Hotz: I object to that as immaterial.

The Court: Sustained.

Q. You would have to pay his salary?

A. Yes, sir.

Q. If any infringement was found, would you have to engage a lawyer?

A. Yes; engage a lawyer to bring suit in a court of law.

Mr. Hotz: Object to that as immaterial and calling for a conclusion of the witness, and a self-evident fact that lawyers have to be paid.

The Court: It has been stipulated the amount in controversy exceeds $3,000.

Mr. Frohlich: I want to show the helplessness of an individual under this act.

Q. Would other writers and composers have to do the same as you, if they were to proceed individually to protect their rights within the State of Nebraska?

A. Every author and composer in this country would have to do the same thing individually.

Q. And every publisher would have to do the same thing?

A. And every publisher would have to do the same thing.

Q. If an author and composer resides many miles from the State of Nebraska, it would impose a greater hardship on them, would it not?

A. It is an impossible task; it is dealing with an impossibility that any single individual could cover the violations [fol. 242] of his works in a state.

Q. When you write a musical composition and have it published, is it frequently the case that your compositions have been manufactured by radio and phonograph companies or piano roll companies into mechanically reproduced compositions?

A. Yes.

Q. In other words, disc records and musical rolls have been made from your compositions from time to time?

A. That is right, because different rights flow from the Copyright Act.

Q. And one of the rights is to make a mechanical reproduction of your composition?

A. Yes, sir.

Q. Now, when these mechanical reproductions were made you were paid under the compulsory provision of the Copyright Act at the rate of two cents a disc record or piano roll, were you not?

Mr. Hotz: Objected to as not within the issues of this case, and having been answered by the witness, and this act applies to vocal and instrumental musical compositions.

Mr. Frohlich: Now, in the first place it is very important to the issues in this case, your Honors, because one of the rights we claim is completely destroyed by this statute, is the right of public performance for profit that would flow [fol. 243] from the public performance for profit of a mechanical disc or piano roll, because the act expressly applies not only to played music but every copy of the composition manufactured. It has been carefully drawn to bring in every form of reproduction of that musical composition. It is our contention that when disc records are made they are made by others whom we don't control, and are forced to put on a price schedule as called for by the act, and these people can take the records and bring them into the State of Nebraska and have them perform, and the copyrighter doesn't get a penny for it, and he can't collect anywheres within the state for that performance. That is very vital here, the construction of this part of the act.

Mr. Hotz: Your Honors, that statement isn't altogether correct. In fact, no part of it is correct. This act doesn't militate against anything of the sort, nothing of the kind. Any composer or author or publisher, any of the 123 publishers, that have rights, certainly this act doesn't exempt them from infringement. The only thing it does prevent is a monopolistic organization from coming into this state and fixing a price, if it can. That is all there is to this act, [fol. 244] and unless they can show by this witness in this question that this disc and musical records are in some way connected up with the act, it is absolutely immaterial. I can't find it in the act.

The Court: Read the question.

(Question read.)

The Court: Overruled.

A. Yes, sir.

Q. And under the compulsory provision of the copyright all other writers and composers and publishers throughout the country of musical compositions receive compensation under this compulsory license provision of the Copyright Act?

A. Equal.

Q. You, of course, know that the act provides that where the copyright licenses one record maker to make a record, then any other record maker in this country has a right, on paying two cents a record, to make as many as he pleases?

A. One phonograph company, that is right.

The Court: That is putting into the mouth of the witness what you say the law is.

Q. Isn't that the procedure in the musical profession?

A. It is the practice that the minute the author and composer and publisher gives to one phonograph company in the United States the right to reproduce that song on a record, every other company in the United States can also make [fol. 245] them at the same price.

Q. If you, Mr. Buck, were to grant somebody the right to reproduce a record of one of your compositions and other disc or piano roll manufacturers under this compulsory license provision of the act, made, manufactured discs and piano rolls of your compositions, could you in any shape, manner or form compel those manufacturers to put on the price of their records or rolls any schedule with regard to the use of public performance for profit within the State of Nebraska?

Mr. Hotz: Object to that as calling for a conclusion of the witness, and leading.

The Court: Sustained.

Q. Were many of your compositions recorded on the disc records?

A. Numerous ones.

Q. Can you give us the names of some of your compositions?

A. "Hello Frisco", "Tulip Time", "Sally Come Back In The Alley", "Garden Of My Dreams", and "No Foolin".

Q. And were many disc records made from the compositions you have just mentioned?

A. Many.

Q. Were disc records made by many manufacturers?

A. Many.

Q. Were many disc records sold throughout the United States?

A. They were.

Q. And some of them are now being sold throughout the [fol. 246] United States?

A. Yes, sir.

Q. Have you any control over any of these records?

A. I have not.

Q. Are they in your possession?

A. No.

Q. Is there any way in which you can compel anyone to affix any price on them?

A. No, sir.

Q. Would you be willing to have any manufacturer of rolls or records fix a price on the rolls or records with respect to public performance for profit?

Mr. Hotz: I object to that as calling for a conclusion of the witness, and immaterial.

The Court: You may answer yes or no.

A. Yes.

Q. Read the question.

(Question read.)

A. Well, in a sense I naturally would recapture the control. That is what I meant when I said yes; that is what I am addressing myself to.

Q. Assuming you now have to operate under the Nebraska Statute, and records are made from your songs, would you be willing to have some manufacturer put on the face of the record any schedule of prices for the public performance for profit?

Mr. Hotz: Object to that as not within the issues of this [fol. 247] case, and not within the Nebraska Act, there is nothing of that sort in there.

The Court: Overruled.

A. No.

Q. Mr. Buck, do you know something about the show business?

A. I do.

Q. Not only did you have experience with Ziegfeld, but did you have experience of your own as a producer of plays?

A. I produced plays myself.

Q. And have you kept in touch with the general profession of producing plays throughout the country?

A. Yes.

Q. Has there been any marked decline in the production of plays since the advent of radio?

A. Yes, a great decline in the actual production of plays in the theatre. Theatres are closed from Maine to California outside of a few major towns.

Q. I show you a schedule prepared from a trade paper called "Motion Picture Herald", dated November 17, 1934, and ask you whether you have ever seen that schedule before?

A. Yes, I have seen that before.

Q. Does that schedule purport to set forth the decline in the production of musical plays?

A. Yes.

Q. For a period of years?

A. Yes; dramatic and musical.

[fol. 248] Q. Would you say you agree with it, and that it is accurate and correct from your experience in the show business?

A. Yes.

Mr. Frohlich: Offer in evidence Plaintiffs' Exhibit Number 19.

Mr. Hotz: We object to this exhibit Number 19 because it has no bearing upon the issues in this case. There is nothing in the complaint and nothing in the answer or bill about it. It is a page taken from the "Motion Picture Herald" and purports to give the Broadway stage from 1920 to 1934, showing the relative declines and increases and so forth in connection with performances. The bill does not attempt to reach public performances of that type; that is, dramatic performances.

The Court: In any event it is hearsay and there is no foundation laid. Sustained.

Q. You know something of the music business, too, don't you?

A. I do.

Q. In your sixteen years as president of the American Society you have personally come in contact with every phase of the music business?

A. Yes, sir.

Q. And you know the history of a great many of the famous songs of the country?

[fol. 249] A. Yes, sir.

Q. And what they did financially?

A. Yes, sir.

Q. How many copies were sold?

A. Yes, sir.

Q. Did you cause a compilation to be made of songs that sold in excess of a million copies?

A. I did.

Q. Before I show you that compilation, let me ask you whether from your knowledge and experience since 1927, 1928 or 1929, or about that period, there was any falling off in the sale of sheet music in the United States?

A. Tremendous.

Q. And at the time that sheet music was falling off was radio becoming more prevalent and popular?

A. Yes.

Q. And did the time come when radio reception was possible in many millions of homes in the United States?

A. There are thirty million sets operating tonight in the United States.

Q. In your opinion, based upon your knowledge and experience did the operation of these radio sets affect the sale of sheet music?

A. It did.

Q. In what way did it affect it?

A. Well, it affected it primarily in the way of pianos and [fol. 250] the desire of people to buy sheet music. The writer of songs first wrote the songs, and besides expressing himself it was his desire to make a living primarily. To make that living, his living was derived first from the sale of sheet music, and secondly from phonograph records. Since the invention and tremendous vogue and popularity of radio, sheet music has fallen off and piano stores have been closed from Maine to California. There is a little economics involved in there too. People are not going down on the corner and buy four or five sheets of music when they can

turn on the radio for nothing and hear the greatest artists in the world. The same thing happened to the phonograph records, although at the moment they are coming back, and owing to this recent craze of so-called "swing music".

Q. Now, Mr. Buck, did you at my request prepare a compilation of musical compositions that have grossed in sales a million or over?

A. I did.

Q. I show you this compilation and ask you whether that is true and correct?

A. Yes, that is true.

Q. Made upon your own personal knowledge?

A. Yes.

Q. And from information received by you from the various publishers?

A. From the publishers who publish the music, and also [fol. 251] the composers—a royalty statement.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 20.

Mr. Hotz: It is interesting, but has no materiality.

Q. Mr. Buck, do you know of any musical composition that sold a million copies within the past five years?

A. No, sir; there isn't any.

Q. In the musical profession they endeavor to write songs that are very popular hit songs, don't they?

A. That is right.

Q. And there have been numerous hits in the last ten years, haven't there?

A. Many of them.

Q. Have any of those hits grossed a million copies of sheet music, to your knowledge?

A. No, sir.

Q. How many copies a day, as a rule, are sold of a hit song?

A. You mean copies a day, or today?

Q. I mean at the present time.

A. At the present time a hit is considered one hundred thousand copies.

Q. In your opinion and from your knowledge of the business, what is that decrease due to in that sale of sheet music?

A. We naturally believe it is owing to the use of radio—we believe that.

[fol. 252] Q. Is radio used a great deal in music?

A. Yes.

Q. When it is pleasing and entertaining is it played frequently over the radio?

A. There are nearly seven hundred broadcasting stations in the United States, and with the magic of its expression on a hook-up you can have a song hit tonight, and where ordinarily prior to the great popularity of the radio, a song would live ten or twelve years—it would take two years at least to go across the country—tonight Bing Crosby or John Boles will sing a song, and instantaneously, conservatively, thirty million people will hear him sing it. Consequently the song for a short time is a sure hit, but today it does not last six weeks. There is not a song hit in America that can last six weeks.

Q. Does this situation affect the author's royalty from the sheet music?

A. It naturally does.

Q. Are the authors' royalties today as high as they were in the days before the advent of the radio?

A. They have dropped seventy per cent.

Q. So that today the writer of a musical composition cannot look to more than thirty per cent on the hit number of what he could get fifteen years ago?

A. Not sheet music.

(Whereupon an adjournment was taken until 1:30 o'clock P. M.)

[fol. 253] Mr. Te Poel: The complainants move that the case be dismissed as to Grace Ballard, formerly County Attorney of Washington County, Nebraska, owing to the fact that she has recently departed from this life.

(Thereupon Mr. Gene Buck resumed the stand for further direct examination).

By Mr. Frohlich:

Q. Now, Mr. Buck, prior to 1914 what were the main sources of revenue that an author and composer derived when he wrote a composed musical composition?

A. The average song writer, so-called popular song writer's revenue was derived primarily from sheet music and phonograph records, but Victor Herbert, Jerome Kern, Berlin and myself, we were the men who wrote musical plays. Like I draw royalties on the Follies, and Herbert on Irene and numerous musical works.

Q. In other words, the writer or composer who wrote or composed musical compositions which appeared in musical plays, he was known as a production writer?

A. Yes, sir.

Q. And a writer who wrote and composed musical compositions to be sold to the public was known as a popular writer?

A. Most of the members of the American Society today are popular writers.

[fol. 254] Q. Does the Society also have in its membership production writers?

A. Yes, sir.

Q. Now, prior to 1914 the popular composer had two sources of revenue, the sale of sheet music and the compensation from the mechanical records, is that right?

A. That is right.

Q. A production writer had the same revenue, in addition to which he also received revenue from the production of his plays, and royalties based upon the office receipts?

A. That is right.

Q. After 1914 and down the years has that picture changed any way?

A. Yes, tremendously.

Q. Very briefly, what change has there been?

A. Well, the change has been with the popular song writer. As I stated here this morning, his income from the sale of sheet music has dropped eighty per cent, and dropped as far as phonograph records, ninety per cent. Now it is on the rebound a little bit on account of Goodman and like swing orchestras. Take the production writer and just look at the picture of the United States today. There aren't ten musical comedies playing in the United States today, and there are not three playing in New York City. When I was in the Follies, at this time of the year thirty-five musical plays would be produced.

[fol. 255] Q. Has the reduction in the production and the amount of musical plays affected the production writer today?

A. Yes.

Q. What is the cause of this reduction in musical comedy production?

A. Owing to the invention of the radio. Along comes the radio, this magic instrument, as I say, and it brings into the home great singers, and the theatre can't compete

with that. If I produce a show tomorrow night and engage Bing Crosby to sing, I can't pay his wages that the sponsors of a radio program will pay Crosby to sing before a vast audience, whereas if he were playing in my theatre I would have only twelve hundred or two thousand seats.

Q. Now, Mr. Buck, in 1914 the revenue derived by the writer, both popular and production writer, from performing rights, was, as you testified, practically nothing, is that right?

A. True.

Q. Since 1914 has the revenue from the public performance for profit of these writers, increased?

A. Yes, it has.

Q. And where does that revenue come from today?

A. From the public performance for profit. In fact, to be candid with you, the only outcome and the only outlook a composer and author has today for his initiative in creating public performance for profit is in the licensed establishment. If sheet music is gone, if the phonograph record [fol. 256] is gone, what is the incentive for a man gifted to sit down and write?

Q. And in what manner is this revenue from the public performance for profit now derived by the writers of popular and production music in the United States; where does it come from?

A. It comes from the American Society; that is the chief source of revenue for any composer and author in the United States.

Q. So that if the revenue from the public performance for profit derived from the American Society is lost, then is it your testimony that the authors and composers of music today would be without any substantial revenue whatever from any source?

A. With thirty-five years in the business as a writer and composer, and with my vast knowledge as president of this Society for sixteen years, yes, sir. That is all he has to look for.

Q. I show you a tabulation made up by your office at my request and ask you if this tabulation truly and accurately represents the number of licenses issued by the American Society to establishments throughout the country since 1922, in each and every state?

A. It does.

Q. Will you please took at that tabulation and give us the

total establishments now licensed by the Society in the [fol. 257] year 1939?

A. In the year 1939, as of June 30th this year, the total licensed establishments of every radio station, motion picture theatre, dance hall and restaurant in the United States totaled 30,824 as of this day.

Mr. Frohlich: I offer in evidence plaintiffs' Exhibit Number 21.

Q. I call your attention, Mr. Buck, to the fact that this tabulation commences with 1922. Did the Society issue any licenses to users prior to 1922?

A. Yes, sir.

Q. Many licenses?

A. Yes.

Q. Between 1914 and 1921 did the American Society issue many licenses?

A. Not many.

Q. As a matter of fact, it didn't obtain any substantial revenue until about 1922, isn't that right?

A. That is true.

Mr. Frohlich: I would like to offer in evidence plaintiffs' Exhibit Number 22, being a schedule which shows the diminution in the sale of sheet music and the diminution in the sale of phonograph records in the United States from 1927 down to 1933, taken from the records of the Department of Commerce and incorporated in the 1936 [fol. 258] hearings on the copyright bill. Is there any objection to its competency?

Mr. Hotz: No, we wouldn't make any objection to the competency of it, but my objection to it is that it is not down to date.

Mr. Frohlich: I couldn't obtain anything later.

Mr. Hotz: Therefore it has no probative force, as being too old and immaterial.

The Court: Have it marked as Exhibit Number 22.

Mr. Frohlich: That is all.

Cross-examination.

By Mr. Hotz:

Q. Now, when the courts in their various holdings discussed the distinction between public performance rights

and ordinary sale rights for sheet music and so forth, your organization then became active in the protection of the public performance rights, is that true?

A. That is right, sir.

Q. And at the present time your organization confines itself almost exclusively to the collection of money from the users of vocal and instrumental music performed for public rights; that is what you call public performance rights?

A. Primarily the protection of its members.

[fol. 259] Q. I understand that, but that is something else. The protection from the infringement is another thing.

A. Yes, sir, but that is what brought the Society into existence.

Q. That is one of the purposes of your Society, to protect your members from infringement?

A. To stop this wholesale piracy.

Q. The way you do that is to have an agent and organization in each state in the Union who looks after and detects infringements of public performance?

A. That is right.

Q. Just explain to the Court what you mean by public performance rights and what people in the State of Nebraska generally are subjected to the payment of fees for public performance rights.

Mr. Frohlich: I really object to that, your Honors, on the ground that it calls for a legal conclusion on the part of the witness.

The Court: Let him answer.

A. I would be very happy to answer that. There are ten broadcasting stations operating in the State of Nebraska tonight. If the broadcasting station operates in this state tonight that is not operating for purposes of profit, this Society gives them a free license. Out of 700 broadcasting stations in the United States there — about seventy universities and churches, and as long as they are not opening their [fol. 260] stations for the purposes of selling time for a five minute spread or spot announcement, or for a shorter period, or a half hour, the Society is perfectly willing to give its entire catalog to any municipal school or university or any broadcasting station that is not operating for purposes of profit. If that station sends out salesmen and they go to furniture stores and insurance companies and to

national advertisers to dispose of its time, that is when the Society asks that station to take out a license.

Q. Now, then in addition to the radio, what else is there?

A. The next phase of activity in this state would be the motion picture theatres in the state who publicly perform music for profit.

Q. And the hotels?

A. Yes. We also license the picture houses, and it is predicated on the number of seats in that picture house. The next group in that would be the dance halls in the State of Nebraska. After all, a dance hall has nothing but the floor and music.

Q. They pay licenses?

A. They take out a license predicated on the size of the dance hall and how much usage of music there is. The next is the hotels. If a hotel doesn't use music, we do not ask for any license, but if the hotel takes a name band orchestra and goes into the show business and uses our music for purposes of getting the public into the cocktail [fol. 261] rooms and to dance, then we ask them to have a license.

Q. Then in addition to the hotels and dance halls, what about the amusement parks and that sort of thing?

A. If that amusement park is operating for purposes of profit rather than space and luring customers in there, they take out a blanket license with the Society. May I say to you, it is very cheap.

Q. Do you mean then for your interpretation of the public performance for profit is any user of music that performs for the public where he might derive benefit from the playing of the music?

A. Where he wants to get the public into his place and do business and utilize music.

Q. Then in the hotel room, where they have music come into the room through broadcasting, how is that handled?

A. We won a decision in the Supreme Court of the United States on that question, and have never charged.

Q. That I am trying to get at is that the hotel rooms also pay that?

A. At the moment we are not collecting from them.

Q. What do you do in connection with the telephone company or branch of the telephone company that has that service?

A. We have nothing to do with the telephone company, sir.

Q. But I mean they have the connection?

A. The remote control by the telephone company from the broadcasting station into hotel rooms?

[fol. 262] Q. Yes.

A. We took the question into the United States Supreme Court and they upheld our rights, but we haven't exercised our right at this time.

Q. Now, how about such things as volunteer fire departments, the American Legion halls and things of that sort?

A. If the American Legion hall is running for purposes of profit, we don't charge the American Legion. I would like to answer that further. If someone hires the American Legion hall, and if the American Legion rent a user their hall, to a group of people who want to stage a dance for purposes of profit——

Q. (Interrupting.) Now, volunteer fire departments, where they conduct dances in municipal auditoriums, how is that handled?

A. No, we do not collect from volunteer fire departments. We are only collecting from people in the usage of music for purposes of profit. We don't collect from granges, American Legions, and we don't collect from municipalities. I can refute it to this record.

Q. Now, Mr. Buck, when this money is collected in for the public performance rights, the composer whose music has been played for public performance rights, he doesn't get the particular money that comes in; it goes into the coffers of the American Society, and there, through its Board of Directors, it is divided up into classifications to which the Board of Directors assign the various membership, is that right?

[fol. 263] A. That is right.

Q. In other words, if a composer who has——

A. (Interrupting.) Let me correct you, sir. The Board of Directors, they distribute it with every publisher and writer member in the American Society.

Q. There isn't any doubt about that. Now, how is that classification of the membership arrived at; who arrives at it and determines that?

A. The classification committee—there is this committee in the American Society. For the record here, all the money

taken in by the American Society is distributed fifty per cent to the publisher members of the Society and fifty per cent to the writer members of the Society. The twelve publishers who are members of the Board of Directors sit down and analyze the activity of the numbers, and the number of works in the catalog of that man; the catalog and quality of his works and the years of service that the Society has had accessibility to that catalog, and that Board is representative, sir, of the production publisher, the so-called standard publisher who publish what we call standard works, I mean like Mrs. Nevin's husband who wrote "The Rosary", and she is in this court room, the widow of him. They have representation on the Board. The popular song writer who writes a number of songs, they have representation on the Board.

Q. You say there are about one thousand composer members?

[fol. 264] A. That is right.

Q. I think that the exhibit you introduced here showed somewhat less than that; I think about 889 to 900.

A. Well, I am telling you as of today. We have taken in members; we have every month a membership committee that meets and reports at our Board of Directors, and we elect new members. I can give it with a degree of accuracy as of today.

Q. Now, among those one thousand members, the composer members, that get fifty per cent of the net receipts, there are classifications of those members that are made by the classification committee?

A. That is right.

Q. Now, you have been a member of that classification committee since its foundation?

A. And chairman of it.

Q. And you are president of the Society?

A. Yes, sir.

Q. And you are familiar with the subject matter of classification, I suppose?

A. Yes, sir.

Q. Now, please tell the Court as briefly as you can the various classifications.

A. I will be happy to do so.

Q. Go ahead.

A. First, I must prepare the Court so there will be no [fol. 265] false intimation in the background in the atmos-

phere of what is going on here. Ordinarily we would like to have a system of each time a number is performed that that person was paid for that individual performance.

Q. That is a physical impossibility.

A. You know that, sir. You know there were sixty-five million performances publicly performed in the United States last year, and it would take a city as big as Lincoln, Nebraska and all its clerks to analyze those programs and extract them.

Q. Get back to the question.

A. I am going back to the question. In the absence of that, we formed what we call a classification system, wherein representatives from the Board of Directors of every quality and nature of work would meet every three months, going over that member's work, his contributions, how many years he had been in the Society, the number of works contributed, the nature and quality of his works, the vogue and popularity of his works. That is the way we classify these members.

Q. How many are there? Give us the classifications; what I want are their classifications.

A. Of the exact classification?

Q. Yes.

A. First class is Double "A", the next is "A".

Q. How many members are there of the Double "A" class?

A. About fifty.

[fol. 266] Q. How much do they get per year?

A. About $15,000.

Q. Are you in that class yourself?

A. No, sir, I am not, unfortunately.

Q. There are about fifty in that class, and they get about $15,000 per year?

A. Yes, sir.

Q. What is the next lower class?

A. "A".

Q. How many are there of that number?

A. There must be about fifty.

Q. And what do they get per year?

A. About $12,000 a year.

Q. Are you a member of that class?

A. No, sir, I am not. And if it is any information to you, owing to my activities in the Society as its president, such as at this moment——

Q. (Interrupting.) You are a member of one of the classifications, are you not?

A. I took myself out of Class "A", where I was since the foundation of the Society, and moved myself down.

Q. How long were you in Number "1" classification?

A. I was in classification "A"—first it was "AA" from 1914 up to six years ago, and I personally took myself out of that class owing to my inactivity.

Q. You haven't written any music or composed lyrics [fol. 267] for many years?

A. The last thing I did was the late Florenz Ziegfeld's last Follies he produced before he died in 1932.

Q. Go on with the rest of the classifications.

A. The next classification is class "Double B", then "B", then "Double C" and then "C".

Q. "B" is what? How many members are there and what do they get?

A. At the moment I can't tell you. I would be very happy to furnish this information.

Q. Couldn't you give us about what they are?

A. Yes.

Q. What are they?

A. I will answer you, and I trust this Court and you will accept this as approximate.

Q. All right.

A. I am not such a genius that I can tell you for sure. I imagine in Class "B" there would be——

Q. (Interrupting.) "Double B."

A. "Double A" fifty—between forty and fifty in "A". I imagine in "Double B", about forty in "B".

Q. Take it right down.

A. I have to wait a moment. In "B", about thirty or forty. In "Double C"——

Q. (Interrupting.) Give us the amount of the various ones.

A. Well, the top class gets about $15,000.

The Court: "What do you mean by "top class"?

[fol. 268] The Witness: "Double A".

A. (Continuing:) "Double B" gets about $9,000, or $8,000. "Single B" gets about $6,000 or $7,000. The next class, "Double C", gets about $2,000.

Q. How many members in that?

A. In "Double C"?

Q. Yes.

A. I imagine about seventy-five or one hundred, and the same in "C".

Q. Then what is there?

A. The next class is called "C-1".

Q. What do they get?

A. They get about 1600.

Q. How many are there in that?

A. Well, in "C-1", I imagine there are about fifty or sixty.

Q. And then what?

A. The next class is the class called "Double D"; that gets about $1200 a year, I imagine.

Mr. Frohlich: You mean each member of each class gets that much each year?

The Witness: Each member of each class gets that much each year.

Q. What is the next class?

A. Interspersed in between the classes—I want to straighten the record out while going down the road. In between I have skipped a couple, where I want to put it in. [fol. 269] There is such a thing as a permanent "A", such as a set classification, that a person derives, and there is a permanent "B", and there is a permanent "C"—as long as they live they get a set amount of money.

Q. What are those amounts and how many members are there in those permanent classes?

A. I imagine in the permanent "A" they get $4,000 or $5,000 a year; about ten. I imagine in permanent "B" they get about $3500 a year; there are about ten or twelve in that class. In permanent "C" there is about eighteen or twenty. You realize, sir, I am guessing, without the accurate figures in front of me, but they are approximate.

Q. What is the lowest class after the last one you mentioned?

A. The lowest class is Number 4.

Q. How many are there in that?

A. Oh, I imagine in "4" there are about seventy or eighty.

Q. And they receive about how much per year each?

A. About $40.00 a year—$10.00 a quarter. They are people who have at some time or another written a song or two, but who haven't written anything that has attained any eminence in the Society, and they want to be members of the Society.

Q. Then you have a non-participating membership, do you?

A. Yes.

Q. How many in that?

A. I imagine the non-participating membership would [fol. 270] have about—may I correct this for the Court here, about this non-participating membership so that this won't be misconstrued? In the policy of this Society, if a man makes application for membership, and he is first put in a non-participating class for reasons of wanting to know his stability, whether he is going to remain a song writer, whether the quality of his work is such that he should be put into an active class, which is an active membership where we divide money, there is a very definite reason for that. If you are a music publisher and make application to the American Society, we take you in and we first put you in the non-participating class.

Q. How long does he remain in that non-participating class?

A. Until such time until some public performance is made in these United States of his work. A lot of those men in those classes don't have public performance. The minute they publicly perform, we make them active.

Q. Is there any fixed time they must remain in there, such as five years?

A. No, sir; they can stay in five minutes if they show activity or have publicly performed in the United States.

Q. When they first come in, they come into the non-participating class?

A. That is right.

Q. That is the way the members come in?

A. Every member comes in the American Society that way.

[fol. 271] Q. And then he stays in there until the Board of Directors through their classifying committee takes him out?

A. No, the classification committee has nothing to do with it. The Board of Directors elects him to membership, like the Bar Association or the Medical Association.

Q. After he is elected to membership, then how does he get into the various classifications?

A. You mean how he gets to his classification?

Q. Yes.

A. These classifications are used in the absence of the program system which would take a million dollars.

Q. I understand that.

A. You mean how does he become classified?

Q. Yes. Through the classification committee; you have already answered that.

A. Yes.

Q. And how many members are there from this list that you handed in of some one thousand members—as I say, nine hundred to one thousand members—that are in the non-participating class probably would be the difference of the sum total of those you have already mentioned, and one thousand, isn't it?

A. I don't think there are over one hundred non-participating members in the Society. He is a person with a desire and inclination to write, and he has written a song that is not publicly performed. That is why he is in the [fol. 272] non-participating class. The minute a publisher or writer shows in any licensed establishment in this country that there is performance of his work he is immediately made active, so I don't want any misinterpretation of a non-participant.

Q. The Society then is operated through a Board of Directors of twenty-four men, isn't that right?

A. That is right.

Q. Of twenty-four members?

A. That is right.

Q. And your articles of the association show how the members are elected?

A. That is right.

Q. And elsewhere here we have the members who make up that Board?

A. Yes.

Q. You are president of this Society?

A. Yes, sir.

The Court: He has testified to that.

Q. You receive compensation for acting as president, do you not?

A. Yes, sir.

Q. And that is paid by the American Society?

A. Yes, sir. But I would also like to put in the record in answer to that question, I served from 1914 to 1931 without a dime in salary.

Q. You get a salary now?

A. Yes, sir.

[fol. 273] Q. What do you get?

A. $50,000.

Q. Per annum?

A. Yes, sir. I would lik. to straighten this out, too. Up to three years ago—let's put all the cards on the table, so that it won't inflame the imagination of the record—I got $20,000 up to three years ago, then I got $35,000, and as of January 1st, unrequested, I get $50,000.

Q. What classification are you in?

A. I am in Class "BB". I put myself there.

Q. How much per annum?

A. That gives me about $8,000, I think.

Q. Now, is Mr. Mills secretary-treasurer of the organization?

A. No, he is not. Mr. Mills is employed as chairman of the administrative committee of the Society.

Q. He receives a salary, too, in the administration of this Society?

A. Yes, sir.

Q. What salary does he get?

A. $50,000 a year.

Q. That is the Mr. Mills who is in the court room?

A. He is here, and is going to testify and tell you about certain things.

Q. Mr. Paine also?

A. He is also here, and he is general manager at $25,000 a year.

[fol. 274] Q. Are either Mr. Mills or Mr. Paine composer members?

A. They are employees of the American Society and run the operation of its business.

Q. You maintain an office in New York City?

A. We certainly do.

Q. What is the address?

A. 30 Rockefeller Plaza.

Q. You have employees?

A. We have.

Q. And run and operate the American Society of Composers, Authors and Publishers at that place?

A. We do. We have no magic to do this without employees.

Q. You have payrolls and pay your stenographers and clerks the same as anyone else in business?

A. Yes.

Q. Now, you also have in your organization a group that are called the publisher members?

A. That is right.

Q. And they consist of some one hundred and twenty-three or one hundred and twenty-five of the music publishers in the United States, is that right?

A. That is right.

Q. When a person composes a piece of music they have it copyrighted or they assign the rights of having it copyrighted to their publisher, is that right?

A. That is right.

[fol. 275] Q. The publisher sets it up in salable or usable form?

A That is right.

Q. The publisher sells that music to the public that want it, the users that want the records?

A. You have forgotten a very important thing in painting that picture. The publisher, when he takes that copy of music I created, he must then create a demand for that music. That is a very important thing, a function besides printing sheet music.

Q. That is a matter of salesmanship?

A. That is right. That is a very important thing.

Q. And each one of those publisher members are members of the American Society of Composers, Authors and Publishers, is that right?

A. Yes, sir. We have no jurisdiction over any publisher who isn't a member.

Q. Of this one hundred and twenty-three, they are the largest and best music publishing houses in the United States?

A. I believe that is true.

Q. Each one of those publisher members receives money from the Society each year?

A. That is right—fifty per cent of the entire.

Q. How is that fifty per cent of the entire divided?

A. That is divided on the same system that the writers have. A group of twelve men representing the so-called standard publishers who publish higher class music such as [fol. 276] sacred music and the like, such as Carrie Jacobs

Bond's music. The group of publishers who produce works of like musical comedies and the popular works——

Q. (Interrupting:) Are put in different classifications?

A. Yes.

Q. How many classifications are there of the publishers?

A. Well, that I couldn't answer. I will be glad to furnish it to the Court. I imagine the publishers have similar classifications to the writers—maybe not as many classes.

Q. About what do the publishers receive from the first class in dollars and cents per year?

A. You mean the top ranking musical publishers?

Q. Yes.

A. Oh, I imagine $100,000.

Q. How many in that classification?

A. I think two; it may be only one. May I say this to you, sir, I am not pleading any ignorance of this question, but I have never had anything to do with the publisher classification. The publishers settle their own classification affairs. While I sit as president of the Society, my presidency comes by virtue of being a member of the Board, and I have always maintained the position that no publisher member sitting at that side of the table has any right to tell a writer member of the Society how he should be classified, or where classified, and from the same viewpoint the writer members never entered in the publishers' activi- [fol. 277] ties where they shouldn't. For the sake of the record, as the president of the American Society, I have attended every classification committee of the writers since its foundation, and never attended a meeting of publishers' classification in my life.

Q. Is there anybody here in your organization that can tell us about that?

A. Yes, sir. We have the general manager here, we have Mr. Paine and Mr. Mills who will enlighten you thoroughly on that question.

Q. In the distribution of this money, what amount or how much does the American Society get?

A. The American Society took in last year nearly six million dollars, and it cost eighteen per cent to operate, and the rest of it was distributed to its members and to fulfill a foreign obligation of about three hundred thousand dollars.

Q. The prices charged for the public performance rights in the State of Nebraska are fixed by your Board of Directors?

A. No, no. Let us get that straight. The prices as charged in the State of Nebraska—we sat down and negotiated, sir, so that we get the whole picture.

Q. Please answer my question.

A. I want to answer the question. You say we fixed it—we did not fix it. We negotiated with the National Association of Broadcasters who fixed it, and we sat down with the Hotel Owners Association and fixed it, and sat down [fol. 278] with the Motion Picture Operators of the State of Nebraska and fixed it. I want that record clear. There was a period of negotiations. It was not fixed by any individual writer or board of directors of the American Society. It was fixed by negotiation.

Q. But the price ultimately arrived at and accepted and made satisfactory to the National Association of Broadcasters and the American Society, that price was fixed and finally determined whether acceptable or not by your organization in New York, isn't that right?

A. That is true, with the other negotiators on the other side of the table. May I say about being satisfactory? I don't think it is satisfactory on either side.

Q. Were any bonuses paid in addition to the regular salaries and things of that sort?

A. The only bonuses ever in the history of the association, and Mr. Mills or Mr. Paine and myself—the highest bonus ever was $5,000 Christmas present.

Q. When was that?

A. Last year.

Q. To each one?

A. Yes.

The Court: Each one?

The Witness: Yes, sir; I as president, and Mr. Paine as general manager, and Mr. Mills as chairman of the executive board.

[fol. 279] Q. There is no agency here in the State of Nebraska that fixes the prices that users here in this state conform to?

A. What we do, our representatives in the State of Nebraska knows about it.

Q. From information you send to him into the State of Nebraska?

A. Let me straighten you out. He knows what the agreement was made in New York by the Broadcasters in the State of Nebraska who are members of N. A. B. on the deal also. He didn't negotiate it personally—it was negotiated by the N. A. B. and Board of Directors of the American Society.

Q. In other words, his information as to what to charge comes from New York, and then he follows out your instructions and puts that into force and effect in the State of Nebraska?

A. That is right.

Q. And that representative of yours here in this state, what is his name?

A. Mr. Eugene Blazer.

Q. He has been your representative for a number of years?

A. Yes, sir; and very efficient.

Mr. Hotz: I will ask the reporter at this time in connection with Exhibit Number 16, whether or not you have had an opportunity to count the number of contracts in that exhibit?

The Reporter: I have not finished it as yet.

The Witness: About 390 in the State of Nebraska, I will tell you now.

[fol. 280] Q. Are there any users of vocal and instrumental music in the State of Nebraska that do not have contracts, where they just temporarily go in and furnish music like dances or something of that sort?

A. We never issue licenses to any singer. We only license the establishment, either the owner or dance hall or the man who controls the lease of the motion picture theatre. Never in our life have we issued a license to a human being.

Q. Whoever it is you deal with, in individual instances, there are no special contracts that are made up for them; you do have instructions of that sort, where they collect money from the various users?

A. Never from an individual performer in the history of this country—from the establishment or hotel or dance hall or broadcasting station or picture theatre.

Q. We will say it is a dance hall or something of that sort, where they occasionally have a dance.

A. That is right.

Q. Where your inspectors would go around and negotiate and make a deal right on the spot?

A. That is right.

Q. I presume there are quite a few of those in the State of Nebraska, are there not?

A. Yes.

Q. Will you give us such instances?

A. Yes. There are some of them that pay $30.00 a year to [fol. 281] the American Society, and it gives them accessibility to forty-six thousand works from all over the world, without which they couldn't open the doors of their dance hall.

Q. You say there are forty-six thousand copyrighted works that the American Society has?

A. Forty-six thousand members, I wanted to say. I will correct myself. One thousand members of the American Society, and forty-four thousand members throughout the world who also go with the license we issue to these establishments.

Q. About how many pieces of copyrighted music would you say that the Society deals in the public performance?

A. How many, you mean, we have in our catalog?

Q. Yes.

A. For a user to use?

Q. Yes.

A. That is very difficult to say. I imagine he would have accessibility to three or four hundred thousand musical works or arrangements and also musical works. You must understand, sir, when I say that, I state that after a certain number of years according to the Copyright Act, the numbers fall into the public domain, but from then on such arrangements are made of classics which is copyrightable.

Q. They are copyrighted then again after that?

A. That arrangement is copyrighted, that specific arrangement.

[fol. 282] Q. Let us get this straight about publisher members. There are one hundred and twenty-five members that are designated as publisher members; they are the part of your organization that actually own the copyrights?

A. They do, yes, in the majority of cases, because the custom has been in the musical business when a composer

and author writes a song, they turn it over to the publisher who secures a contract from them at so much royalty, probably one or two cents, and for a production, six cents. That copyright is taken out by the publisher and that is why the publisher must be in the American Society.

Q. These publisher members each publish a catalog or have a catalog of the musical copyrighted compositions owned by their house, do they not?

A. Yes.

Q. But the public performance rights on each one of those catalogs by each publishing house is assigned to the American Society?

A. That is right; everything in their catalog is assigned.

Q. That applies to the State of Nebraska as well as elsewhere?

A. That is right.

Q. Those catalogs are available from those respective publishers?

A. They are.

Q. So that the public knows what each publisher has, the style, the kind and class of music, is that right?

A. Yes.

[fol. 283] Q. In dealing with the public performance rights it must come through the American Society?

A. That is right, because there are thirty thousand licenses and no individual publishing house or writer is capable of looking after his interests with the infringements from Maine to California.

Q. Of course, you don't know, and have no way of knowing, the number of individuals and composers that have made up that vast amount of music, do you?

A. Yes.

Q. How many would you say there were in the United States?

A. I have given you the accurate figures of the number under our control—one thousand writers. In that, so that the record will be straight, there are about two hundred estates in there; they are dead, such as Victor Herbert and Sousa. Their widows and their children get money just as if Sousa and Herbert were living.

Q. Through whatever classification they happen to be in?

A. And they happen to be in the best, although Herbert has been dead for fifteen years; also Sousa.

Q. These composer members, in addition to what they receive from the American Society for public performance rights, they also receive, do they not, through an arrangement with their publisher, a royalty on the music sold?

A. Absolutely; that is why he went to the publisher with the song, to get it published, because it is not under the [fol. 284] jurisdiction of the American Society until published.

Q. And they have got to come through the publishers in order to get any place with the American Society?

A. No, not necessarily.

Q. Then their music couldn't be published; they have to have a publisher?

A. When he starts.

Q. Do you know generally, and I think it appears in these depositions on file, what percentage or royalty they get for each piece of music sold, vocal and instrumental?

A. In the so-called popular song, such as any modern hit, what we in the trade practice call a popular song?

Q. It is three cents, isn't it?

A. Two in some instances.

Q. Between two cents and three cents?

A. It depends. A writer that is more distinguished, the more he can get.

Q. On that end of it, that is a matter of negotiation between the composer and the publisher?

A. Yes. The American Society has nothing to do with that.

Q. The composer gets his check for that royalty directly from his publisher for any amount he wishes to charge or whatever the deal is?

A. Whatever his standing is as a representative writer. He may have six cents if he is big enough and has written magic hits and there is a demand for his work. Irving Berlin publishes his own music.

[fol. 285] Q. Irving Berlin is an important composer and a member of your Society, is he not?

A. One of the original members of the American Society in 1914.

Q. And a publisher member?

A. Yes; he owns his own publishing house and writes. He has a tinge of genius.

Q. The matter of the collection of the public performance rights, if the user in the State of Nebraska refuses to pay

or refuses to accept the terms and conditions, how is that handled? Supposing the user of vocal and instrumental music in the State of Nebraska in dealing with the representative of your Society in the State of Nebraska, couldn't get together with him, and they refused to pay or said it was too much and wouldn't pay that amount, and they couldn't make a deal or a transaction satisfactory to your Society in accordance with the instructions from your office in New York.

A. That same goes with any business in the world. If there is no deal you don't want that, and then you don't use it.

Q. Then you furnish him with a typewritten or copy list of the copyrighted music you own?

A. No. We furnish any licensee with the American Society. We have no printed list.

Q. There is no printed list furnished?

A. May I say this so that the Court will have a clear con-
[fol. 286] ception of it.

Q. I want them to have a clear conception.

A. We have put in this record a list of the members of the American Society, every composer and author and every publisher, and it is very easy for a user of music who desires to use music for public profit, all he has got to do is look at that sheet music—there is the publisher and there is the writer, and if that fellow belongs to the American Society and he wants to use it, all he has got to do is find out whether the Society has control of it or not.

Q. By going to the copyright office?

A. No.

Q. By going to the music itself?

A. No.

Q. Now, Mr. Buck, isn't it true that the average operator of a hotel or broadcasting station who buys his music under contract, and is liable under the law for these public performance rights, has no way of telling what his musicians are going to play?

A. It is not true, and he is not running a good broadcasting station if he is operating that way. Even when there is remote control into the hotel, he should see the quality and nature of the works if he is running a good station, and that is the only kind he will run if he is smart.

The Court: Just a minute. Limit your answers to the questions.

[fol. 287] The Witness: I beg your pardon; I apologize to the Court.

Q. You think it is necessary under your viewpoint that a hotel proprietor or dance hall proprietor or any other user of music such as broadcasting stations, they must know and determine if they can't deal with you or won't deal with you, and they must then determine from each piece of music played, from the marks placed on it, whether it is copyrighted or not, and by whom?

A. There is not a copy of sheet music played unless the publisher's name and the author's name is on it.

Q. In the event the music comes into Nebraska from the National Broadcasting Station in New York, or the Columbia or Mutual, and it is sent in to WOW or the Central States Broadcasting Station in this state, and there rebroadcast, and assuming they haven't had any opportunity to deal with you, or have not dealt with you, what means or method would they have of knowing whether or not it was copyrighted?

A. I am quite sure with all the rights involved in getting a license from the United States Government that no broadcasting station in the State of Nebraska would indulge in any such activity even if they bought and paid for a sustaining program from New York. They certainly want to know the nature and quality of it, and that it was cleared, and if they bought a nationally known program like Charlie McCarthy or Toscanini's orchestra, they would [fol. 288] certainly know that stuff was cleared. The broadcasters are smart.

Q. Mr. Buck, the fact remains if they cannot deal with your Society with the amount of copyrighted music there is, speaking now of broadcasting stations, hotels and so forth, or don't deal with your Society, and assuming that they are acting in good faith and do not want to infringe on the copyrights, they have no alternative excepting to go to the sheet music and look on it and see in whose name it is copyrighted?

A. I beg to differ, sir. In operating a broadcasting station he pays the employees for a musical knowledge and to put on a program. A good broadcaster knows where to get a product from, and I hope he knows the nature and quality of his works. I am leading to this point, that the public domain has millions of works that are acceptable and that he can use.

Q. Who would know in your organization, would it be Mr. Blazer or otherwise, the amount of money paid to your Society in the State of Nebraska that is not covered by the contracts in Exhibit Number 16?

A. That is rather a complex question. If you will simplify it, please.

Q. I mean not covered by contract, but isolated.

A. What is Exhibit Number 16?

Mr. Frohlich: It is based on something not in evidence.

[fol. 289] Mr. Hotz: I only asked him who would know it.

Mr. Frohlich: You asked him who would know something, which, I say, is not in the evidence.

A. If you will specify, I will be glad to answer, if you will tell me what contracts.

The Court: I don't think there is any place in the evidence for that question.

Mr. Hotz: I will withdraw the question.

Q. Now, what percentage of the publishers of the United States are members of the Society? I mean that are really in the business; I don't mean isolated publishers.

A. How many musical publishers in the United States?

Q. I mean what percentage of publishers of vocal and instrumental music used in the State of Nebraska, published by members of your Society?

A. I imagine about fifty per cent.

Q. What amount of the vocal and instrumental copyrighted music is vested in your Society in public performance rights?

A. You mean created in the United States?

Q. Yes.

A. As created in the United States and as written?

Q. Copyrighted in the United States.

A. That is a very difficult question to answer. I would imagine about seventy per cent of it, conservatively. That is all of it the people want to hear.

[fol. 290] Q. I think you stated clearly you did not publish a complete list of your copyrighted music?

A. We do publish a complete list of every publisher member and we do publish a complete list of every author and composer under contractual arrangements with the American Society, and all you have to do is get from the American Society that book as put in evidence. If you are run-

ning a broadcasting station or dance hall, and if you are using any of those, you are doing it without their permission. It is very simple.

Q. That is the way you have of notifying the public of the copyright?

A. That is right.

The Court: There is a continual flow of music. While I am talking to you now, men are creating and writing music —it couldn't be up to date.

Q. What if somebody uses one of those that is just published or copyrighted?

A. If he is a member of the Society there is no danger of that at all. It can't reach the user until it reaches that state of composition.

Q. Through the publisher?

A. Through the publisher, unless the man is so famous, as Mr. Berlin or Mr. Kern, who let bands introduce it before publishing. Mr. Victor Herbert used to do that, and Mr. Sousa used to do that with his famous marches. He [fol. 291] would write a march for a university or state or band and he would let them go ahead and use it before it was even published.

Q. Do you know the amount of music that was sold, vocal and instrumental, by the publisher members last year?

A. All I know, sir, is the sales of sheet music dropped from about seventeen million to two million in ten years. That will give you an idea. There is a cross section of the picture. It has dropped from seventeen million income to be distributed to the writers, from seventeen million to two million. That gives you some idea of what has happened.

Mr. Frohlich: Are you talking about 1933 for that two million, or down to the present time?

The Witness: 1933.

Q. You say you could not estimate the number of copyrights your Society now owns, you as president of it, that is, in the United States?

A. No, I could not.

Q. Or the public performance rights your American Society own?

A. Frankly, I couldn't give you an accur e picture.

Q. Can't you come within one hundred thousand of it?

A. No. May I say I can't?

Q. Who in your organization can?

A. I am going to answer that, sir. It is entirely possible Mr. Mills or Mr. Paine can give you with some degree of accuracy the number, as they are the actual technical runners of the American Society, just what it has in it. They [fol. 292] can be more capable of answering that particular question than I can. You will have that answered in the record here.

Mr. Hotz: With the permission of the Court and counsel, Mr. Bennett would like to ask the witness a few questions. Is there any objection to that?

Mr. Frohlich: Well, I have no objection, if Mr. Bennett will state his relationship to the National Association of Broadcasters and state for the record whom he represents.

Mr. Bennett: our Honors please, I am representing one of the defendants in this case, and happen to be a practicing lawyer in Washington, D. C., and one of my clients is the National Association of Broadcasters.

Mr. Frohlich: No objection.

Mr. Hotz: Mr. Bennett is also with the Department of Justice.

Cross-examination:

By Mr. Bennett:

The Court: Is there some special line on which you would like to examine?

The Witness: I will be glad to answer them.

Mr. Bennett: I would like to qualify some of the things [fol. 293] that were overlooked.

The Court: All right; proceed.

Q. Mr. Buck, you stated on your direct examination that you were present in Washington and appeared before the copyright committee of Congress on all of the statutes or bills which you testified were introduced in Washington?

A. Yes, sir.

Q. Do you recall appearing in Washington before the copyright committee of the House, or rather the committee on patents of the House of Representatives of the 71st Congress, second session, March 4th and 5th and April 2nd, 1930?

A. I do, yes. May I ask, is that the House? Will you specify who was the chairman at that particular time of that sub-committee? Was it Mr. Sirovich?

Q. I imagine so, but I can't state that. I would like to read the statement you made as appears in the official publication of the testimony, and ask you whether that statement was true at the time it was made; it is from Page 250.

The Court: You better first ask him whether he made it.

Q. This appears in the transcript of that record as part of your testimony and statement to the committee.

The Court: Just a minute. That is not pertinent at all.

Mr. Bennett: I think, your Honors, it is quite pertinent in line with Mr. Buck's testimony put in here.

[fol. 294] The Court: If you want to ask him whether he made such a statement, you may do so.

Mr. Bennett: I did ask him.

The Witness: I haven't heard him.

The Court: You didn't ask him whether he made any such statement.

The Witness: You haven't asked me yet.

Q. Did you testify before that committee?

A. Yes, I did.

Q. Will you read this statement and state whether you made it?

A. Why not ask the Court what it is? Let's have it out in the open here.

Q. I would be happy to read it.

A. Go ahead.

Q. "In former times they had told you about the American Society—a terrific monopolistic chimera that was just going to take the Victor Company and the motion picture industry right out of business. Let us put the cards on the table and see what the American Society is. The American Society is an organization which consists of all the authors and composers and their publishers in America."

A. It is entirely possible I said that as a salesman, like your pride of telling the people the N. A. B. is the greatest broadcasting organization in the United States, and as Mr. Ford said, he has the best car. It is entirely possible as [fol. 295] head man selling the music of this nation to users of this country, I am entirely capable of saying I

have the best product. It is very human, and I am entirely capable of saying that.

The Court: Just a minute. Just answer the question whether you made that statement or not.

A. (Continuing) I may have said that. I would like to read what the question was leading to that.

The Court: The question is, did you make that answer or not.

The Witness: I would like to read it.

The Court: He read it to you.

The Witness: It says there I said it. It must be true.

Q. Now, Mr. Buck, do you recall testifying at the hearing held March 21-24-25, 1932 by the committee on patents of the House of Representatives, 72nd Congress, in which you testified; do you recall that?

A. I testified, as I said, at every hearing before the Congress on anything pertaining to the copyright act. I don't know what I said. I did testify. What is the substance of that testimony, I can't recall at the moment. Tell me what I said.

Q. The record published of the committee hearings shows the following testimony: "Mr. Boland:"

A. He was the attorney for the Hotel Men's Association of the United States.

[fol. 296] Q. (Continuing) "The American Society of Composers, Authors and Publishers, I believe—I may be wrong—does not control much more than one-half of the popular music." "The Chairman: Why, Mr. Buck told me they control ninety-five per cent." "Mr. Buck: The copyrighted works." "The Chairman: Can you prove that to me?" "Mr. Buck: Yes." Did you make that statement, Mr. Buck?

A. It says it there. I don't recall it at the time. I am entirely capable of saying that. It depended on that question which was before the House at that time.

Q. Did you believe that statement to be true at the time you said it?

A. That we controlled ninety-five per cent of the music at that time?

Q. Yes, in 1932; March, 1932.

A. I am incapable of saying anything unless I really believe it, Mr. Bennett.

Q. Mr. Buck, in your direct testimony you stated that if it wasn't for the Society you would have to have personally three or four checkers or investigators in the State of Nebraska in order to check up on possible infringements of your copyrights?

A. As the law now stands, but if this law is passed, I would need one hundred.

Q. In the bill of complaint filed in this cause, on Page 14— [fol. 297] you signed the bill of complaint, I believe?

A. I did.

Q. (Continuing) This statement is made: "Complainant Gene Buck wrote the lyrics in many musical compositions for over twenty years last past, and from time to time he entered into contracts with various musical publishers, pursuant to which such publishers duly secured copyright in such respective compositions by publication, deposit and registration of the works as required by the Copyright Act." Do you own the copyrights of those works, Mr. Buck, or the publisher with whom you contracted?

A. The publisher owns them.

Q. Then am I right in believing that it would be the publisher who would have to check to determine infringements in the State of Nebraska?

A. May I correct you, Mr. Bennett, and say to you it so happens in the construction of the American Society that when a member signs an agreement, from the time he signs that agreement, an author and composer vests in that Society that performing right before it is ever published. It comes under the jurisdiction of the Society on its creation. I want to make that clear with this Court. The minute he writes that comes under the jurisdiction of the Society through a contractual arrangement.

Mr. Bennett: May I suggest for the record there is a copy in the record, and it shows as to whether it transfers [fol. 298] any rights prior to publication.

That is all.

Mr. Hotz: Would the Court consider it of any value right now if I read one of those typical contracts?

The Court: I presume it is in evidence.

Mr. Hotz: It is in evidence.

The Court: It speaks for itself, unless you want to make an argument, and have an argument with this witness. One of the troubles here is that the witness has construed a good many things that are in writing.

Further cross-examination.

By Mr. Hotz:

Q. Now, the point I want to get at is this: In the agreement you have with the——

Mr: Frohlich: Do I understand you are interrogating the witness?

Mr. Hotz: Yes.

Mr. Frohlich: I thought you had completed.

Mr. Hotz: Just one question.

The Witness: It is all right.

Q. When a member becomes associated with the American Society and signs one of these contracts such as Exhibit Number 14, which you have signed, you say every [fol. 299] other member must sign?

A. Publishers and writers have the same form of contract. There is no difference.

Q. They have the exclusive right of public performance in every musical work, and it shall be deemed assigned to the Society by this instrument, whether they have made any other assignment?

A. That is right.

Q. And that goes for future works and everything else?

A. If I go home tonight and write a song, the minute I get through it comes under the jurisdiction of the Society. Here is the distinction I want to make clear for the Court.

Q. Just a minute. I will let your counsel examine. That is all our cross examination.

A. All right.

Mr. Frohlich: No further questions.

Witness excused.

[fol. 300] Edwin Claude Mills, was called as a witness in behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. State your full name.

A. Edwin Claude Mills.

Q. Where do you reside?

A. New York City, in Shelter Island.

Q. How many years have you resided in New York?

A. About twenty-two.

Q. Prior to your coming to New York had you been engaged in any business in connection with the theatrical or entertainment professions in the country?

A. Yes; for many years previously I had been in practically all forms of show business.

Q. Had you any connection with any motion picture theatres at any time?

A. I ran a string of theatres in the south and southwest.

Q. Did you become familiar with the custom and practice of operating motion picture theatres?

A. All types.

Q. Did you have any connection with the stage in any manner?

A. I did.

[fol. 301] Q. Will you please state what that connection was and when it commenced?

A. Well, I produced dramatic stock, played travel and concert companies, all sorts of entertainment, and the legitimate in Texas, Oklahoma, Arkansas, Kansas and Missouri from 1911 to 1913.

Q. Did you have any experience with the stage after you came to New York?

A. No direct experience, but as an employee of the vaudeville protective association I had an opportunity to observe the operation, particularly of the vaudeville theatre.

Q. Vaudeville was prevalent in those days and was quite a business?

A. It was an enormous business.

Q. Is vaudeville practically finished today?

A. Yes, sir.

Q. When did you come with the American Society of Composers, Authors and Publishers?

A. In 1921 actively with it.

Q. In what capacity were you employed by this American Society?

A. Chairman of its administrative committee.

Q. Have you been employed by the Society ever since 1921?

A. Except from November, 1929 to March 1932.

Q. And during that period what were you engaged in?

A. I was president of the Radio Music Company.

Q. After you ceased your connection with that company [fol. 302] in 1932, did you then resume your employment with the American Society?

A. I did, as chairman of its administrative committee, as general manager.

Q. And then did the time come when your official position with the Society was changed?

A. Yes; some two years ago I was elected chairman of its administrative committee.

Q. And that is your present official standing with the American Society?

A. That is right.

Q. Now, in your business connection with the American Society did you have occasion to contact the various users of the performing rights of the works of the members of the Society?

A. Many times, yes, sir.

Q. Were you with the Society when the motion picture theatres became active in the use of American Society music?

A. Well, the motion picture theatres had been active in the use of American Society music since the beginning of motion pictures. I was with the Society at the time of the first negotiations between the Society and the motion picture theatres.

Q. In what year were those negotiations?

A. They started in 1919. I testified a moment ago I went with the Society in 1921. I had been acting in an advisory capacity in the Society without fee since the middle of 1919.

Q. But you became officially connected with the Society [fol. 303] on a salary basis in 1921?

A. Yes, sir.

Q. During that period from 1919 and thereafter did you personally conduct the negotiations with the motion picture theatres with reference to license fees?

A. Under the authority of the Board of Directors, yes.

Q. Do you recall the names of the various groups of associations, trade organizations of the motion picture theatres in those years?

A. Well, the first organization, national organization, with whom we were successful in making a contact, that is, getting them to sit down and talk the thing over and

stop attacking us, was the Motion Picture Exhibitors League, of which Sidney Cohen, now deceased, was the president. We had had and attempted to make, sometimes successfully and sometimes unsuccessfully, contacts with a great many of the state organizations of motion picture theatres. The names of the individual associations I don't recall, except I recall New Jersey, Kansas, Texas and California.

Q. There was one in New York?

A. Yes; and Wisconsin. Definitely in New York, yes.

Q. Did a time come when you acting on behalf of the American Society, negotiated a form of contract with the motion picture theatres?

A. A number of different times. The first contract we succeeded in negotiating with the Motion Picture Exhibitors [fol. 304] League after the first copyright hearings in Washington, which I remember were about 1922, and proposals had been made there to amend the copyright law.

Q. Were you present at those hearings from time to time?

A. Yes, sir.

Q. Can you refresh your recollection from this document as to when the hearings were held and bills were introduced in Congress from 1924 down to 1936, affecting the copyright act?

A. As to all of these except those on which hearings were held in 1931 and 1932, I attended the hearings and testified at many of them.

Q. I show you a tabulation, according to years, setting out the various bills introduced in Congress from 1924 down to 1939, affecting the copyright act of 1939, and ask you whether that was gotten up pursuant to your direction?

A. Oh, yes; I made this myself.

Q. Does that truly and accurately represent the bills introduced in Congress during that period?

A. According to the best records we have, it includes all the bills. We think there are some bills not included. It is not all inclusive.

Q. Will you hold this document in your hand? What year was the Dill bill presented?

A. In 1924, the 68th Congress and first session.

Q. What, if you know, was the important amendment in that bill with respect to performing rights for profit?

[fol. 305] A. Well, the bill's purpose was to declare a performance of a copyrighted musical composition by radio

or broadcast or radio telephone should not be considered a public performance.

Q. That bill never passed, did it?

A. No.

Q. Were you present when any hearings were held on the bill?

Mr. Hotz: I object to that as incompetent and immaterial and not within the issues of this case. Here is a witness who has appeared before various committees in Congress.

The Court: I assume it goes to the purpose and necessity for the organization.

Mr. Frohlich: It is simply to show who sponsored those bills from time to time in Congress, and who appeared in favor of those bills, because I think it gives the Court a history and picture of what has been attempted by the users of the copyright over the years. I will be very brief with it, and I have only a few questions on it.

The Court: Well, go ahead.

A. Yes.

Q. Do you recall who appeared in favor of the bill?

A. Yes.

Q. Who?

A. Organizations representing the broadcasters, the associated Broadcasters, the motion picture theatres, the hotel [fol. 306] owners, the dance hall proprietors, representing all organizations of users in commercial public performance of copyrighted works.

Q. Were you present when any Senate bills were introduced along the same lines?

A. Yes, sir.

Q. Do you remember the Duffy bill introduced by Senator Duffy?

A. Yes, sir, very well.

Q. Were hearings held on that?

A. Yes, sir.

Q. Were you present?

A. No, sir.

Q. You were not present then?

A. No, sir. I was away from the Society then.

Q. Now, Mr. Mills, you testified you assisted in the negotiations, or participated in these negotiations between the Society and picture people that resulted in a contract. Do

you recall the terms of the first contract with reference to the compensation to be paid by picture theatres for use of music?

A. Yes; they were to pay five cents per seat per annum, and if they operated four or less days per week they were to pay two and a half cents per seat.

Q. Were those sums paid by the pictures?

A. Not universally or unanimously or agreeably paid—when we could collect them.

[fol. 307] Q. Did the time come when you entered into further negotiations with the picture people?

A. Yes, sir.

Q. Were these terms changed?

A. Yes, sir.

Q. Will you please state what the change was?

A. The rate was increased under the negotiations to ten cents per seat per annum, and five cents in a case of a theatre operating four or less days a week.

Q. Were negotiations conducted with a trade association representing the theatres?

A. In both cases, yes, sir.

Q. By the way, when was the second contract made with the picture companies?

A. I would say in 1928.

Q. Was any further contract made with the picture theatres?

A. Yes, sir.

Q. About when?

A. In late 1932 or early 1933.

Q. Have the rates been changed?

A. Yes; the rates were again increased by negotiation.

Q. And what are the rates now?

A. They are on a sliding scale now, with a maximum of twenty cents per seat per annum for theatres having a capacity of more than two thousand seats, and fifteen cents per seat per annum for theatres with fifteen hundred to two [fol. 308] thousand seats, and ten cents in the lower bracket seating capacity.

Q. Are those rates now in force in the State of Nebraska?

A. Yes, sir.

Q. By the way, in the conducting of these negotiations with the picture theatres and further negotiations with respect to users throughout all this period from 1921 did any

individual member of the Society, whether an author, composer or publisher, himself or itself have anything to do with fixing the price for the particular use of music?

A. Only to the extent he authorized his Board of Directors to fix the rate.

Q. In other words, the Board acted on behalf of the members?

A. All members.

Q. The Board, in the last analysis, fixed the price?

A. No, it didn't

Q. It made the rate?

A. These prices were fixed on the basis of negotiations between committees representing the Society and the users. We never dealt with an indivdual user.

Q. Perhaps you have not understood my question. The individual members didn't ever have a voice in agreeing or coming to a price of any kind, did they?

A. Not in specific and direct relations.

Q. It was always the Board of Directors or the general manager who fixed the fee or suggested a fee, and then con- [fol. 309] ducted negotiations along the lines trying to obtain this fee?

A. Without exception.

Q. Did you conduct negotiations with radio broadcasters?

A. Yes.

Q. When were the first negotiations held with the broadcasters?

A. In September, as I recall it, 1923 when broadcasting was first becoming popular. We called a conference of the representatives of the then broadcasting stations, of which there were but a few.

Q. Where was that conference held?

A. In our office at New York City.

Q. Do you recall who was present on behalf of the broadcasters?

A. Yes. You mean the persons or the organizations?

Q. First, the persons.

A. Well, the American Telephone & Telegraph Company was represented by Mr. Harkness, Mr. McClelland and Mr. White. The General Electric Company was represented by an attorney from the offices of Craveth, DeGierseorf, Swaine & Wood. The Westinghouse Electric & Manufacturing Company was represented, as I recall it, by Mr. Charles H. Tuttle. Station WJAZ of Chicago owned by the Zenith

Radio Corporation, and a number of the other then Chicago stations were represented by Eugene McDonald. There were a few other scattered representatives there, whose names I don't remember, one from Boston and one from Cincinnati.

Q. Did these negotiations result in an agreement between [fol. 310] the Society and the organizations you have just mentioned, with respect to licensing radio broadcasting stations for performing rights of music?

A. No.

Q. Were there any further conferences after the one you described?

A. The first conference was in September and was adjourned to October, at which everyone was going into the whole proposition over the basic problem, being whether or not the broadcasters would concede that performance by radio was a public performance and was a performance for public profit, and at the October conference the broadcasters advised us they reached the conclusion their performances were neither public nor for profit.

Q. At or about that time in 1923 were the motion picture theatre people active in a controversy with the Society?

A. Oh, yes.

Q. Did the motion picture theatre people make complaint to the Federal Trade Commission?

A. They did, and also to the Department of Justice and Post Office Department and to Better Business Bureaus and to Bar Associations.

Q. Did the Federal Trade Commission investigate the Society?

A. They did. We afforded them access to our files and records without any reservation whatever, and we went to Washington and testified.

[fol. 311] Q. Did you in 1923—and when I say you, I mean the American Society—receive notification of the decision of the Federal Trade Commission with respect to its investigation?

A. Yes, sir.

Q. I show you this copy of a document dated January 2, 1923 and ask you whether you ever saw the original?

A. Yes, sir; the original is filed around in some of these papers and courts as an exhibit.

Q. Is the copy you now have in your hand a true and accurate copy made under your supervision?

A. Yes, sir.
Q. Was the original received by you?
A. Yes, sir.
Q. Addressed to Mr. Sidney S. Cohen?
A. A carbon copy was sent to us.
Q. Of the motion picture theatre owners of America?
A. That is right.

Mr. Frohlich: I would like to offer in evidence plaintiffs' Exhibit Number 23.

Mr. Hotz: Objected to as prejudicial to our rights in this case. It purports to be a letter written by the Federal Trade Commission to Sidney S. Cohen, President of the Motion Picture Theatre Owners of America in 1923. It states that the Federal Trade Commission has made an investigation and so forth of this Society in 1923, and what [fol. 312] they did in 1923 and what they are doing today may not be so good. It may not show up according to their own testimony. It is immaterial.

The Court: What part are you objecting to?

Mr. Hotz: Objected to as prejudicial and immaterial.

The Court: Overruled.

Mr. Hotz: There is no proper foundation laid, and the further objection it is an unsigned letter and it is incompetent and immaterial, and is a self-serving declaration.

The Court: By parties to this suit?

Mr. Hotz: No, your Honor.

The Court: Then why it is a self-serving declaration?

Mr. Hotz: Because of the fact that it mentions in the body of the letter the American Society. But it purports to be signed by the Federal Trade Commission. It is a copy of a letter, and says it is a copy of a letter addressed to Mr. Cohen. Further object to it as hearsay.

The Court: What does it say?

Mr. Hotz: Exhibit Number 23 states they have examined this Society and as a result they concluded "that the case is not one calling for the exercise of the Commission's [fol. 313] corrective powers." "The chief reason for this conclusion may be stated as the fact that the making of a claim for royalties apparently in good faith, cannot be said to constitute an unfair method of competition in commerce."

The Court: How is that prejudicial?

Mr. Hotz: It doesn't give us a chance to answer or find out anything about it. It might be.

The Court: Objection sustained. There is not sufficient foundation for it.

(Short recess.)

Q. Mr. Mills, in the years 1924, 1925 and 1926 was litigation going on between the American Society and the radio broadcasters with respect to the construction of the copyright act?

A. Yes, sir.

Q. As a result of that litigation there were decisions by the courts in favor of the Society?

A. There were decisions by the courts construing the law as applicable.

Q. Holding that the performance in a broadcasting studio was, in effect, public performance for profit?

[fol. 314] A. Yes, sir.

Q. Did a time come when you, on behalf of the Society, had further conferences and negotiations with the broadcasters?

A. Yes, sir.

Q. Did these conferences and negotiations result in a contract between the Society and the broadcasters?

A. In 1932, yes, sir.

Q. That was your first contract, wasn't it?

A. The first uniform contract.

Q. In those negotiations and in that contract were the broadcasters represented by any trade organization?

A. Yes, sir; by the National Association of Broadcasters.

Q. How many broadcasters were there in existence at that time?

A. About four hundred, as I recall.

Q. About how many of those four hundred were members of the trade organization?

A. I don't know.

Q. But, at any rate, the National Association of Broadcasters was active in the negotiations that led up to the contract, is that right?

A. Purported to represent the entire industry and conducted the negotiations on behalf of the entire industry.

Q. Represented by counsel as well?

A. Yes, sir.

Q. You had conferences with their counsel?

A. Yes, sir.

[fol. 315] Q. The contract of 1932 was for how long a period?

A. Three years.

Q. At its expiration were there further negotiations with the broadcasters with respect to renewal of the contract?

A. With the National Association of Broadcasters.

Q. Again the National Association of Broadcasters was in the picture with its counsel?

A. Yes, sir.

Q. And you negotiated with the representatives of that association and its counsel?

A. With a committee appointed by the Board of Directors, N. A. B. and its counsel.

Q. These negotiations, did they result in a contract?

A. They resulted in a renewal of the existing agreement.

Q. For how long a period was the existing agreement?

A. The existing agreement was for a period of three years—1933, 1934 and 1935.

Q. In 1935 were there further conferences with the broadcasters?

A. Yes, sir; those are the conferences regarding which I have just testified.

Q. Was a contract made in 1935 between the Society and the broadcasters?

A. An agreement was made to renew the contract then in effect, for an additional term of five years.

Q. So that all those contracts now expire by limitation of time by the end of 1940?

[fol. 316] A. They all run concurrently to December 31, 1940.

Q. About how many broadcasters are there in the United States at this time?

A. Commercial stations, about six hundred; altogether something between six hundred and seven hundred stations.

Q. Do you know how many of those stations belong to the National Association of Broadcasters?

A. I do not.

Q. Do you know and have you information with reference to the operations of broadcasters today; do you know how they conduct their business?

A. In general, yes, sir.

Q. Under their contracts with the Society, the broadcasters have been required from time to time to furnish reports of their operations, haven't they?

A. Yes, sir, a few of them.

Q. Hasn't the Society also made periodic surveys of their broadcasts with a view to ascertaining the compositions performed by the broadcasters?

A. Yes, sir.

Q. Do the broadcasters from time to time send in their programs at large to the Society?

A. Yes, sir. Not all of the broadcasters. A selective group of broadcasters do from time to time.

Q. That is done by the Society with a view to ascertaining the uses made of the music of its members so that [fol. 317] proper classification may be given to its members?

A. So that we can ascertain relatively the compositions of which members are contributing most to the earnings of the Society, so that they may participate proportionately in the distribution.

Q. The broadcasters are divided into groups, aren't they?

A. Groups of broadcasters, yes; the networks and the independents generally.

Q. How many networks are there?

A. Four principal networks.

Q. Will you please name them?

A. Those operated by the National Broadcasting Company, the Columbia Broadcasting Company the Mutual Broadcasting Company, and then I don't recall the corporation name that operates it.

Q. Is that the one known as the Blue Network?

A. The Blue Network and the Red Network are operations of the National Broadcasting Company.

Q. These networks are also called chains, are they?

A. Yes, sir.

Q. Their operations are by means of broadcasts in their own studios and hookups by means of telephone wires coming into the various stations throughout the United States?

A. The program originates in a key station, which may be any station among those stations hooked up for the network broadcast and interconnected by telephone lines with [fol. 318] a program which is rendered in the key station and is broadcast simultaneously and transmitted simultaneously to all interconnected stations and broadcast simultaneously by them to their respective listening areas.

Q. Now, have these chains any hookup with the broadcasters in the State of Nebraska?

A. Yes, sir.

Q. Are there about ten or eleven broadcasters in the State of Nebraska at the present time?

A. Yes, sir.

Q. I show you these maps of the National Broadcasting Company, the Mutual Broadcasting Company and the Columbia Broadcasting Company, and ask you whether these accurately represent the chain systems of broadcasting by these respective chains?

A. Yes, sir.

Q. All over the United States?

A. Yes, sir.

Mr. Frohlich: I would like to offer in evidence plaintiffs' Exhibits Number 24, 25 and 26.

Mr. Hotz: We object to them as incompetent and not made by the witness; they are irrelevant because they do not tend to prove or disprove any of the issues in this case.

Mr. Frohlich: I am laying a foundation, your Honors.

[fol. 319] The Court: Objection sustained.

Q. I show you a list of broadcasting stations within the State of Nebraska, and ask you whether you can tell from this list which of these stations are affiliated with the national chains?

A. Yes, sir. You want me to call off the stations?

Q. Call off the names of the stations.

Mr. Hotz: In Nebraska?

Mr. Frohlich: In Nebraska.

A. Station KFAB at Lincoln, Nebraska, operated by the Central States Broadcasting System is on the chain of the Columbia network operated by the Columbia Broadcasting System, Incorporated, and having its general offices in New York City. Station KFOR of Lincoln Nebraska is on the network operated—I withdraw that; that doesn't seem to be a network operation now. It used to be. Station WOW in Omaha, Nebraska on the network operated by the National Broadcasting Company, general offices in New York City. Station KOIL of Omaha, Nebraska is on the network operated by the Columbia Broadcasting System. I think that is all.

Q. Now, Mr. Mills, when these networks broadcast a performance outside of the State of Nebraska that performance appears simultaneously in all the stations affiliated or hooked up with the network at the moment, doesn't it?

A. Yes, sir.

Q. So that a station in Nebraska which is affiliated with [fol. 320] the Columbia Broadcasting System, and a performance is given in the studio of the Columbia System in New York or Hollywood, that performance comes in under the hookup within the State of Nebraska, doesn't it?

A. If the station is taking that particular program, yes.

Q. And that applies to the three stations you have mentioned in Nebraska with respect to those particular chains?

A. Under those circumstances, yes, sir.

Q. Are many of the compositions of the American Society members performed in network broadcasting?

A. Yes, sir.

Q. You know that from your own knowledge and reports of the broadcasters over many years?

A. Yes, sir.

Q. And a great many compositions are performed outside of the State of New York and reproduced by network hookups in the State of Nebraska?

A. Yes, sir.

Q. I show you a document which was furnished to you, and ask you whether you recognize it?

A. Yes, sir.

Q. Will you please describe that document and tell us what it is?

A. This is a list of compositions transmitted by the National Broadcasting Company in network broadcasts to Station WOW in Omaha, Nebraska during the week of June [fol. 321] 28, 1937 to July 4, 1937.

Q. And that was after the passage of this act in Nebraska, is that right?

A. Yes, sir.

Q. That was furnished to you by the National Broadcasting Company?

A. That is right.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 27.

Mr. Hotz: Objected to as not the best evidence and merely hearsay, and the witness not shown to be qualified to answer.

The Witness: That is not hearsay. I know about that.

Mr. Hotz: You don't know about each one of these individual pieces.

The Witness: I know it was furnished to us by the National Broadcasting Company as a statement of the compositions it had broadcast to that particular station by network.

The Court: In the regular course of your business?

The Witness: Yes, sir.

Mr. Hotz: He is not in the National Broadcasting business.

[fol. 322] The Witness: I am in the American Society and receive this from them every day, year in and year out.

Mr. Hotz: May I ask the witness whether or not you license the National Broadcasting Company?

The Witness: Yes, sir.

Mr. Hotz: The best record, of course, would be the records of WOW to show what they used or didn't use.

Mr. Frohlich: This is a record furnished by them to us, by the National Broadcasting Company.

Mr. Hotz: I said WOW. I am not ready to admit that. We object to that as not the best evidence.

The Court: What is the testimony as to how this came into his possession?

Mr. Frohlich: This is to show, your Honors, that the compositions of the members of the Society are continually broadcast, and here is a week. I could come down with three hundred weeks, each week of the year. These compositions were broadcast outside of the state, and rebroadcast by this hookup within the State of Nebraska, and to me it is very important because this statute frees such broadcast to the broadcaster in the State of Nebraska if the compositions are owned by members of the Society. That is [fol. 323] very material.

The Court: I haven't in mind the materiality exactly. What is the witness' testimony with reference to this document, how it came to him or his associates?

Q. Can you tell us in detail how you got possession of this document?

A. Under the contracts between the Society and all broadcasting stations the Society has the right to demand of the stations from time to time a list or log of the compositions which they perform, and in case of a network broadcast

the so-called traffic sheet which shows the stations that were interconnected for the purpose of receiving the broadcast. Under that clause in our contract we from time to time request the broadcasting stations to furnish us their programs, and in response to that program and pursuant to their obligation under the contract, the National Broadcasting Company, the Columbia Broadcasting Company and other networks, and individual stations, furnish us, we presume honorably and honestly, and we have no reason to believe otherwise, complete lists of the compositions they broadcast program by program, and in each case accompany the program by the traffic sheet which shows how many and what stations specifically received a rebroadcast of that program.

Q. Did you, pursuant to a request made upon the National Broadcasting Company, obtain from them this particular [fol. 324] document?

A. I cannot so testify. I repeat that this looks like one of them. We receive thousands, and I presume it is, but that particular document, of course, every rule of reason will tell you it would be impossible to so testify.

Q. It isn't prepared on paper or typewritten in your office, is it? You can recognize that.

A. It is prepared by the National Broadcasting Company.

The Court: Objection sustained.

Q. I show you a document entitled, "Census of Business, 1935, Radio Broadcasting" of the United States Department of Commerce, Daniel C. Roper, Secretary, Bureau of the Census, William L. Austin, Director, dated October, 1936, and ask you whether you have seen that before?

A. Yes, sir.

Q. I direct your attention to Page 59 of that document, Mr. Mills, and ask you whether that page contains some statistics with reference to radio broadcasting within the State of Nebraska?

A. Yes, sir.

Mr. Frohlich: I would like to offer in evidence Exhibit Number 28, prepared by the Department of Commerce.

The Court: It purports to be one of the publications of that Department?

[fol. 325] Mr. Frohlich: It does, your Honor; it is a government publication.

Mr. Hotz: In reference to the offer of Exhibit Number 28, we do not object to the competency of the line after "Nebraska" in the report on Page 59, which is a compilation by the United States Department of Commerce for the year 1935, but we object to it as wholly immaterial and having been made four years ago, and irrelevant to the issues of this case.

Mr. Frohlich: It is just offered for the purpose of proving the amount of money taken into the State of Nebraska in that one year.

The Court: Objection overruled, but the offer will be limited.

Mr. Frohlich: I will limit it to one bit of information, your Honors. It shows ten broadcasting stations within the State of Nebraska which took in, in net revenue, from the sale of time in the year 1935, $510,000. For that limited purpose only, I want to offer it. They took in that much business from their activities.

Mr. Hotz: You mean the Department of Commerce showed for the ten stations in Nebraska gross income of $510,000.

Mr. Frohlich: It doesn't say "gross"; it says "net revenue from sale of time".

[fol. 326] The Court: What difference would it make if it were that much, or $100,000 less?

Mr. Frohlich: Those are the approximate figures. I want the Court to know the amount of business done by the users.

I offer in evidence plaintiffs' Exhibit Number 29, being a document issued by the Federal Communications Commission, dated June 6, 1938, on Page 19 of which there is set forth the number of stations in Nebraska and the amount of revenue and net sales of time on the air for the year 1937.

Mr. Hotz: Not that we demand any proof as to competency of the Federal Communications Commission publication of June 6, 1938, but we object to the materiality of it and the relevancy of it, and we object to it for the reason that there is no way of checking its accuracy.

Mr. Frohlich: Your Honors, the figures show a decided increase just in two years, and I have some other statistics which I will bring down to date.

The Court: Limit your offer to this one page.

Mr. Frohlich: It will be limited to this one page. In fact, [fol. 327] I have to limit it further because there are other

stations on that page. I will offer it as to one line on that one page, plaintiffs' Exhibit Number 29.

Mr. Hotz: It shows gross sales in Nebraska of $1,110,449.

The Court: How much is that?

Mr. Hotz: It shows gross sales under column 8, in the State of Nebraska for all of the Nebraska stations of $1,110,449.

The Court: Is that simply to show it is an important business?

Mr. Frohlich: It is a tremendous amount of money.

The Court: In volume, that is the only purpose?

Mr. Frohlich: That is the only purpose, and this is my last on that point, which will bring it down to date.

Mr. Hotz: You don't mean to say that is for everything the stations did?

Mr. Frohlich: No.

Mr. Hotz: That is all sales of time on the air?

Mr. Frohlich: Everything. I will grant all.

Mr. Hotz: Not necessarily music?

Mr. Frohlich: No; all their time on the air.

[fol. 328] Mr. Frohlich: I have an official publication issued by the Department of Commerce and by the Electrical Division, John H. Payne, Chief, bearing date of May 15, 1938, which on Page 15 are some important statistics with reference to radio as an industry, computed down to 1938, showing the amount of radio sets sold, time on the air, homes with radios, what the public paid, and matters of that kind, which I think would be helpful as showing what is involved in this controversy.

The Court: Is that in the United States or in Nebraska?

Mr. Frohlich: That is for the United States, throughout the country.

Mr. Hotz: We object to that as incompetent and irrelevant to the issues of this case, and it is immaterial and doesn't purport to show or give any method by which could be determined anything in connection with the State of Nebraska.

The Court: What is the materiality of that?

Mr. Frohlich: The amount of music in an industry which depends upon music; the amount of revenue derived by the industry throughout the country; the amount of money invested and involved; what the public pays just to one in-

[fol. 329] dustry to listen to music, and taken in conjunction

with the fact that our rates are before the Court. We have filed with the Court as exhibits the amount of money we have got in from every State of the Union from 1922 down to date. We have shown what we charge; we want to show our rates are reasonable in comparison with the growth of this tremendous industry. We are not oppressive, we don't try to extort unfair amounts from licensees; we have charged a very modest royalty.

The Court: There is nothing to show that this is music, is there? These programs aren't all music?

Mr. Frohlich: No, they aren't. That would be an impossible task, because it would mean the breaking down of every single program every hour throughout the United States. It shows the industry as a whole.

The Court: What materiality would it have then? Half of it may have been a political campaign.

Mr. Frohlich: All of us know without putting it in evidence that radio furnishes a great deal of music, and that it couldn't get along without that, it couldn't operate its station without that.

I will offer in evidence plaintiffs' Exhibit Number 30.

[fol. 330] The Court: Sustain the objection.

Q. Mr. Mills, have you prepared this document I show you?

A. Yes, sir.

Q. What does that purport to represent?

A. Well, this is circular letter No. 3129 of August 16th from the Society to the Board of Directors and all representatives, and is a list of the so-called anti-ASCAP legislation introduced in various cities and states for the past few years.

Q. Was that list prepared under your supervision?

A. Yes, sir.

Q. Is it true and accurate?

A. Correct.

Mr. Frohlich: I would like to offer in evidence plaintiffs' Exhibit Number 31. For the purpose of saving time I would like to offer in evidence plaintiffs' Exhibit Number 31 for the purpose of showing that there has been a concerted plan on the part of the broadcasting industry throughout the country in the past few years to have legislation which would cut down or destroy the rights of the members of this Society.

Mr. Hotz: We object to that as incompetent and irrelevant to the issues here, and immaterial. The exhibit pro-
[fol. 331] poses to give by different states the name of a bill, for example, introduced in a certain legislature. For instance, they say Daytona Beach Ordinance No. 622 introduced January 22, 1935 providing for $2500 annual occupation tax, was enacted. St. Petersburg ordinance introduced the same as the two preceding, was not enacted. Now, it is so on down the list—Iowa House bill No. 289 following the Washington pattern introduced in 1937, was not enacted. Then it gives Missouri and Montana and Minnesota and so forth.

The Court: On what theory is that offer made?

Mr. Frohlich: This statute, as we say in our bill of complaint, affects the federal rights. We have rights under the Copyright Act, and those are affected by this statute, and it is the claim of these defendants, and must be their claim, and the only claim to justify the enactment of the statute which affects a federal right, and there must be some public interest involved, something which affects the safety and morals and health of the public, there must be some evil which necessitates the state coming in and doing this very drastic thing. It vests within the police power
[fol. 332] of the state. The state has, in certain cases, a police power which it may exercise to correct some evil. I want to make as a part of my record, and I offer this document in evidence to show that there is not involved any evil in the State of Nebraska and no necessity for the exercise of this extraordinary police power; that the interests affected are private interests. This is a private feud between these broadcasting stations and the other users of music, a small group within the state, and the American Society, and that the great public interest of the state with its many thousands of citizens is not affected, and they have no rights here affected which should be curtailed or which in any way should be legislated by this bill. I think on the question of the police power of the State of Nebraska to enact a bill, and on the showing there is a private interest involved rather than a public interest, this is admissible.

The Court: Objection sustained.

Q. Did you, Mr. Mills, prepare an index of compositions which were in demand and in common use by broadcasters during the past few years?

A. Yes, sir.

Q. When did you commence the preparation of that index?

[fol. 333] A. I began laying the foundation for it many years ago—all of ten or fifteen years ago.

Q. Up to the present time have you completed that index?

A. No.

Q. About how many compositions have you recorded?

A. Some eighty-four thousand.

Q. Did you offer to furnish that index to any of the broadcasting stations in the United States?

A. I offered it to all of the broadcasting stations in the United States.

Q. Did you offer it upon the payment of any fee?

A. Offered it entirely free of charge.

Q. What did it cost the Society to compile this index?

A. We have spent approximately $40,000 to date compiling it.

Q. That is $40,000 to date.

A. Yes, sir.

Q. And it is still in the process of work?

A. We will continue to spend on it—it is a continuing thing.

Q. How many of these broadcasters accepted your invitation to furnish them with this index?

A. Some less than two hundred of them.

Q. Out of how many?

A. Six hundred odd.

Q. Will you please tell us just what this index contains?

A. This index is a list, title by title, showing the name [fol. 334] of the composer, the author and the publisher in each case, and the performing rights, affiliation, if any, of the copyright owner, by that meaning an indication who controls the performing rights of the particular composition, covering every composition broadcast by the stations which furnished ASCAP programs during the year 1935. Every composition copyrighted at Washington during the years 1936 and 1937, all of the compositions in the public domain of which we have any record or can ascertain any record, the names and addresses of all music publishers in the United States so far as we know them, and including the works of non-members of the American Society, the works of other societies doing business similar to the Amer-

ican Society, and works of members of the American Society, accurately listed, identified, checked and re-checked.

Q. How many did you say there were down to date?

A. Eighty-four thousand, it is my recollection—in the early eighty thousands.

Q. In this large box, does this contain the complete list of eighty-four thousand?

A. Yes, sir, if that is the ASCAP index—the first seven installments of it.

Mr. Frohlich: I would like to offer that box in evidence, your Honors, that large box over there (indicating).

The Court: If there is any objection to it, it will be sus-
[fol. 335] tained.

Mr. Hotz: If your Honors please, I object to it as encumbering the record.

The Court: The witness has described this, and that is the only purpose, is it not?

Mr. Frohlich: May I offer in evidence a sample card?

The Court: Do you withdraw your other offer?

Mr. Frohlich: Withdraw the offer.

Mr. Hotz: There is no objection to the sample page.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 32.

Q. Will you explain why you have musilage or glue on the back of it?

A. The sheet is perforated, your Honors, and eight titles are printed on the one sheet; the title of the composition, the name of the composer and author, the year copyrighted and the name of the copyright owner and whether or not he is a member of the American Society or some other society or operates as an independent. It is printed so that these stickers can be torn apart and placed on a card of standard size in a card index cabinet. It is sent to the broadcasting people and it is the most economical method of filing these forms and so forth, the complete index to all the musical compositions currently being used by most of the broad-
[fol. 336] casting stations.

Q. In conjunction with this index did you prepare this little document or catalog showing the filing system?

A. That is a description of the ASCAP index and how to install it and operate it, and the cost of installing it, and its usefulness to those stations.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 33.

Mr. Hotz: No objection.

Q. Now, Mr. Mills, from 1921 down, have the users of music campaigned or made efforts to free themselves of the necessity of paying royalties to the American Society, and to use music which was not controlled by the American Society?

A. Yes.

Mr. Hotz: Just a minute. I move to strike out the answer so that I may object to that.

The Witness: I beg your pardon.

The Court: It will be stricken out.

Mr. Hotz: Objected to as incompetent and irrelevant, the witness not having shown himself qualified to answer. He said the users of music. There are thousands and thousands of them. If you go into that, I will offer to show it was an impossible task as far as numbers were concerned in this state using this and paying license fees to you people, and never had any representation except through this legisla-

[fol. 337] tion.

The Court: He may answer.

A. Yes.

Q. Do you know that of your own knowledge?

A. Yes.

Q. Did you in your conferences with the representatives of the picture theatre companies discuss the question of the picture theatres using music which didn't belong to the American Society?

A. Yes, sir.

Q. Did you have such a discussion with Mr. Cohen, president of the Motion Picture Exhibitors League?

A. Yes, sir.

Q. Did you have many discussions with him along that line?

A. Yes, sir.

Q. Did the motion picture trade organizations issue articles in the trade papers from time to time along that line?

A. Yes, sir.

Q. I show you this particular article taken from a publication called "Exhibitors Trade Review", Volume 10,

Number 11, August 13, 1921, and ask you whether you ever saw this article entitled, "No tax on this music"?

A. Yes, sir.

Mr. Frohlich: I will offer in evidence plaintiff's Exhibit Number 34.

Mr. Hotz: We object to that as incompetent and irrele-
[fol. 338] vant. It purports to be a sheet from a magazine conducted by one Norman Stuckey.

The Court: Objection sustained.

Mr. Frohlich: Your Honors, I have a number of other documents similar to this, all trade papers.

The Court: He has already testified what their efforts were, and the manner in which they attempted to bring that about is not at all material.

Q. Now, you have had a great deal of experience and you have testified with respect to music and the business of arranging the performing rights of American music?

A. Yes, sir.

Q. And that experience extends upwards of twenty years?

A. Yes, sir.

Q. You were in charge of the records of the Society for most of that period with regard to the copyrighting of music and the study of copyrights of musical compositions in Washington over the years, isn't that right?

A. Yes, sir.

Q. Have you from time to time attempted to compute the amount of music which is copyrighted each year in Washington?

A. Yes, sir.

Q. Have you any figures available on that subject?

A. Those that are issued by the Register of Copyrights in
[fol. 339] his annual reports.

Q. How much music has been copyrighted each year?

Mr. Hotz: I object to that as not the best evidence.

The Court: It is showing the basis on which he bases his testimony.

Mr. Hotz: Those records are available, your Honors.

The Court: There is no lawsuit based on those records. You can cross-examine on them.

Q. About how many copies of musical compositions are copyrighted yearly in Washington?

A. Approximately twenty-five thousand.

Q. There are a great many copyrights that have gone into the public domain over the years?

A. Hundreds of thousands.

Q. As to those copyrights in the public domain, the American Society has no rights or connections with them?

A. Every citizen has equal rights when they are in the public domain.

Q. Have you ever been able to ascertain or obtain any information or figures with respect to how many copyrightable copyrights have been in or are now in the public domain?

A. No, sir.

Q. Is there any method obtaining information of that kind?

A. Not to my knowledge.

[fol. 340] Q. In addition to the copyrights that went into the public domain, is it not true a great many musical compositions have never even been copyrighted?

A. Tremendous numbers of them, particularly as to foreign compositions of foreign origin.

Q. There are many publishers, writers and composers in the United States who do not belong to the American Society?

A. A great many.

Q. Have you any information as to the number of publishers in the United States who do not belong to the American Society?

A. Well, there are five hundred odd active publishing firms in the United States; therefore approximately one hundred and ten belong to the American Society.

Q. And the remaining publishers do not belong to the Society, and publish music over which the American Society has no connection or control?

A. That is right.

Q. A great many writers and composers of music write and compose music which does not come into the repertoire or catalog of the American Society?

A. Thousands of them.

Q. Among the twenty-five thousand compositions copyrighted each year, what would you say represented the proportion of music controlled by the American Society?

A. Maybe three thousand of them.

Q. Three thousand out of the twenty-five thousand?

[fol. 341] A. Yes, sir.

Q. Did the radio broadcasters attempt to compile a catalog of musical compositions which was not within the control of the American Society?

A. Yes, sir.

Q. Can you briefly tell us what attempts they made?

A. The radio broadcasters made?

Q. Yes, sir.

A. Well, not under that general term, but the National Association of Broadcasters attempted to compile a library of so-called tax f-ee music, that is, music not amenable to control as to public performance by the American Society or any other performing right society, and to make electrical transcriptions of those compositions with new, modernized, beautiful arrangements, and under the auspices of the National Association of Broadcasters such a library of transcribed tax free music was, in fact, created. To the best of my knowledge, at the conclusion of the supervision of the operation by the National Association of Broadcasters they had some one hundred and fifteen hours of such music in transcribed form which they had offered for sale to the broadcasting stations. The operation and the accumulation of master records and recordings was transferred from the National Association of Broadcasters to Langloise & Wentworth, Incorporated, of New York City. More recently the National Association of Broadcasters [fol. 342] has organized a corporation to be known as Broadcast Music, Incorporated, with the declared intention of——

Mr. Hotz: If your Honors please, this witness has not shown himself qualified. He is talking about an organization that he is not a member of.

The Court: He may testify to what the facts are.

Q. Please confine yourself to the facts. What did the National Association of Broadcasters do or the National Broadcasting Company do?

A. Announced its intention in the public press to organize a corporation to be known as Broadcast Music, Incorporated, and to put that corporation into the business of developing and exploiting a catalog of music, of which the then Broadcast Music, Incorporated, would be the copyright owner, and the intention was, and so stated in the public press, to make that catalog available for the use of broadcasters and to build it into a repertoire sufficient to enable the broadcasters to operate without access to the American Society license.

Q. Did the Langloise & Wentworth Company issue advertisements from time to time with respect to their catalog?

A. Yes, sir; and catalogs.

Q. I show you this advertisement and ask you whether this is a typical advertisement published by them in the [fol. 343] magazine entitled "Broadcasting"—by the way, is that a trade paper?

A. Official organ of the National Association of Broadcasters.

Q. You have read it for a great many years and are familiar with it?

A. Yes, sir; and I am acquainted with the editor.

Q. I will ask you if that was published therein?

A. In the 1938 yearbook.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 35.

Mr. Hotz: Where did you say you got this sheet from?

The Witness: From the 1938 yearbook issued by the Broadcasting. Official magazine or official organ of the National Association of Broadcasters.

Mr. Hotz: Your Honors, we object to this as nothing to show the witness is qualified to speak on this thing, except here is a sheet of paper with an advertisement called "Lang-Worth Leads" by the "Lang-Worth Feature Programs, Incorporated"—"every selection tax free".

The Court: He stated it came from the yearbook.

Mr. Hotz: He says it does. It says here, however, it comes from 420 Madison Avenue, New York, which is the Lang-[fol. 344] Worth Feature Programs, Incorporated. That is all there is to it. The rest of it you can't tell anything about it. I don't think it is competent, and along the same line as other advertisements and pages from magazines it is immaterial. Your Honors, there is nothing in there that helps a bit, and it encumbers the record.

Mr. Frohlich: The witness has testified the National Broadcasting Company has made an arrangement for this sort of catalog from the Langloise & Wentworth Company, and here is an advertisement issued by this company which speaks of "Every selection tax free."

The Court: Plaintiffs' Exhibit 35 may be admitted.

Q. That Langloise & Wentworth is a transcription service, isn't it?

A. Yes, sir.

Q. By that, what do you mean? Explain it to the Court.

A. Well, a transcription is another word for electrically recorded program of music on a phonograph record; a version of the phonograph record.

Q. That is broadcast by the broadcaster in place of the live musician singing or playing?

A. That is right.

Q. Today in the broadcasting industry do you know of [fol. 345] your knowledge what proportion of broadcasting is live talent and what proportion is by electrical transcription?

A. The question must be divided up in order to answer it. Some stations broadcast nothing but live talent, and some stations nothing but mechanical, and some stations a combination of the two. I wouldn't be prepared to hazard a guess as to the whole operation.

Q. Is it safe to say a great many of the stations use a considerable amount of electrical transcriptions?

A. All stations use a very great amount of them, except the principal stations. The more important stations do not —the key stations of the network.

Q. Those are located in large cities, aren't they?

A. Yes.

Q. Where live talent is available?

A. Yes.

Q. Take broadcasting stations in the small towns where live talent is not available, is there a great deal of electrical transcription broadcast?

A. Practically all of it except network programs and the crop and market and news reports and spot announcements and political speeches.

Q. Do you know which of the broadcasting stations in Nebraska subscribe to a transcription library service?

A. I think all of them do.

Q. Would it be fair to say all the stations in Nebraska at [fol. 346] some time or other during the day broadcast from electrical transcriptions?

A. Oh, yes, without exception.

Q. That form of broadcasting electrical transcriptions is, of course, a public performance for profit just as much as the singer or musician playing in the broadcasting room would be?

A. It is a rendition of the copyrighted music.

Q. If the author or composer or copyright proprietor is deprived of his performing right in the State of Nebraska on records, he is deprived from collecting any license from the broadcaster by reason of such transcription broadcasting, isn't that right?

A. That would be the result.

Q. Is there a catalog of any considerable quantity of copyrighted music owned by publishers who are not members of ASCAP which particularly offer their compositions to the broadcasters?

A. Yes, sir.

Q. Now, can you name one of those firms?

A. Davis & Schwegler of Los Angeles.

Q. What business are these gentlemen engaged in?

A. Printing and publishing.

Q. In what city?

A. Hollywood or Los Angeles.

Q. Mr. Davis was at one time attorney for the National [fol. 347] Association of Broadcasters?

A. Kenneth Davis was general attorney for and secretary of the Washington State Association of Broadcasters. I think he has never been associated directly with the National Association of Broadcasters.

Q. Merely with the State Association?

A. The Washington State Association.

Q. And is he now engaged in the publishing business in Los Angeles?

A. Yes, sir; he is a partner in the firm of Davis & Schwegler.

Q. Does he furnish his music to the broadcasting industry, do you know?

A. Yes, he does.

Q. He has circularized the industry and you have seen his circulars from time to time?

A. Yes, sir.

Q. It is possible, isn't it, Mr. Mills, for a broadcaster to conduct a station and play music without dipping into the repertoire of the American Society at all, isn't it?

A. It is very simple and very possible and very easy.

Q. With music in the public domain?

A. Yes, sir.

Q. Isn't it true some of the finest and sweetest music we have is found in the public domain?

A. All old masters and the classics are in the public [fol. 348] domain.

Q. And they may use as much as there is in the public domain?

A. Yes, and without a license.

Q. Isn't it true broadcasters also may, if they choose, refrain from using music of the American Society, and contract with other composers and publishers for their music and agree to use their music and pay them?

A. Yes.

Q. Now, do you know a broadcasting station in the United States that has ever gone around making contracts with musicians and copyright owners and composers for the public performance of their compositions in broadcasting?

A. Yes, sir.

Q. With whom have they made such contracts?

A. Many and varied individual composers, authors and publishers.

Q. As a matter of fact, there is another society which controls a great many European compositions and functions in the United States?

A. Yes, sir.

A. Do you know the name of that society?

A. The Society of European Stage Authors & Composers.

Q. Do they have an extensive catalog of compositions?

A. Yes, sir.

Q. Are there other associations similar in kind and scope?

A. Yes, sir.

[fol. 349] Q. Can you name it?

A. The Society of Jewish Composers and Authors.

Q. Do they have an extensive catalog and music?

A. I would not say an extensive one. Their catalog embraces practically all music used in Jewish religious services and rituals and folk songs.

Q. There are other associations of a similar nature in the United States?

A. Well, there are other listings and works available for the free use of broadcasters.

Q. What are those other listings, you say?

A. The Victor Talking Machine Company of Camden, New Jersey issues a special and very extensive catalog containing many thousands of titles which they have recorded and which are either in the public domain or copyrights of

which are owned by persons or corporations who grant the free use for performance of these compositions to broadcasters. The National Broadcasting Company and the Radio Corporation jointly have organized a service of electrical transcriptions which they call a thesoris, and have divided that into two sections, one section of music copyrighted by members of the American Society, and other section copyrighted by non-members or non-copyrighted, being available for free and unrestricted use by the broadcasters. There are similar listings by other phonograph manufacturers, all of them in special catalogs of the compositions of which they have made recordings, which are not amen- [fol. 350] able to American Society control with respect to performing rights.

Q. There are also many works written for radio performance that have never been copyrighted or published?

A. Thousands of them.

Q. And those, likewise, are available to radio broadcasters?

A. Yes, sir.

Q. Now, there are in evidence, Mr. Mills, photosatic copies of the contracts between the American Society and the foreign societies. I show you this document and ask you whether that represents a tabulation made by you or under your supervision?

A. It is a continuation of the tabulation originally made under my supervision, yes, sir.

Q. Does that represent the moneys received from and paid to the European societies for the years 1936, 1937, 1938 and 1939?

A. Yes, sir.

Q. Are those figures taken from your books in the regular course of business?

A. Yes, sir.

Q. Are they true and correct?

A. Yes, sir.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 36.

Mr. Hotz: No objection.

[fol. 351] Q. Now, the licenses issued by the Society to broadcasters and other users are in the nature of "blanket" licenses?

A. Yes, sir.

Q. What do you mean by "blanket"?

A. The licensee has a right to use as few or as many selections or whatever his desire from the repertoire represented by the American Society.

Q. Well, now, did the broadcasters at any time in their negotiations with you——

A. (Interrupting). May I add to my answer to the previous question?

Q. Yes.

A. Subject to an occasional restriction made for a particular reason upon the performance of specifically listed compositions.

Q. And on that question of restriction, what type of compositions are usually restricted by the publishers from radio broadcasters?

A. Compositions featured in musical comedies or other stage productions being currently staged on Broadway or any motion picture currently being presented.

Q. State the reason for that restriction.

A. Because in our experience and in the experience of the American Society if such compositions as are featured in musical comedies or motion pictures are not restricted from broadcasting, they will be broadcast so repititiously and so constantly and over so many stations that they kill [fol. 352] the popularity of the songs and remove any desire that people might have to go to see the show in which that music is featured—they destroy the production of the picture.

Q. In order to protect the investment in the production of the motion picture, it is necessary to restrict indiscriminate wide broadcasting of certain popular music until the production has run its course, or the picture has run its course?

A. That is right; that is the sole reason for doing it. The restriction is not irrevocable. The Society grants special permission if and when applied for, for a certain number of those compositions from time to time so that the public may not be entirely deprived from hearing them, but it limits performance so that the major works cannot be destroyed by excessive broadcasting.

Q. From time to time in your negotiations with the broadcasters did they suggest any other form of license, that is, a form of license other than a blanket license?

A. In my negotiations from time to time with the National Association of Broadcasters there have been all sorts of suggestions made.

Q. Was the question of a per piece system brought out?

A. Yes.

Q. Was the question of a program system brought out?

A. Yes, sir.

[fol. 353] Q. Did any broadcasters say they wanted a per piece system?

A. Yes, sir.

Q. How was it made to operate?

A. It is not clear to anyone yet how it would operate. I don't know and they don't know.

Q. Under the per piece system they meant only to pay so much for a particular piece as and when used, is that generally the idea?

A. I will give you my conception.

The Court: It is immaterial.

Q. Under the program system, what was the suggestion?

A. The suggestion was that the broadcaster should pay fees in respect only to the music copyrighted by the members of ASCAP.

Q. If that program were put into effect, how would it work out as a practical proposition?

A. It would probably triple the broadcaster's cost for rendering programs for music service for the clerical cost that would be incident to preparing the program reports. It would triple our costs and split up the money and divide it—it would be an accounting burden.

Q. The Society would have to keep track of each program?

A. The broadcaster—the Society would have to receive from each broadcaster a complete and detailed accurate log of the music used on each and every program.

Q. Wouldn't it have to check up on that log?

[fol. 354] A. It would have to break-down and audit the stations and credit it to the proper composers and authors —thousands of blunders would occur.

Q. Would that entail a large substantial cost?

A. A tremendous cost.

Q. Is that cost saved in the system of blanket licensing?

A. Yes, sir.

Q. In your opinion is the blanket license the best form of license given to any user of music?

A. It is the cheapest and most economical, and gives the most service to the public and author.

Q. Does the Society indemnify the users against claims of infringement?

A. Yes, sir.

Q. Have claims of infringement been made from time to time against the users, particularly the broadcasters?

A. Yes, sir.

Q. Has the Society defended suits at its own expense?

A. Yes, sir, and saved and held them harmless in any case.

Q. No single broadcaster or user in the United States who had a license from the American Society since 1914 that has ever been compelled to pay a five cent piece to any third party on a claim of infringement?

A. There have been none. We have made payments in their behalf.

Q. In your opinion could a broadcaster operate economic- [fol. 355] ally on any but a program license system?

Mr. Hotz: I object to that as not the best evidence, and hearsay, the witness not having shown himself competent; he has never run a broadcasting station.

The Court: Objection sustained.

Q. Just what is spot broadcasting?

A. It relates to those programs—spot broadcasting is a term used by advertising agencies relating to the purchase of idle time in spots and localities where it may be available in filling that time in with a transcribed program or electrical transcription making an announcement of some sort.

Mr. Hotz: By electrical transcription you mean a disc?

The Witness: A phonograph record; the broadcasters named it "electrical".

Mr. Hotz: Put on a machine and played in the broadcasting room?

The Witness: It plays in the same manner and routine, and is an apparatus such as an ordinary commercial phonograph record, except it is larger and has a different timing as to revolutions per minute at which it revolves, and has a different cutting on its surface for the purpose of recording

its music, but for the layman it is just the same thing as a [fol. 356] phonograph record.

Q. For this spot broadcasting these broadcasters charge rather substantial rates, don't they?

A. Yes, sir. I am differentiating as between spot broadcasting and spot announcing. Are we talking about the same thing?

Q. I am talking about spot announcing.

A. That is different. The spot announcement is time sold by a broadcaster between musical programs for a brief announcement, generally not exceeding three minutes, and usually one hundred words or less.

Q. For that advertiser who wants his product announced, he pays a substantial rate to the studio?

A. Yes, sir.

Q. That spot announcement is usually preceded by a radio pragram?

A. A typical program is at 6:30 P. M. by the Ben Russ Watch that always follows and precedes a musical program.

Mr. Frohlich: That is all.

(Whereupon an adjournment was taken until 9:30 o'clock A. M., Tuesday, September 19, 1939).

[fol. 357] (At 9:30 o'clock A. M., Tuesday, September 19, 1939, Court convened pursuant to adjournment, all parties present as heretofore, and the following proceedings were had, done and entered of record, to-wit:)

Edwin Claude Mills, a witnes son behalf of the complainants, on the stand at adjournment of Court, was recalled to the stand for further examination, as follows:

Cross-examination.

By Mr. Hotz:

Q. Mr. Mills, who are the following: "Harms, Inc.", "T. B. Harms Co.", "M. Witmark & Sons", "Remick Music Corp.", "New World Music Corp.", "Victoria Publishing Co.", and "Schubert Publishing Co."?

A. They are all music publishers.

Q. Of New York?

A. Yes, sir.

Q. And those seven were exempted by notification from your company, were they not, that they did not belong to ASCAP any more after December 31, 1935?

A. Well, I don't understand the meaning of the term "exempted". Oh, yes, they did not belong—their memberships terminated.

[fol. 358] Q. They had been members prior to that time?

A. That is right.

Q. Are they large concerns?

A. Some of the large firms and concerns.

Q. What connection did Warner Bros. have with those seven?

A. It is my belief and understanding Warner Bros. are the owners of the capital stock of those separate corporations.

Q. And they withdrew from the American Society on December 31, 1935?

A. They did not renew their then membership.

Q. Are they now back in the association?

A. Yes, sir.

Q. When did they come back in?

A. Well, more or less about July of the following year, I would say.

Q. July of 1936?

A. Yes.

Q. In your showing here in one of the affidavits that was filed is was stated that the consideration in connection with the transaction between Warner Bros. and the withdrawal was eleven million dollars. Do you know anything about that?

A. The consideration was eleven million dollars?

Q. Yes, that is the consideration that Warner Bros. paid in connection with those seven companies.

A. To ASCAP.?

Q. Not to ASCAP, but to these companies.

[fol. 359] A. You mean consideration paid to these companies for the purchase of their stock?

Q. Yes.

A. I have no knowledge of that.

Q. Now, could you give us any idea as an officer and director of this American Society, the amount of money that was paid to these seven companies as publisher members of your organization last year?

A. No, but there will be a subsequent witness who will be perfectly competent to testify on that. I wouldn't want to guess on it.

Q. When they came back into the American Society in 1936, what large companies were left out of ASCAP then as publisher members?

A. Of this group?

Q. Of the whole group, of the list of members published by you and introduced in evidence, which says, "List of Publisher Members"?

A. The question then is, what large publishers from among that list——

Q. No; what large publishers in the United States are not members of ASCAP, publisher members of ASCAP?

A. The M. M. Cole Publishing Company of Chicago, Arthur P. Schmidt of Boston, Associated Music Publishers of New York City, and Bright, Coff & Hartel.

Q. Davis & Schwertley of Los Angeles?

[fol. 360] A. Yes, sir.

Q. Who else?

A. Well, I would have to have the list from which to refresh my mind.

Q. Have you got such a list?

A. Not with me, no.

Q. Do you know where you could get one?

A. Yes.

Q. Could you before you leave get us such a list?

A. I am planning on leaving here this afternoon. No.

Q. When you gave the list of publisher members of ASCAP at one hundred and ten, I believe you stated—your pleadings show one hundred and twenty-three—did that take in the subsidiaries? For instance, I will call your attention——

A. The answer is no—you don't need to call my attention to anything.

Q. For instance, Edward B. Marks Music Corporation has twenty-eight subsidiaries.

A. No, those are not subsidiaries.

Q. What are they?

A. They are not operated as separate companies; merely titles of corporations, owners in some cases of a very few songs, which songs have been absorbed into the catalog of the Edward B. Marks Music Corporation. The companies are not operated as subsidiaries.

Q. But your Exhibit Number 5, as well as your Exhibit [fol. 361] Number 4, both list the names of the one hundred and twenty-three publishers, and then underneath the names of the one hundred and twenty-three publishers are all these other organizations, is that right?

A. We list in bold type the names of the firms that are members of the American Society. Under the names listed in bold type are names listed in italics. Those represent the titles of very small publishers owning a few compositions that from time to time they have sold to the principals whose names are listed in the bold type. Those firms no longer operate and do not operate as subsidiaries of these principal concerns. The purpose of printing the names here is to notify the users of music that these are the names which appear as the copyright owners upon the music published by these firms before their catalogs were purchased by the principal firms.

Q. But in all of the instances of those companies who are companies listed in the fore part of Exhibits Numbers 4 and 5, your company has the public performance right?

A. The American Society is not a company, but it has the performance right.

Q. That is, the public performance right?

A. Right.

Q. The same as they do, as those listed in bold type?

A. Yes, sir.

Q. Are you able to estimate or do you have any figures [fol. 362] from which you can tell me the amount of the vocal and instrumental musical compositions that are copyrighted that are owned by the publisher members and these other companies listed in the fore part of Exhibits Numbers 5 and 5?

A. The total number of copyrighted compositions presently embraced in the American Society?

Q. Yes.

A. That would be a guess.

Q. You stated yesterday that you had a box of evidence here, and you have introduced some, is that correct?

A. Eighty-four thousand.

Q. And that isn't complete?

A. Nor is it confined to the compositions controlled by the American Society.

Q. It doesn't even purport to represent an accurate list?

A. It is a list of the titles embraced.

Q. But it contains other things besides pieces of music, vocal and instrumental music, the public performance rights of which are vested in the American Society, is that right?

A. Yes.

Q. And it has taken you a considerable length of time to work that out, hasn't it?

A. Years.

Q. Has anybody else tried to work it out, any user of music? They would have the same difficulty you have had in connection with it, would they not?

[fol. 363] A. Unless they were more skillful than we have been.

Q. So that you want to conclude here in this regard in your testimony that the American Society does not have any accurate list of the copyrighted vocal and instrumental music of which they control or own the public performance rights?

A. We own the public performance right in respect of every composition, the copyright of which is controlled by a member of ASCAP. A copyright notice is printed on every sheet of music and every orchestration published, and anyone who comes into possession of one so published and from which a performance is rendered, may know whether or not they have the right to perform it by looking at the name of who composed it, and whether he has membership in ASCAP, and, if available, we can distribute it to interested persons. By comparison of those items, any user of music may quickly ascertain whether or not he has a license to publicly perform it. His is the simple problem. Ours is the difficult problem.

Q. If anyone were to get a complete list they would have to go through the same mechanization as you have, in order to arrive or attempt to arrive at an accurate list?

A. In order to produce the same list, they would have to exercise the same effort.

Q. This office that is maintained by the American Society in New York, just generally how expensive is it and how [fol. 364] big an office is it, in space?

A. It occupies about seventy-five per cent of the forty-fifth floor of the building at Rockefeller Plaza, known as the R. C. A. building in Radio City, New York.

Q. Approximately what rent do you pay for that space?

A. Around $30,000 a year, in round figures.

Q. Yesterday, Mr. Buck, when he was on the stand, made the statement that the networks, the National Broadcasting Company, Columbia and Mutual, and others, paid ASCAP. Now, Mr. Mills, I want to straighten that out through you, if I can. The network as such doesn't pay ASCAP any fee, does it, for public performance right?

A. The National Broadcasting Company strictly and technically—that would not be the case, that the networks paid as a network, by the networks broadcasting people, in respect of each of the broadcasting elements——

Q. Let us get down to brass tacks. Unless the National Broadcasting Company or the Columbia Broadcasting Company own individually and personally as such a broadcasting station somewhere, they do not pay to ASCAP any public performance license fee?

A. In respect of stations which they do not own or operate?

Q. Yes, sir.

A. No.

Q. Do you know how many stations the National Broadcasting Company own and operate, of their own?

[fol. 365] A. About eleven stations.

Q. And yet the National Broadcasting Company serves throughout the country a large number of local broadcasting stations, including some in the State of Nebraska?

A. The chain programs, yes.

Q. So that for any music that emanates in New York from the National Broadcasting Company station, and which serves, for example, WOW in the State of Nebraska, there are no public performance rights paid to your society by the National Broadcasting Company in New York?

A. No.

Q. That is true with Columbia?

A. Yes.

Q. That is also true with the Mutual?

A. Yes, sir. It is true of all of them; it is the universal practice.

Q. How many networks are there?

A. As networks, probably fifteen or eighteen.

Q. That is true with all of them?

A. Yes. Each station pays its own fees.

Q. Going back a moment to the publisher members that own copyrights of vocal and instrumental music, the public performance rights of which are vested in your Society,

would you be able to tell us, or do you have any records to show the proportion that that music bears to the total number of publishers that have copyrights in the United [fol. 366] States?

A. I will have to ask you to repeat the question.

Q. What I am trying to get at is the copyrights that are owned and controlled by your publisher members.

A. By the whole group?

Q. The whole group.

A. Yes.

Q. What would that bear to the sum total of the copyrighted music by all the publishers in the United States, including those that are not members of your Society?

A. That again has to be a guess.

Q. What I am trying to get at is, what is the percentage?

A. We would like to get at it. Everybody I know who is interested in this subject would like to get at it.

Q. You can't tell?

A. I can guess.

Q. Give us your guess.

Mr. Frohlich: I object to that.

The Court: He can make an estimate.

Q. You have charge of this thing for your company, do you not?

A. I have had.

Q. You sit right there all the time?

A. I do—I don't sit all the time, but I am there.

Q. You know these various houses publish their catalogs of the amount of music they own?

A. They don't all publish catalogs.

[fol. 367] Q. Some have typewritten memoranda, but all have some list of music they have for sale, do they not?

A. They do.

Q. You are interested in all of those, because you have the public performance rights?

A. Yes, sir.

Q. As a matter of fact, they are filed in your organization, are they not, in your Society?

A. Of recent years they have been filing the card on all the new compositions that they have published.

Q. Now, those organizations that are not members of your Society, I suppose you have had some correspondence with them to get them in your Society, have you not?

A. In our history we have never solicited a member.

Q. Not anybody?

A. Never.

Q. Not a publisher member?

A. Never a publisher or composer. Every member of ASCAP makes a voluntary application for membership in the organization; there is no exception.

Q. These seven members of Warner Bros., how did they get back in?

A. Applied for re-entry.

Q. Were there any negotiations in that regard between yourself and them?

A. Once.

[fol. 368] Q. The result is they came back under certain conditions into the American Society?

A. They came back under no conditions whatever. They applied for re-election to ASCAP.

Q. As a matter of fact, Mr. Mills, isn't it true from the knowledge you have of this situation, that the copyrighted music that is owned by these publisher members and their subsidiaries constitutes the largest part of the commercially usable copyrighted vocal and instrumental music in the United States?

A. I think so, but no more important—put it at a given time.

Q. I say at the present time.

A. In respect of a given program or construction of a particular musical event or entertainment, at that time any composition, and one particularly fitting the mood and atmosphere and needs and necessity of the program, that would make a well-balanced and diversified entertainment to meet the needs of that particular enterprise, one composition is just as important as another, regardless who owns it.

Q. In connection with the users of your music in the State of Nebraska, the larger users of it, such as the broadcasting stations and hotels?

A. The hotels are not among the larger users. They are minor users—there are three hotels in the State of Nebraska that use music.

[fol. 369] Q. Which are they?

A. The Fontenelle.

Q. The Paxton?

A. The Paxton is not presently using music. I don't believe. I heard none when I was there the other day.

Q. Mr. Blazer would know more about that?

A. Much more.

Q. He knows which ones are, and which ones are not?

A. Yes, sir.

Q. Do you know of any companies that broadcast that could operate or run a musical program without the use of your music on which you own and control the public performance rights?

A. Yes, I assume they all could. Why not?

Q. For example, take WOW, do you say they could run and operate with the arrangements they have, without using the American Society music?

A. They certainly could; they have never tried.

Q. They couldn't try, you know that as a matter of fact?

A. I do not know it as a matter of fact. I know quite the reverse. If they would exercise the same ingenuity and efforts and persistence in attempting that, as they do in attempting to destroy the protective organization of these composers, they might discover what I say is entirely true, that they could get along well without the American Society repertoire, and they are now declaring their intention to [fol. 370] do that through their national organization.

Q. Yet the list of publishers, members of your Society, contains substantially all, or a large part at least, of the vocal and instrumental copyrighted music in the United States?

A. I conceded previously in my testimony a large part of it, a very large part, an important part, a very important part.

Q. The publisher members, as well as your organization, are consistently keeping up their efforts to acquire the public performance rights of music?

A. I repeat we have never solicited a member. We are, however, anxious that our members shall produce as much music, good music, as possible for the better service of our clients, our licensees and the public. We want them to produce music.

Q. It is increasing right along, is it not?

A. It must increase, because radio destroys it so rapidly.

Q. I mean by that the public performance rights your Society now owns and controls, is on the increase. It is not going down any?

A. In the sense of the number of compositions and repertoire, it increases, yes, but as many die as are born. A new

song is created, and an old song goes out. There is just that constant flow of material. Of the old songs, a few remain alive in the public affections, but most of them die. [fol. 371] Songs are created now much more rapidly than heretofore, because the songs die much more quickly, and a writer must write more songs to keep himself off the breadline, than he used to have to do.

Q. Referring to plaintiffs' Exhibits Numbers 17 and 18, it shows here that in 1938, on Exhibit Number 17, there was $68,789.54 as a total from all sources collected by you in the State of Nebraska, and that against that was an expense item of——

A. (Interrupting): Whatever it is, if it is accurate, I will concede it.

Q. We will take 1937. In 1937 the gross receipts were $54,474.64 in the State of Nebraska, and the total expense was $11,890.41 according to Exhibit Number 18.

A. About a sixth of the income.

Q. I mean it was $11,379.03.

A. The income was how much?

Q. The income was $54,474.64.

A. About twenty per cent. Of that, you understand, don't you, as to the amounts received from broadcasting stations for each nickel received by the American Society, the broadcasting station received one dollar from the advertiser.

Mr. Hotz: I move to strike that out as not responsive to any question.

The Court: It may be stricken out.

Q. Then was this expense item here just shown of [fol. 372] $11,379.03 in Nebraska?

The Court: What exhibit is that?

Q. Referring to Exhibit Number 18, was that the expense here in the State of Nebraska for making these collections?

A. May I see the exhibit?

Q. Yes.

A. Is this one of our exhibits?

Q. Yes.

A. Which is the year you are reading?

Q. 1937, because 1938 was not down to date.

A. That is correct. The answer to this question is yes.

Q. That that was the Nebraska expense?

A. That is right, legal and otherwise, all expense.

Q. In Nebraska?

A. Yes.

Q. Then the net amount that went to the American Sosiety for the year 1937 was $54,474.64, less $11,379.03?

A. That would be correct, yes, sir.

Q. And I think Mr. Buck testified it cost about eighteen per cent to operate. I would assume he meant "operate"?

A. The National organization—the complete operation. Our expenses vary between eighteen and twenty-three per cent. Presently it is a little higher because of all of this litigation.

Q. Would you or Mr. Paine know more about just generally what amounts of money were paid out to some of your [fol. 373] publisher members?

A. Mr. Paine.

Q. You can't give it?

A. No, sir.

Q. Who is the biggest one, for example, Irving Berlin, Inc. or Harms?

A. The largest one? Either Harms or Berlin would probably be the highest.

Q. What is that, about how much per year?

A. My guess is about eighty or ninety thousand dollars a year. It fluctuates according to the number and performance which they have on the programs which we analyze by the publishers ratings.

Q. The publisher, Irving Berlin, has a catalog of vocal and instrumental music?

A. Yes, sir.

Q. That it published?

A. That is right.

Q. And which you have on file in your office?

A. Not in its entirety, perhaps.

Q. Are they classified in the membership the same as the others?

A. The same. They are classified, in general, the same way, but entering into their classification are various elements, their seniority in the organization.

Q. I am not asking about what enters into it. I am asking you if there are classifications for your publisher members?

[fol. 374] The answer is yes.

Q. And tell us what those classifications are as briefly as you can, and give us the amount paid to each classification.

A. They are classified under three headings, first, under the heading which relates to their seniority in the Society, in which a number of points are credited.

Q. How many are?

Mr. Frohlich: I object to that.

(No ruling).

A. They are all in it, in that classification.

Q. How many publisher members are in your first classification?

A. As many as have been in the Society the longest period of time.

Q. How many are there?

A. One.

Q. And who is it?

A. The one who came into the Society first.

Q. Who is it now?

A. I don't know. The membership record will show who ever came into the Society first.

Q. Whoever came into the Society first?

A. Whichever publisher rates Number 1 as to seniority has the highest seniority classification, and the most recent one, the lowest.

Q. What does he get, that one that is in there the highest?

A. Well, now, I am going to tell you, solemnly tell you. [fol. 375] Each publisher——

Q. (Interrupting): Answer the question: How much does he get?

Mr. Frohlich: I object to the question.

The Court: This witness is not attempting to be unfair; let him answer the question in his own way.

A. (Continuing): Each publisher receives a point of credit under the seniority heading for each quarter, that is to say, each three months that he has been a member of the Society. The total number of points accredited to all of the publishers under that heading are computed, and then each publisher receives a share in the seniority fund, so-called, according as the number of points accredited to

him are computed as a percentage of the total number of points of all publishers. If that percentage is six, he receives six per cent of the royalties distributed under the seniority heading. When the total amount of royalty available for distribution to the publisher members has been ascertained, that sum is divided into three parts, one to be divided under the seniority heading, and one under what we call the "availability rating", and one according to performance credits. The seniority ratings I have just described to you, I hope freely; if not, I will be glad to go into such details as you want me to. The availability rating is based upon the so-called availability value of the catalog of the participating publisher. These catalogs are rated [fol. 376] as to their availability by the committee of the publisher members, and those ratings are covered by the vogue and popularity of the catalog as a whole, the prestige of the publisher and the scope and extent and method and quality of the works in the catalog. It does not relate to the number of works in the catalog, because one work may be greatly used in public performances, and another work not at all. Therefore the availability value of the work greatly used is much more than such value of the work that is seldom used. Those ratings are fixed for the publishers by points. Each publisher, and publisher by publisher, is studied as to his catalog. These publishers who constitute the committee make a study and are skilled in the business, and all of them are veterans of the music publishing business as a matter of general practical trade knowledge, and know, for example, what is in the magazine of Harms.

Mr. Hotz: I think he has gone far enough.
The Court: I think he has gone far enough.
The Witness: I will try to answer the question.

Q. Tell me the amount of that first classification of which there is one member?

A. Twenty per cent of the amount available for distribution is divided among them.

Q. Twenty per cent of the amount available for distribution?

A. Is divided under the seniority heading. Thirty per [fol. 377] cent under the availability heading, and fifty per cent according to the program credits.

Q. Will you add those all together and tell us how much

you are paying for your first classification at the present in dollars and cents?

A. I would say about eighty thousand dollars a year.

Q. How many other classifications are there besides Number 1?

A. Well, there are all sorts. They are not in definite classes like writers.

Q. They take that scale, twenty per cent, thirty per cent, and fifty per cent, and use that and apply it as spread out by the committee over your publisher members?

A. Three separate sums, twenty, thirty and fifty per cent, apportioned among the entire publisher members according to their participation. The sum total the leading publisher received from his participation in those three funds added up at the end of the year, I would guess at the moment, about eighty thousand dollars a year. It may have been increased since I saw the report.

Q. What is the least amount paid at the present time in dollars and cents to a publisher member of your Society?

A. Will you let Mr. Paine testify on that question? He can testify exactly; I can't. I haven't been in touch with that for a couple of years.

Q. In connection with these contracts that have been introduced as Exhibit Number 16, being some three hundred [fol. 378] and ninety-one to four hundred, you talk about negotiations that were had with your Society in reference to the amounts that these users of music should pay. Now, I am going to hand you this list of exhibits, Number 16, and have you pick out, if you can, which ones of those contracts were arrived at by negotiations with your organization in New York.

Mr. Frohlich: I object to that as incompetent, irrelevant and immaterial. The contracts speak for themselves.

The Court: He may answer, if he knows.

A. I can't answer; I don't know. I have never personally handled them before, or seen them before.

Q. You, of course, are located in New York and confine your attentions to the New York office?

A. Yes, sir, and supervision of the field in previous years.

Q. When you told Mr. Frohlich yesterday in your examination and made reference to negotiations, just what did

you have reference to? Whom were you referring to as the other party to the negotiation?

A. In the various cases.

Q. In connection with the broadcasters.

A. That National Association of Broadcasters.

Q. You did not have any direct negotiations with the ten or eleven stations in the State of Nebraska; they didn't have any personal representatives there as such, did they?

A. Oh, I think they did.

[fol. 379] Q. For example, whom?

A. Well, at the moment I say I think they did, but I can't recall. The negotiations were years ago. If they had no representatives there personally, they had authorized representatives act for them and their association.

Q. How do you know that?

A. I suppose the National Association of Broadcasters when they represent the broadcasters of the United States of America, I assume they do.

Q. How about the hotel men?

A. The American Hotel Association.

Q. You didn't have any direct negotiation with any hotel men?

A. On the contrary, I did have. I didn't have direct negotiation, but negotiations with their agents. They are all members of the association—the Nebraska hotels are all members of the American Hotel Association.

Q. But there were no members from the respective hotels, users of your music, in the State of Nebraska, that appeared there to negotiate, is that right?

A. Not personally, no.

Q. And as far as the dance halls and other users covered by the contracts in Exhibit Number 16, that likewise is true, there was no one appeared there to negotiate?

A. They negotiated with our representative.

Q. Here in the State of Nebraska?

A. Yes, sir.

[fol. 380] Mr. Hotz: Mr. Bennett wanted to ask the witness some questions, and Mr. Frohlich said he didn't have any objections if the Court didn't.

The Witness: Has the witness any voice in the matter?

Mr. Hotz: I don't think so.

The Witness: I want to know who Mr. Bennett represents.

Mr. Hotz: I think I can state that. Mr. Andrew Bennett is counsel for the National Broadcasters Association of New York, and has been for a considerable length of time.

Mr. Bennett: I am not representing the National Broadcasters here.

Mr. Hotz: Mr. Bennett has also had a vast amount of experience in connection with the copyright law by virtue of his previous connection with the Department of Justice.

The Court: Is he representing somebody here?

Mr. Hotz: At the present time he is not representing in this action either one of those parties that I have just mentioned.

The Court: Is he representing anybody?

Mr. Hotz: He is representing and has appeared here as counsel for Mr. Grosshaus, party defendant to this case, [fol. 381] and is the president of the State Association of County Attorneys. I want to give Mr. Mills the benefit of that situation.

Cross-examination.

By Mr. Bennett:

Q. Mr. Mills, just two or three things in your direct examination I think we might clear up. You recall that on direct examination you testified that a publication known as the "Broadcasting Magazine" and a yearbook was the official publication of the National Association of Broadcasters?

A. No; I testified that it was the official organ.

Q. The official organ?

A. Yes, sir.

Q. As the consequence of that, the Court admitted an exhibit which I think the Court normally would have excluded in line with the exclusions of others. I have here a publication entitled "Broadcasting Year Book" for the year 1939, and also "Broadcasting Magazine". Will you look on Page 42 at the publication notice and note the name of the publisher?

A. It states it is the official organ of the National Association of Broadcasters, and I hope my counsel puts you on the stand and makes you think it isn't.

Q. Are you familiar with the publication known as the "N. A. B. Reports" published each Thursday and Friday morning?

A. They are confidential and distributed to broadcasters [fol. 382] only.

Q. One copy of that goes to the American Society, does it not?

A. No.

Q. You still think that is the official organ?

A. I still think, maintain and insist that is the official organ of the National Association of Broadcasters.

Q. Is it your contention the National Association of Broadcasters has any interest in this publication at all?

Mr. Frohlich: I object to this line of testimony.

(No ruling).

A. I don't think any financial interest.

Q. I think the Court has a misconception of the "Broadcasting Magazine".

A. It is the official organ of the National Association of Broadcasters, and the mouthpiece for the radio industry.

Q. Have you personal knowledge of that, or are you assuming it?

A. I have personal knowledge of it.

Q. Will you state the means of your personal knowledge?

A. You don't want me to.

Q. Yes, I do.

A. Well, in deference of the people for whom you are speaking, I won't answer that question unless the Court compels me to.

Q. Do you know the owner of the "Broadcasting Magazine"?

A. Pretty well.

[fol. 383] Q. Who owns it?

A. The publisher's name must be printed at the masthead there.

Q. It is.

A. Well, let me see it. It is——

The Court: It is immaterial.

Mr. Bennett: I confess it is immaterial.

The Witness: It is owned by "Broadcasting Publications, Inc."

Q. There are half a dozen magazines devoted to the radio broadcasting industry in which the association has no connection at all and no control or nothing.

The Court: You are not testifying.
Mr. Bennett: I am trying to explain, your Honors.

Q. Do you want to change your testimony that this is the official organ?
A. No, I don't want to change my testimony. I don't see why I am asked these questions.

Mr. Bennett: You testified to it on your direct examination, Mr. Mills.

Q. Mr. Mills, you stated that you conducted negotiations with various users of music, and outlined very much in detail the various negotiations. You stated that in 1934 you conducted negotiations with the motion picture theatres. Do you recall with whom you discussed the motion picture [fol. 384] situation?
A. Yes, with Walter Vincent as chairman of the committee appointed by the motion picture theatre owners of America.
Q. Who were the other members of that committee?
A. I don't recall—somebody from Paramount and Fox.
Q. May I refresh your recollection——

The Court: What difference does it make?
Mr. Bennett: I think the whole story is most important to the issues.
The Court: Any objection?
Mr. Frohlich: I object to this line of testimony.
The Court: Sustained.

Q. When was the first meeting you had with the representatives of the motion picture industry and who was present?
A. The first meeting would have been in about the latter part or about the middle of 1921.
Q. I am talking about 1934 in these negotiations.
A. You asked me when the first meeting was held. The first meeting was held in 1934.
Q. The 1934 negotiations?
A. The first meeting was in 1934—I do not recall when it was held.
Q. You do recall it was about the middle of July?
A. That is as good a date as any—I will concede about that.

[fol. 385] Q. Do you recall the reason for holding that meeting?

A. An announcement of an intention on our part to increase the rates charged for licenses.

Q. What was the substance of that announcement?

A. I don't remember.

Q. May I refresh your recollection on that?

A. You have my permission, yes, sir.

Q. Do you recall you sent out the first part of July notices to a number of theatre operators that on and after October 1st the fees of each motion picture theatre would be increased to a sum equal to one complete sell-out of the house at the highest price charged at any time during the year?

A. No such letter was ever sent out; no such announcement was ever made.

Q. Are you sure of that?

A. I am positive.

Q. Do you recall at the meeting in July——

Mr. Frohlich: Just a moment. Have you such a letter in your possession? Will you offer it in evidence?

Mr. Bennett: I called for such a letter on deposition, the interrogatories requested the letter. I do not have such letter in my possession.

The witness: It was a forgery if you have it. There [fol. 386] never was such a letter.

Q. I had what purported to be such a letter.

A. So that I may not thought to be evasive, I suggested and proposed on ASCAP's behalf that there should be a new rate, and requested the motion picture industry to appoint a committee and confer with us upon it, and negotiate with that as a basis, and that is what was done, but you never had any letter announcing that from such a date that would be the rate.

Q. Was that formula discussed at the meeting in July with Mr. Vincent and other members of the committee?

A. Yes.

Q. Did those members of the committee call your attention to the fact that that amounted to an increase in many instances of eleven hundred per cent?

A. Yes, and upon further discussion it was disclosed the increase would be so great because many theatres and theatres in respect to which the increase particularly would

have been so great, had falsely reported to us in previous years the number of seats in their theatres and paid us fees, for example, on seven hundred seats on their statement, and said that was all they had, when, as a matter of fact, they had sixteen hundred, eighteen hundred and two thousand seats, and when we sent the investigators to count the seats we found there had been dishonest reports.

Q. You have answered the question.

[fol. 387] A. The increase would have been eleven hundred per cent or fifteen hundred per cent or what have you in regard to such theatres.

Q. Did you not insist at that meeting in July that no reductions from that formula could be made?

Mr. Te Poel: Objected to as irrelevant.

(No ruling).

A. I endeavored to get as much increase for my people as I could get.

Q. And the formula——

The Court: It is in evidence that there was an attempt to get an increase. Does it make any difference what the details of that effort were?

Mr. Bennett: Your Honors, I think there has been so much irrelevant material put in here so far as the issues are concerned. For the benefit of the Court, they should know the entire history that took place in these various meetings.

The Court: Because some irrel-vant matter went in, you think we ought to have some more irrelevant matter in the record?

Mr. Bennett: When the irrelevant matter has gone in, it should be cleared up so that the Court may know the entire history.

The Court: The Court doesn't think this clears up anything.

[fol. 388] Q. Was anything done, Mr. Mills, toward reaching an agreement at that meeting in July?

A. Yes, a formula was negotiated.

Q. Did the theatre operators agree to it?

A. The committee did on behalf of the theatre operators.

Q. At that meeting in July?

A. It may not have been culminated then, but there were a series of conferences, six or seven or eight in all, and as a

result of this series of conferences a formula was agreed on, and an increase in rates granted by the motion picture interests.

Q. When was the final formula agreed on?

A. If you say the meeting started in July, I would say in August or September.

Q. Don't you recall the next meeting after that? The next meeting with the committee was September 25th.

A. I concede it, yes, if you say it—I don't recall it.

Q. Do you recall who was present at that meeting?

A. No. I presume Walter Vincent, O'Toole, Comerford and the usual crowd.

Q. Do you recall what took place at that meeting?

Mr. Frohlich: I object, your Honors, to any further testimony along these lines.

The Court: Objection sustained.

Q. Will you state when the last meeting took place, Mr. Mills?

A. With the committee representing the Exhibitors?

[fol. 389] Q. Yes.

A. That would have been the last meeting, the meeting at which the agreement was culminated.

Q. It was culminated September 25th?

A. I don't know if that was the exact date, but if it is a date that pleases you, it is agreeable to me.

Q. It isn't a question of pleasing me.

A. I don't remember. I hate to use that phrase here—"I don't remember". I like to remember things.

Q. You have been pretty clear on many other things. Like most of your testimony, your memory has been pretty clear.

A. Give me leave to come back to the stand, and if the Court will excuse me to go to the long distance phone, I will phone the office in New York and find out if the date was September 25th, if that is important.

Q. May I refresh your recollection on the dates?

A. Yes.

Mr. Frohlich: If the Court please, I object again to this line of testimony on the ground it is entirely irrelevant and immaterial.

The Court: Objection sustained.

Q. What was the final formula that you suggested to the motion picture operators?

A. I testified to it yesterday.

Q. Do you have any objection to repeating it?

The Court: Is there any issue or question about it?

[fol. 390] Mr. Bennett: I don't think so.

Mr. Frohlich: I object to it then as no dispute or question.

The Court: We don't want to listen to testimony because it is true.

Mr. Bennett: Withdraw the question.

Q. Mr. Mills, on your direct examination you referred to a meeting in Exhibit Number 22 with certain representatives of the broadcasting industry, I believe you mentioned them, with the Department of Commerce and various other individuals. Did you bring with you a copy of the stenographic notes of that meeting?

Mr. Frohlich: As a matter of fact, I think a copy of the stenographic notes are annexed to the interrogatories propounded in this case.

A. The answer is no. They are here in these records somewhere.

Q. I have here a copy of the reports of the copyright committee of Congress, 1924, which on Page 105 contains a number of pages of what purports to be the minutes of that meeting, is that correct?

A. Maybe I can save time if you will let me glance at it. I will admit the whole thing, whatever it is. What is it? The reprint of the minutes of those meetings? Yes, that is what was said and done, and correct and accurate, and are [fol. 391] authentic.

Q. I would like to read you two sections from Pages 112 and 113, statements made by you at that meeting, and ask you whether you made them: "Mr. Mills: Probably not more and I think certainly not less than fifty per cent, although I have made no accurate study on this point."——

Mr. Frohlich: I object unless he reads more of it.

Mr. Bennett: I will go back then.

Q. "Mr. Mills, you doubtless notice the programs as they are published in the papers. What percentage of those programs is included in the copyrights coming under your

control? Mr. Mills: Probably not more and I think certainly not less than fifty per cent, although I have made no accurate study on this point. I think we may safely say that of the time spent broadcasting music at least half is given to so-called popular and jazz music. Of such music we represent, as has been stated, more than ninety per cent. Of the other half of your musical program which we will say is of standard or high class music, the Society controls a minor portion only. As to such foreign works as are performed and which are subject to copyright, we control, say, forty per cent." Then skipping a paragraph which is on another subject——

Mr. Frohlich: I want you to read that. If you are going to read it, read it all.

[fol. 392] Q. "However, I ask your consideration here of the point of actual entertaining value. Popular or jazz music, broadcasted, suffers not nearly as much as high class music. The latter requires, for proper appreciation, the trained, educated music sense; hence the number of those entertained by this class of material is considerably less than those enjoying popular music, which requires but an ear attuned to simple harmonies, pleasing melodies. In the practical operation of broadcasting stations it seems very, very difficult to give a satisfactory rendition of a high class number; some of them we hear on our own set are execrable, whereas the popular tune does not suffer so in transmission. Played in the room or auditorium where an audience is present, high class music is difficult of satisfactory rendition; it loses much in radio transmission, and some of it becomes atrocious."

"Of the two classes of music, the popular has much the greater audience. We control ninety per cent of the popular music, a minor proportion of the high class music."

I ask you, Mr. Mills, at the time you made that statement was it true?

A. Yes, in my opinion in 1924.

Q. Now, in response to another question——

The Court: I don't think there is any necessity for further encumbering the record.

[fol. 393] Mr. Bennett: This takes up another proposition.

The Court: The witness has testified what is in there, and states it is a correct report of what he said. It is not necessary to ask him about any more.

Mr. Bennett: There are only these two statements of the witness. This other one pertains to standard material.

The Court: It is already in evidence, isn't it?

Mr. Bennett: No, sir, it isn't.

The Court: Do you want to put it in evidence?

Mr. Bennett: I think it would unduly encumber the record to put the entire report in evidence.

Mr. Frohlich: I object to putting the report in evidence.

The Court: So far I don't see the purpose of any part of it.

Mr. Bennett: There are only a few lines of it.

The Court: Very well.

Q. "Q. But, Mr. Mills, apparently these high class publishers have their own association, and if they see fit can enforce their copyright as to public performances of their [fol. 394] music." "Mr. Mills: Yes, absolutely." "Q. Then would it be correct to say that in these two organizations you would have practically a hundred per cent of the music that is copyrighted?" "Mr. Mills: Yes, sir." Was that statement correct at the time you made it?

A. Well, of course, it was correct. Are you meaning to infer I would have made it had I thought it not correct?

Q. Now, Mr. Mills, did the standard publishers to whom you referred in that last statement, later become members of the American Society?

A. Yes, sir, most of them.

Q. Your membership has increased materially since 1922, has it not?

A. Yes, sir.

Q. Both as to composers, authors and publishers?

A. Yes, sir.

Q. And in foreign societies affiliated with ASCAP?

A. Yes, sir.

Q. And the society's repertoire has remained proportionately about the same?

A. As to the total repertoire?

Q. Yes.

A. I would say yes.

Q. You referred in your testimony to the discussions or negotiations of 1932 with the broadcasters. Will you state what precipitated those discussions?

[fol. 395] A. A desire upon ASCAP's part and an announcement of that desire to the radio industry for an increase in fees being paid by broadcasters to the Society.

Q. About when was that made?

A. April 11, 1932.

Q. Was that made in a form of a letter?

A. Yes, sir.

Q. Do you have a copy of that letter here?

A. I do not have, but it is repetitiously in the records of trials of this sort.

Q. Will you state the substance of that letter?

A. The substance was it opened with the statement of the conditions in the industry and the distress of the American Society as they found themselves in by the diminution of their normal sources of revenue on account of the inroads of radio and the changes occurring in the music habits of the nation, a statement that commencing June 1st of that year the rates for American Society licenses would be a sustaining fee plus five per cent of the receipts of the stations for the sale of time on the air in respect of programs which used ASCAP's music, and in the case of a network broadcast the entire fee to be paid by the originating station.

Q. Five per cent of the gross income?

A. Five per cent of the receipts from the station for the sale of time on the air. There are a lot of other charges charged advertisers—a hundred different kinds of fees. [fol. 396] I am talking about receipts from sale of time on the air, and that only.

Q. What do you mean, Mr. Mills, by "time on the air"; what do you include in receipts for time on the air?

A. The amount paid by the advertiser for the number of minutes of the facilities of the broadcasting station which he purchases for the presentation of a program, and the usual "blursh" about his hair oil or his tooth paste or his breath rectified, or whatever it might be.

Q. You include talent charges in that?

A. No. What do you mean by "talent charges"? I don't know.

Q. Salaries or wages, whichever you wish to call them, to artists and orchestras and vocalists or whoever may be engaged in the program.

A. We don't include them in there. We don't rent them any artists.

Q. Do you include special services rendered by a broadcasting station to the advertiser in preparing the program?

Mr. Frohlich: I object to that.

A. Do we include what?

Mr. Bennett: He has insisted upon this time on the air thing.

Mr. Frohlich: If the Court please, I object to the witness giving any definition of a contract which is in evidence. [fol. 397] The radio contracts here in Nebraska are in evidence in this court that fully define each and every part of the contract.

The Court: Objection sustained.

Q. You say this letter was sent April 11th. What happened after that, Mr. Mills?

A. Well, the broadcasters let out a yell and said they didn't want to pay any more money, and couldn't pay and wouldn't pay any more money, and the industry finally appointed the National Association of Broadcasters as its spokesman to deal with the American Society. The National Association of Broadcasters in turn through its Board of Directors appointed a committee especially empowered to deal with the American Society, which committee—I presume you want the names—consisted of Mr. Ashby, general counsel, Edward Klauber, executive vice-president of the Columbia Broadcasting System, and Paul Morency, managing director of broadcasting station WTIC owned by the Travelers Insurance Company at Hartford, Connecticut. That committee was appointed to negotiate with the American Society in behalf of the National Association of Broadcasters which professed to speak for the industry.

Q. Did you extend the time to which the new rate would become effective?

A. Again and again and again, yes.

Q. Just a minute. Are you sure that it was several [fol. 398] "agains", or just one?

A. Until I had a beard nearly down to my knees, yes.

Q. What was the date to which it was extended?

A. We had established June 1st as the date upon which the new rates should become effective.

Q. Do you recall the meeting of April 19th?

A. Yes, sir.

Q. Do you recall at that meeting it was extended to September 1st?

A. Yes, sir.

Q. Did not the contracts go into effect September 1, 1934?

A. Retroactively, yes. They were not negotiated by September 1st, however.

Q. Did the broadcasters object to making a payment of a percentage on their gross business?

A. They objected to making any payment.

Q. Did they object to making a payment of a percentage on their gross business?

A. I have answered the question.

Q. Please answer the question.

The Court: The witness has answered it.

A. Yes.

Q. What offer did they make to the American Society?

The Court: Does it make any difference? There is a contract here, isn't there? What is the importance of the [fol. 399] details of these negotiations?

Mr. Bennett: The witness, in his direct examination in connection with all these negotiations, has very clearly brought out, or attempted to bring out, these contracts were entered into voluntarily by the industries, and not because they had any other option. The details of the manner in which these negotiations are conducted, I submit, will demonstrate the inability and the method by which the various users of music were compelled right at the last minute to enter into the agreements on the terms fixed and determined by the Society, not by mutual agreement.

A. But we never did get the terms we attempted to fix in any case, not a single case ever.

Q. You have a uniform contract to the broadcasters at the present time?

A. But not on the terms we dictated.

Q. No?

A. No.

Q. Do you remember a meeting of your Board of Directors on June 3, 1934?

A. I presume so. I attended all the meetings when I have been in town. If there was a meeting, I attended it.

Q. What was the formula you were instructed to negotiate with the broadcasters presented to that board meet- [fol. 400] ing and approved by your board meeting?

A. What was that date?

Q. June 3, 1932.

A. I don't remember. I would have to refresh my memory from the minutes.

Q. Have you got your minutes? May I refresh your recollection by reading you an extract from them?

A. Yes, you may. Do you mean to tell me you want to read an extract from the minutes of the meeting of the Board of Directors?

Q. I think that is immaterial to the issues of this case.

Mr. Frohlich: From what are you reading?

Mr. Bennett: From a copy of your minutes.

The Witness: I would like to know how you came into possession of it.

Mr. Bennett: (Reading) "Commencing January 1, 1933 a large number"——

Mr. Frohlich: I object to it. There is nothing to show Mr. Bennett is reading from a real accurate copy of the minutes of our Board of Directors. If he has the minutes of the Board, I have no objection to him reading it, but something which he himself has prepared, we don't know whether it is authentic or true.

The Witness: If he has, we want to know it.

The Court: Just a minute. What is it you are purporting [fol. 401] to do?

Mr. Bennett: If the Court please, the complainants were requested to bring their records and they stated that they would. I have asked for the minutes of the directors' meetings.

Mr. Frohlich: You have not; there is no such request.

Mr. Bennett: I am merely trying to refresh the witness' recollection to a very important meeting of his Board of Directors of June 3, 1932.

The Court: Objection sustained. There is no basis for the authenticity of the matter from which you are reading.

Q. Mr. Mills, do you recall you were instructed by your Board to require from the broadcasters a formula as follows: "A sustaining fee equal to the amount paid for the year preceding, plus three per cent of the gross station income for the first year, four per cent for the second year, and five per cent for the third year, the agreement to be a three-year contract"?

A. No.

Q. You don't recall that?

A. No.

Q. You mean to state you received no such instructions?

A. I say I did not recall that, and now I say I received no such instructions.

[fol. 402] Q. Do you recall a meeting at your home along around the middle of August with Mr. Edward Klauber, vice-president of the Columbia Broadcasting System and one of the members of the committee?

A. Mr. Sidney Kaye, general counsel, who visited me socially at my home in Shelter Island.

Q. Do you recall the substance of the discussions at that meeting?

A. Yes.

Q. Did you not reach a form of agreement with Mr. Klauber and Mr. Kaye at that time?

A. No.

Q. A method?

A. As to anything, no.

Q. When did you have the meeting of your Board of Directors which approved the formula for broadcasting, that ultimately went into effect September 1, 1932?

A. Well, undoubtedly shortly following the agreement between the committee representing the American Society and the committee representing the N. A. B. that such a formula would be acceptable to both sides, and we would have as soon as possible a meeting of the Board of Directors to confirm it for our part, the same as they would for their part.

Q. Did you or did you not shortly before September 1, 1932, call on Edward Klauber after a board meeting of your [fol. 403] Board and say to Mr. Klauber that your Board had turned you down on your recommendations; that the only formula they would accept was a sustaining fee equal to that paid by the station the preceding year, plus three per cent of its gross income for the first year, four per cent for the second year, and five per cent for the third year?

Mr. Frohlich: I object to that, your Honors, and object further questioning as to the details of these negotiations.

Mr. Bennett: I can prove the facts.

Mr. Frohlich: We are taking up a lot of time of the Court over nothing.

The Court: You may answer, if you know.

A. I don't remember.

Q. It is a fact, though, that is the contract that was entered into and submitted to stations effective as of September 1, 1932?

A. It is a fact that is the formula that was approved at the time by the committees authorized to represent both organizations, and the formula ultimately went into effect.

Q. Just a minute, Mr. Mills.

A. I will answer you.

Q. It is a fact that is the formula in the contract put into effect as of September 1, 1932?

Mr. Frohlich: I object to that as immaterial.

[fol. 404] The Court: Sustained.

Q. Mr. Mills, that contract was for a three-year period, was it not?

A. That is right.

The Court: Is the contract in evidence, and printed?

Mr. Bennett: Not that one.

Mr. Frohlich: Yes, it is, it is in evidence.

Q. That original agreement of 1932 expired August 31, 1935?

A. It was for three years, and it expired three years after the effective beginning date.

Q. Mr. Mills, you recall the discussions for renewal of that contract in 1935, do you not?

A. Yes.

Q. You were present at those discussions?

A. Yes.

Q. Do you recall with whom you discussed those renewals?

A. The committee representing the National Association of Broadcasters.

Q. Do you recall the individuals?

A. The same cast, more or less.

Q. Mr. Klauber?

A. Yes, and Mr. Ashby.

Q. Mr. Levy?

A. And Mr. Levy.

Q. Mr. Ashby?

[fol. 405] A. Yes.

Q. And Mr. Hostetler of Baker, Hostetler, Sidlow and so forth?

A. Not them.

Q. You do not recall Mr. Hostetler being there?

A. He was not present at the preliminary conferences.

Q. Was he present at any of the conferences?

A. At the very end of them.

Q. Was Mr. Phillip G. Loucks present there?

A. Yes, I think so.

Q. When did those conferences start, Mr. Mills?

A. You mean the date?

Q. Approximately, to the best of your recollection.

A. I would say they started August, probably, 1935, three or four months before the expiration of the agreement.

Q. The contracts you know were expiring August 31st?

A. Then three or four months prior to that date.

Q. May I refresh your recollection as to a few dates and happenings at that time?

A. Yes.

Q. Do you recall that on or about the 5th of May or the 6th of May a suit was filed, known as the United States versus the American Society et al?

Mr. Frohlich: I object to that, your Honors.

The Court: Objection sustained.

Q. Do you recall meeting with the committee about the 21st of May, 1935?

[fol. 406] A. Which committee?

Q. Of the committee of broadcasters.

A. The committee of the National Association of Broadcasters?

Q. The committee of broadcasters we named.

A. A committee representing the National Association of Broadcasters?

Q. Yes.

A. Yes, sir.

Q. At that time did you make an offer to the broadcasters to extend all contracts for a period of five years from December 31, 1935, without increases in fees?

A. Well, I wouldn't say from my recollection it was quite as simple as that.

Q. You did ultimately make that?

A. Ultimately that was the arrangement, yes.

Q. Do you recall that the committee requested extension for the duration of the suit then pending?

A. What suit?

Q. The so-called government suit, the United States versus the American Society.

Mr. Frohlich: I object to that.

The Court: Sustained. It is not cross-examination of anything, and assuming facts not proper and wholly immaterial as far as the Court can see.

[fol. 407] Q. When was the last meeting? Did you have a number of meetings between the latter part of May, 1935 and the first five or six days of June, 1935 with this committee of broadcasters?

A. I presume so, yes, sir.

Q. Did you reach an agreement with the committee on behalf of the industry?

A. The committee on behalf of the industry and myself on behalf of the American Society.

Q. Did the committee agree to an extension for five years without increases of fees, and did they agree to that on behalf of the entire industry?

A. Yes, to both parts of the question.

Q. Are you sure of that, Mr. Mills?

A. Yes, to both parts of the question. I wouldn't say the N. A. B. specifically said all broadcasters are to be bound by this formula we had negotiated, but the N. A. B. purported to speak on behalf of the industry. They have always said we speak for the industry; the broadcasters will do what we tell them to.

Q. Is it not a fact, Mr. Mills, they refused that on behalf of the industry?

A. Well, not to my recollection. Well, they attempted to refuse anything on behalf of the industry and attempted to get the rates reduced.

Q. I am talking about the first part of June, 1935.

[fol. 408] A. I can't distinguish one of these meetings from another in my memory, because so many of them were constant and repetitious. One meeting was on this ground, and another meeting on that ground, and there was ground gained and lost by both sides in the negotiations in our attempt to get more favorable conditions and their attempt to buy music cheaper.

Q. Just a minute, Mr. Mills. Is it not a fact Mr. Isaac D. Levy, owner of station WCAN, and Mr. Klauber on behalf of the Columbia Broadcasting System, and Mr. Ashby or one of the other officials of N. B. C. on behalf of the National Broadcasting Company, about the 6th of June, 1935 entered into a renewal agreement of their existing contracts, extending those contracts for a period of five years from December 31, 1935, with some increases in fees so far as the network was concerned?

Mr. Frohlich: I object to that as incompetent, irrelevant and immaterial. I don't see how we are going to pick the negotiations apart and prove every contract was signed, or we are going to be here all day on just one phase of this case.

The Court: What is the theory of the offer?

Mr. Bennett: I will demonstrate by a correct answer to that that as a result of that action some three hundred broadcasting stations throughout the United States were [fol. 409] compelled to accept the demands of the Society.

The Court: This voluntary statement is not based on any evidence, and it will be stricken from the record. Ask the question again.

(Question read.)

A. Why pick out Levy—he is not the owner of station WCAN.

Q. He is one of the owners, is he not?

A. Well, I can't identify the time and sequence into which these conferences and agreements were reached; I just can't separate them in my memory, one from the other. You asked me on or about that date. I can't say that date or some other date, or preceded or succeeded some other particular conference. It would have to be better identified for me.

Q. It did happen approximately that time?

A. I don't know when it happened.

Q. But it did happen, did it not?

The Court: Are those contracts in evidence?

The Witness: Yes.

Mr. Bennett: They are not in evidence in this suit, your Honors.

The Court: They are in writing?

Mr. Bennett: Yes, but I am sure he is familiar with the contents. He signed them himself, and I was going to question him about the contents of those contracts.

[fol. 410] The Court: The most accurate evidence with reference to them is the contract itself. The objection to this testimony is sustained.

Q. Mr. Mills, have you ever notified the Columbia Broadcasting System, or the National Broadcasting System, to cease delivering programs to affiliated stations under provisions of your agreement with N. B. C. and C. B. S.?

A. You asked me if I had? The answer will be no.

Q. Has the Society ever notified them to cease delivering programs?

A. A later witness will have to testify to that.

Mr. Frohlich: Object to any testimony along that line.

The Court: The witness has testified he will not be able to answer.

Q. Are you personally familiar with your agreement with C. B. S. and N. B. C.?

A. In general.

Q. Does that agreement contain a provision that they shall not deliver programs to any station which does not have a license from the American Society?

A. Yes.

Q. Now, Mr. Mills, the latter part of 1935, you testified, I believe, and the record shows that effective as of January 1, 1936 the Warner Bros. subsidiaries of Harms, Witmark and several other musical publishers withdrew from mem-

[fol. 411] bership. That is correct, is it not?

A. Yes, sir.

Q. Did you have discussions with Mr. James W. Baldwin as managing director of the National Association of Broadcasters toward the latter part of 1935?

A. Yes.

Q. Did Mr. Baldwin bring up the question of the American Society fee which should be paid by stations for the depleted catalog?

A. Yes.

Mr. Frohlich: Just a moment. I object to that question and to any other similar questions along that line, because it is going into the matter of Warner Bros., already covered by Mr. Hotz.

The Court: The answer may stand, but there is no use going over the same ground again.

Q. Mr. Mills, did ASCAP make any reduction to the broadcasting stations because of the loss of that material?

A. No.

Q. Did you or did the American Society on or about January 11, 1936 send telegrams to all stations in the United States demanding that the renewal agreements be signed not later than January 15th?

A. Have you got one of the telegrams?

Q. I do not have, but you should have; it is your telegram.

[fol. 412] A. I don't know. You say the date we sent them telegrams demanding something? The telegrams speak for themselves.

Mr. Bennett: Do you have the telegram, Mr. Frohlich?

Mr. Frohlich: We don't have it.

Q. I don't have a copy of that telegram with me, but there was a communication.

A. I don't know what it said.

Q. Do you recall that there was such a communication sent?

A. There was a communication sent about the necessity of renewing the licenses which were expiring. They were probably advised if they didn't renew them on and after the expiration date, the music could not be legally performed for the purpose of profit without the consent of ASCAP; therefore, get a license.

Q. Those were at the same price; you were making no reductions?

A. The renewed agreements are in evidence, and show what the terms were.

Q. Those renewals made no reduction for the loss of the Warner material?

Mr. Frohlich: I object to that.

The Court: Objection sustained.

Q. Just one or two more questions. On your direct testimony you stated that the broadcasting industry from time to time had requested from you or the American Society a formula for the payment of fees on a per piece perform-
[fol. 413] ance basis, and at times on a per program payment basis, did you not?

A. Who had requested that?

Q. The broadcasting industry, the representatives of the broadcasting industry.

A. No. Individual broadcasters, not the broadcasting industry.

Q. You say that none of these committees have requested such a formula?

A. None have discussed such a formula.

Q. Don't you know at the present moment that request has been pending for the last five or six months?

A. I don't know that, and it has not been made.

Q. By a committee?

A. It has not been made.

Q. I said the American Society, and whether you knew it.

A. I don't know it.

Mr. Bennett: That is all.

Redirect examination.

By Mr. Frohlich:

Q. Mr. Mills, did you ever prepare a list of music publishers in the United States?

A. Yes, sir.

Q. I show you this document and ask you whether that is a list you prepared?

A. Yes, sir; it is a list of music publishers in the United [fol. 414] States so far as it is shown by our records.

Q. Does that include publishers of ASCAP?

A. All publishers in the United States shown by the records of the copyright office, by our records and by the various trade magazines and all sources to which we know of to go—the names and addresses.

Q. How recently was that prepared?

A. Probably last year.

Mr. Frohlich: I would like to offer in evidence plaintiff's Exhibit Number 37.

The Witness: That list has been offered to all broadcasting stations in the United States alphabetically listed.

Mr. Hotz: Might I interrogate the witness just a moment to find out about this?

The Court: You may.

By Mr. Hotz:

Q. Now, you have in here music stores that sell music.

A. But we have in there also music stores, owners of copyrights, in musical compositions. For instance, Jenkins Music Company of Kansas City, Missouri, which own Piccolo Pete and Saxophone Sam and a number of very important musical compositions. The Theodore Presser Company of Philadelphia, one of the largest dealers in sheet music and jobbers of sheet music in the United States, and [fol. 415] Oliver Ditson Company, Inc. of Boston, and Lyon & Healy of Chicago, and Sherman, Clay & Company of San Francisco.

Q. And who else?

A. Well, I will take the list and go down through it.

Q. I don't want the ordinary music stores throughout the country.

A. You haven't got any, so far as I know.

Q. In this Exhibit Number 37 you haven't any music stores?

A. Which one have I there that is just a music store?

Q. Let us find out what a music store is.

A. A store that deals in sheet music and music accessories and retails publicly.

Q. None of those are in here?

A. None, no.

Q. What are the publishers, just what are their functions, the publisher members of the association? When we say your publisher members like Harms, like Remick, like Witmark and the rest of those large New York publishing houses, what are their functions, just how do they operate, what do they do?

A. Well, they get the manuscript of a new song, a new piece of vocal or instrumental music from the composer or author. He brings it around and plays it for them and demonstrates it to them, and says it is going to be a great song and sure to be a hit, and the publisher, according to his judgment, decides he will invest a very substantial sum [fol. 416] of money in trying to find out whether the public believes it is a hit. He takes the composition and manuscript from the composer and author, and sends it in to one of his expert arrangers, who works and makes a business making piano arrangements and orchestrations and all that sort of thing, from this manuscript which the author and

composer have submitted. He decides to publish it so that he gives the author and composer, or authors and composers, if plural, in either both or either case, a contract, in which he takes over the publication rights of the song and the copyrighting of the song, the entire works. He proceeds then with the publication of what is called "professional copies". You want me to go into this?

Q. Yes.

A. Professional copies from the manuscript of the composition are finally worked into shape by the arrangers. These professional copies are distributed to orchestras and dance halls and singers and artists and so forth throughout the country. It begins what is called commercial exploitation of the songs. If the artists like the song they play, and the broadcasters like it, they put it on their programs; if the motion picture theatres like it, they have their pianist or organist play it, or the motion picture people put it in a picture, and all that sort of thing. The public likes the song, we hope. In most cases, it doesn't; it likes about one out of every thirty. If as and when the public demon- [fol. 417] strates an interest in the song, what are called regular piano copies are then issued. It is a copy usually on a good grade of paper with two colors. You have a lithographed sheet nicely produced, and it is sent to the music jobbers, in circular letters sent to the dealers, and advertisements are put in the trade papers calling attention to the quality and public popularity of this new composition. Orchestra leaders are playing it, and if the public likes the sheet music, the music stores have the music and they sell it to the public. And that is about the routine production of the publication of a song.

Q. Now, those publisher members, they are really wholesalers, aren't they?

A. They are producers. Wholesalers are jobbers; the publisher doesn't act as jobber.

Q. Publisher members are more like manufacturers?

A. Yes, sir. The writer is the producer, the publisher is the manufacturer, and the jobber is the middle man.

Q. That music gotten up and sponsored by the publisher members, such as Witmark, is sold out into the territory throughout the United States?

A. The music store in Lincoln will be selling copies and phonograph records.

Q. And at Omaha, Patton's and Schmoller & Mueller, and every hamlet in the State of Nebraska?

A. That is right.

[fol. 418] Q. The jobbers in this line of business are middle men?

A. Yes, sir.

Q. They don't make any deals with the author and publisher?

A. No, they have no contact with them.

Q. These music stores in Nebraska don't make any deals with the publishers? They do not have the facilities?

Mr. Frohlich: I object to any further questions along that line, because Mr. Hotz stated he wanted to cross examine the witness for the purpose of making an objection to this Exhibit Number 37, and I think he has gone far enough on that.

The Court: Yes.

Q. Now then, what does this box of exhibits contain?

A. A complete list——

Mr. Hotz: Withdraw that question.

Q. In the light of the question I have just asked you about the mechanics of publishing this music, Mr. Mills, what I want to get at is how many of these publishers in this list there might be, such as are in your organization and listed as publisher members, in this list you have here.

A. In that list will be all of our members, so obviously a hundred odd of the names in there are publishers such as would be in our organization.

Q. Of that kind of publisher, let's say, how many would you say would be in this list?

[fol. 419] A. There are all kinds of publishers in ASCAP.

The Court: That isn't answering the question.

Q. Of your publisher members.

The Court: How many of your members?

A. One hundred and twelve is the membership of the Society.

Q. Are there any more in this list like that, and if so, how many who function as they do?

A. They all function in the same manner. Now, not all are as large as some of the publishers in the American So-

ciety, but some of the members in the American Society are as small as any of those in the list. There may be some in the list smaller, if that is what you are getting at.

Q. How would I know in going through this list here of just what are music houses, what might be construed as music houses that have no publishing facilities; we might say manufacturing facilities?

A. There are relatively none such in there. There may be some one in there on the records of the Register of Copyrights as a publisher, who has, in fact, since become simply a music dealer—I don't know. There would be none such there as far as our records are concerned. This list combines the names from all sources where we could find them, of music publishers largely, and also the list of the Register of Copyrights at Washington.

Mr. Hotz: Object to plaintiffs' Exhibit Number 37 for the [fol. 420] reason that it tends to encumber the record. It does not prove anything that is material to the issues of this case, and there is nothing to show by the witness, nor by the exhibit itself, if your Honors please, by the form of the exhibit itself, what it is and what bearing it has on the issues in this case, and what relation relatively to the publisher members of the American Society. You can't tell anything about it.

The Court: It shows what the association did in that regard. The objection is overruled.

Mr. Frohlich: That is all.

Mr. Hotz: That is all.

Witness excused.

[fol. 421] JOHN GREGG PAINE, called as a witness on behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. What is your name?
A. John Gregg Paine.
Q. Where do you reside?
A. Wilton, Connecticut.
Q. How long have you been a resident of that state?

A. Seven years.

Q. Are you in any way connected with the American Society?

A. I am the general manager.

Q. How long have you been such?

A. Since May 1, 1937.

Q. And prior to assuming your duties as general manager of the Society, what occupation did you follow?

A. You mean immediately prior?

Q. Yes.

A. Immediately prior to that I was chairman of the Board of the Music Publishers Protective Association.

Q. What kind of an association is that, a trade organization?

A. A trade association of the music of a certain number of music publishers.

[fol. 422] Q. How long were you connected with that organization?

A. From October, 1929 to May, 1937.

Q. Has that organization anything to do with the Society?

A. Nothing.

Q. Has it any connection in shape, manner or form?

A. Not in any way, shape, manner or form.

Q. Are there some publisher members of the Society who are also members of that organization?

A. Oh, yes, and some who are not members of this Society.

Q. By the way, have the writers of the American Society also their own trade organization?

A. Yes, they have.

Q. What is the name of that association?

A. Song Writers Protective Association.

Q. Prior to your coming with the Publishers Protective Association, did you have any connection with any other company or firm in the entertainment field?

A. Yes.

Q. Will you please state what it was?

A. From the time I finished law school in 1914 to 1927 I was with the Victor Talking Machine Company, in charge of their copyright work, and subsequently from 1927 to 1929 I had charge of the copyright work of Warner Bros., Inc.

Q. In your duties in connection with these various occupations you have described, did you become familiar with the music publishing business?

[fol. 423] A. Oh, yes, that was my business.

Q. Can you state that you know the customs and the usages of that business?

A. Yes, sir.

Q. You know how publishers operate and how writers operate?

A. Yes.

Q. Did you at my request make up a list of musical compositions which were composed by William J. Hill, one of the plaintiffs in this action, a member of this Society?

A. I did.

Q. I show you a list and ask you whether that is a correct and accurate list of the compositions of Mr. Hill on the files and according to the records of the American Society?

A. This is a correct and accurate list of Billy Hill's compositions.

Mr. Frohlich: I would like to offer in evidence plaintiffs' Exhibit Number 38.

Mr. Hotz: What is the purpose of it?

Mr. Frohlich: He is one of the plaintiffs.

Mr. Hotz: I suppose you have a list for Sousa?

Mr. Frohlich: Yes, sir.

Mr. Hotz: And your object is to show the interest those plaintiffs have in this case?

Mr. Frohlich: Yes.

Mr. Hotz: We have no objection.

[fol. 424] Q. I show you a similar list of the musical compositions of John Philip Sousa. Did you prepare that from your office records?

A. Yes, sir.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 39.

Q. I also show you a list of the works of Oley Speaks, one of the plaintiffs. Was that likewise prepared by you?

A. Prepared by me from the office records, and this is the one prepared.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 40.

Q. I show you a list of the works of Deems Taylor, one of the plaintiffs. Was that likewise prepared from your office records of the American Society?

A. It was prepared from our office records, and this is the one I prepared.

Mr. Frohlich: I would like to offer in evidence plaintiffs' Exhibit Number 41.

Q. Now, you were with the Victor Talking Machine for approximately thirteen years, is that right?

A. That is correct, yes, sir.

Q. Now, were you the head of their copyright department?

A. Yes, sir.

Q. What particular function did you exercise there?

A. The purpose was to clear the copyrights for such [fol. 425] musical compositions as they desired to use on their records. I was employed there to study the copyright status of those records, both in the United States and all territory in the world in which the Victor Company did business, and to obtain contracts wherever the contracts were necessary.

Q. When you say you were to clear titles, you meant to pay whatever fees were necessary to be paid and obtain proper licenses for the rightful owners to permit the Victor Company to make a record of that composition?

A. So that we could record without infringement.

Q. The Victor Company is the largest company of its kind in America?

A. Yes, sir.

Q. And it has made and sold a great many thousands of records all over the years?

A. A great many millions over the years.

Q. Did you have occasion to familiarize yourself while you were with the Victor Machine Company with the titles of compositions that were in the public domain in the United States?

A. Yes; I had a catalog of musical compositions, and I was still engaged in the creation of such a catalog when I left.

Q. The Victor Company made up its own catalog of public domain music?

A. Yes, sir, in the United States.

Q. You left the Victor Company in 1927, is that right?

A. Yes, sir.

[fol. 426] Q. Had you looked at that catalog shortly prior to your leaving the company?

A. Yes, sir.

Q. Were you familiar with the catalog?

A. Yes, sir.

Q. How many titles would you say there were of compositions in the public domain of that catalog?

A. We had close to a million titles—over nine hundred thousand; I don't remember the exact number—over nine hundred thousand.

Q. Nine hundred thousand musical compositions in the United States, and which nobody owned the copyright on?

A. They were in the public domain.

Q. If it had a copyright, it had expired by limitation of time?

A. Yes. Of course, that didn't cover all public domain, that was just part of the public domain we had cataloged.

Q. A portion of it?

A. Yes, sir.

Q. Since 1927 would it be safe to say that additional public domain music has come around?

A. Oh, my, yes.

Q. A great many thousands of compositions?

A. Yes.

Q. Can you estimate with some degree of certainty how many additional copies there would be since 1927?

A. It would be a very, very difficult thing to do.

[fol. 427] Q. You would rather not guess?

A. I would rather not guess.

Q. What are the popular dances in the past few years?

A. Well, the dance form changes from time to time. The popular dance of the last few years has been the rhumba and the tango and the fox trot, and recently the polka has come back, and personally I am glad about that.

Q. As a matter of fact, hasn't a great many compositions in the public domain been transposed or arranged or adopted so that they may be danced today by the rhumba and fox trot and similar dances?

A. Yes.

Q. As a matter of fact, for a great many years now has there been a tendency on the part of the music world to take old numbers and change the rhythm and time and adapt them to modern dancing?

A. That is right.

Q. That has been done with a great many compositions that you say were in the public domain?

A. They do that constantly—"A Tisket a Tasket" an old nursery rhyme was modernized into a dance and a very popular one.

Q. So that would you say there could be played today out of this great catalog of public domain music a sufficient amount of music to offer dancing entertainment for the public?

[fol. 428] A. Yes. For example, there are more rhumbas in the public domain than copyrighted—many, many more.

Q. A great many of the rhumbas come from South America?

A. Yes, and they don't want to bother copyrighting them in the United States. The same is true of the tango—there are many, many more in the public domain than in the copyright field.

Q. Would you say a dance hall today or a radio broadcast could play and perform a sufficient amount of music to entertain for dancing purposes without having to dip at all into the reservoir of the American Society?

A. Certainly. Any user could—not as cheaply as with us, but they could do it.

Q. Has the Victor Company any affiliation with any broadcasting company whatsoever?

A. Yes; it is now the R. C. A. Victor Company. When I was connected with it, it was the Victor Talking Machine Company.

Q. "R. C. A." stands for the Radio Corporation of America, is that right?

A. Yes. And also owns the National Broadcasting Company.

Q. Which all in turn are owned by the General Electric Company and the Westinghouse Company?

A. I understand that is so.

Q. So that the Victor Company and the National Broadcasting Company are now affiliated corporations?

A. Yes, sir.

[fol. 429] Q. Having a common interest?

A. Yes, sir.

Q. These phonograph records of public domain music, which were made by the Victor Talking Machine Company, are now available to the National Broadcasting Company as well as to others, isn't that right?

A. They have a library of them offered to all radio stations. Every radio station in the country has a catalog of Victor public domain music.

Q. Does the Victor Company furnish any records to broadcasting stations for performing rights of this public domain music?

A. Yes, they do.

Mr. Hotz: I object to that because it is not a definite question. He says music that is furnished by the Victor Company to various broadcasting stations. Do you mean records?

Mr. Frohlich: I mean in the form of records.

The Witness: Recorded music.

Mr. Hotz: You didn't say that; you said music. You are talking about records now?

The Witness: Recorded music.

Mr. Hotz: With that explanation I withdraw my objection.

Q. Has Columbia any affiliation with any record company?

A. They recently purchased the American Record Company.

Q. Does the American Record Company have a catalog of [fol. 430] public domain music?

A. That is the old Columbia Phonograph Company, and I think they have consolidated the Brunswick and Columbia and the old American Record Company, and they gathered up a great number of companies.

Q. Phonograph companies?

A. Old phonograph companies.

Q. These other phonograph companies and the American Record Company have a similar catalog of public domain music?

A. Yes, public domain and copyrighted.

Q. And the American Record Company is now a subsidiary or affiliate of the Columbia Broadcasting Company?

A. It is owned by the Columbia Broadcasting Company.

Q. Do the broadcasting companies, and if you know of your own knowledge otherwise please do not answer, have libraries or catalogs of music in the public domain in addition to the catalog prepared by the Victor Company and the American Record Company?

A. Yes, they do. You mean available to them?

Q. Yes.

A. Yes, they do. They have the Langloise & Wentworth catalog which is originally all public domain music. Re-

cently they have been recording works that they have purchased from the authors, in the nature of hill-billy songs and that sort, which they have added to their catalog, but all tax free. There is the Davis & Schwegler catalog; there [fol. 431] are other catalogs available to them, which is part public domain and part copyrighted. There is McGregor-Solle Standard Radio. Well, I don't know—there are quite a number of them; there are quite a number of companies engaged in the United States in recording music on order, so that an advertiser that desires to put on a recorded program, if he wants to have public domain music in that recorded music, can go to one of these recording companies and they will make a record for him.

Q. I will ask you if the Schubert Publishing Company has a catalog of music which is not in the control of the American Society?

A. The Schubert Publishing Company is owned by——

Q. Bright, Coff & Hartel?

A. Bright, Coff & Hartel is a German firm with offices in New York and do a great deal of publishing in the United States of great German copyrights.

Q. Which are not owned or controlled in any way by the American Society?

A. No, which are not owned or controlled in any way by the American Society. The Universal Edition is another tremendous catalog not owned or controlled by the American Society.

Q. How about the Associated?

A. Well, the Associated Music Publishers, which Mr. Mills mentioned, is a group of large publishing houses—[fol. 432] they call themselves "Associated Music Publishers", and none of them are in the American Society repertoire.

Q. G. Recorde Milan?

A. That is an independent, and not a Society repertoire.

Q. These firms names you have mentioned have extensive catalogs, haven't they, of music not owned or controlled by the Society?

A. Big catalogs.

Q. Would you say there were many thousands of compositions in the aggregate of those firms?

A. Yes, I would say all kinds of music.

Q. Satisfactory for all entertainment purposes?

A. Satisfactory for all entertainment purposes. It may not be so rich in fox trots, but in everything else it is an enormously rich catalog.

Q. As a matter of fact, you heard the testimony yesterday in the court room? You were here, weren't you?

A. Yes, sir.

Q. You heard Mr. Buck describe a hit song or a hit number. In the past ten years have there been a great many hit numbers created by publishers, writers and composers who are not members of the American Society?

A. Oh, yes.

Q. Will you be good enough to state a few of those numbers?

A. Well, there are two big hits running at the present time, neither of which were composed by members of the society.

[fol. 433] Q. What are they?

A. Beer Barrel Polka and Sunrise Serenade—two very, very popular musical compositions, neither of them composed by members of the American Society.

Q. Has the American Society the performing rights?

A. On the Beer Barrel Polka it has, but the Sunrise Serenade, it has not.

Q. Does it derive the rights from the publisher?

A. Yes.

Q. Can you give us an illustration?

A. "My Dear Miss Duchesne" was not composed by a member of the American Society, and it was available for use for a great many years to the radio, but they never used it until a publisher in the American Society had translated the lyrics and put in the English lyrics, and that became a very popular musical composition. The whole Snow White score of lovely music connected with pictures was not composed by members of the American Society. They have since been made members because of that very fine job they did. I can't recall any more, but there are quantities of them, plenty of them.

Q. You heard the testimony in the court room yesterday there had been a great diminution in revenue from the income of sheet music since 1927, and of your own knowledge and your experience in this business would you say that is true and correct?

[fol. 434] A. Oh, yes, it is alarmingly true.

Q. The testimony yesterday was confined to 1927 down to 1933. Would you say that the same condition existed today as it existed in 1933?

A. Generally speaking, the condition today is much worse than it has ever been in the history of the music publishing business.

Q. You are familiar, aren't you, with these big publishing houses in New York and the small publishing houses in New York and elsewhere throughout the country?

A. Yes, sir.

Q. And you know the publishing situation fairly well, isn't that right?

A. Yes, sir.

Q. Are these music publishers, members of ASCAP today, able to operate their business enterprises on the profits and moneys received from phonograph records and from the sale of sheet music?

A. No, sir, they certainly cannot.

Q. In days gone by, the sale of sheet music was a very substantial income, wasn't it?

A. Yes, sir.

Q. In fact, a tremendous income?

A. Yes, sir.

Q. And tremendous business profits, isn't that right?

A. Yes, and they did not publish so much music.

[fol. 435] Q. And the income from phonograph records was a very substantial sum in the old days?

A. Yes, sir.

Q. Today, isn't it a fact, that so far as the American Society is concerned, that the largest and most substantial income is the income obtained from ASCAP for these performing rights?

A. What they get from the American Society determines whether or not their year's operation is in the red or black.

Q. You heard Mr. Mills describe the method by which a song is published. What would you say is the expense of publishing the average musical composition today?

A. One of the great difficulties today is that today the cost of publication has gone up very enormously. The demand for music has increased at a tremendous rate, as the public demands a lot more music, and it is more expensive than before. I can give you a general idea of the cost of making a piano arrangement. You see, when a writer comes in he brings you a sheet with the lyrics and so on. It is not

in very usable form, and it has to be arranged now for a piano number. The cost of arranging that averages from twenty-five dollars to thirty-five dollars, depending on the salary of the arranger in the established publishing house. When put in that form it is still a manuscript and it is sent to a printer and plates have to be made, usually four plates. The cost under the present union rates is four dollars per [fol. 436] plate. Then a title cover has to be made, and that has to be drawn. You used to get them for twenty-five dollars and now you pay about fifty dollars per title page, and then you have to have two plates made—two-color plates made, and if three-color plates, three-color plates have to be made, costing in the neighborhood of eight dollars apiece for those. Then you print it and the printing costs have gone up to a point where it is twenty-four dollars a thousand if you only want one thousand, and twenty-one dollars a thousand if you want more than one thousand. You usually order about five thousand printed originally. Then, of course, you have it only in piano form and that isn't usable as a musical composition to a great entertainment world. So it has to be put into orchestral form and has to have an orchestration made. Those orchestrations, if dance orchestrations, are made as a rule by specialists in the field; they get three hundred dollars for an orchestration. The orchestration contains anywhere from sixteen to twenty-four plates at four dollars a plate, and printing an orchestration costs eleven cents apiece. They usually get from twenty-five hundred to five thousand orchestrations of these dance orchestrations. Then, of course, the entertainment world today has a great many singers with orchestras, and people who sing with the orchestras, so they have to get a vocal orchestration and you have to go through the job again. So that altogether when you multiply and add it all [fol. 437] up it costs anywhere from fifteen hundred dollars to twenty-five hundred dollars to publish a musical composition of the popular dance type.

Q. That is without cost of publication?

A. Yes, sir.

Q. That doesn't pay for the exploitation of the song in order to give it popularity?

A. No. Then you begin to exploit it.

Q. How is that done?

A. All publishers have what they call professional men, a very technical and specialized field of operation. These

professional men are men who have a wide acquaintanceship in the field of performance. They know orchestra leaders and they know singers and quartets and all kinds of instrumentalists and people who happen to know music.

Q. Stage entertainers and vaudeville artists?

A. Yes, sir. Not only do they know them personally but they know their art and know the type of thing they like. There is no use offering Rudy Vallee, for example, something that Lawrence Tibbet ought to sing. They have to know all about it; they are very skilled people. They take hold of these musical compositions and begin to schedule a series of contacts. They know whom they are going to see, and that this is a song they would like to have—they believe that Kate Smith is interested in it, so they see Kate Smith. He has an opportunity to study that song and get [fol. 438] to know it, and know something of the background of Rudy Vallee; or if it is a rhythm number then they feel they ought to go to Benny Goodman or Fred Waring or some of the bands that specialize in rhythm performances. Those men receive salaries—a new one just starting in the field will get fifty dollars a week, and a very highly skilled one, a very experienced one, will get seven hundred and fifty dollars to one thousand dollars a week. Then they begin what is known as the exploitation of the song, seeing to it that the public gets to hear it through the artists who are capable of presenting that particular type of song to its public in its best manner.

Q. That is part of the overhead which must be allocated to each composition?

A. Yes.

Q. In addition to which are allocated the proportionate share of the printing, rent, general overhead and salaries to the employees?

A. The shipping department and all the rest.

Q. So that publishing a song is a proposition that involves an investment of some capital?

A. Yes, sir.

Q. About how many songs would a publisher publish in the course of a year?

A. Well, I had occasion to make a study of not a big publishing house but a very substantial house—Edward B. [fol. 439] Marks, and Marks in the course of the last two years has published three hundred and twenty-seven musical compositions. That is all kinds.

Q. How many were successful?

A. Well, in the popular field I would say that from my recollection there were eighty-nine popular musical compositions published during that period. The rest of them were quartets and music of all kinds, things which a music publishing house covers, and I think it is eighty-nine in the popular field where we talk of hits and so on and so forth. I don't believe that two of them has lived or will be in existence this time next year. That gives the mortality of popular songs.

Q. It is quite a risk and campaign, is it not?

A. Yes, it is a great risk and it is quite a campaign.

Q. You said something a moment ago about the increase in the use of music. Will you explain to the Court about this increase in the use of music?

A. Yes, I can give you some figures on that. The radio broadcasting industry, for example, we make a survey of that in the American Society by surveying the musical programs of the principal chains, the Red and Blue Networks, and the C. B. S. and about twenty-five independent stations so that it gives us a cross-section of the performance of music in about two hundred and fifty radio stations out of the entire radio industry. It is to be sure just a cross-[fol. 440] section. In the first quarter of 1936 we analyzed ten thousand programs from that group, and there were six hundred and eighty thousand performances of music in those programs. In the first quarter, the corresponding quarter, for 1939 we analyzed eighteen thousand programs from that same group of musical programs, and there were two million six hundred and thirty thousand performances in that period of time.

Q. While you analyzed only eight thousand more?

A. If it were twice as many it would still be a tremendous increase—over one hundred per cent increase.

Q. As a matter of fact, the radio today plays a song for three or four or five weeks and then that is the end of that song?

A. Right.

Q. And it uses up a lot of material?

A. Yes; a musical program in 1936 would have in a half hour ten musical compositions on the program; today they have twenty-one to thirty musical compositions—they just crowd it in.

Q. That means an author and composer has to be more active and has to do more composing than he would do years ago in order to get any revenue?

A. Yes, and the publishers, in order to get their revenue, have to increase tremendously their publication program.

(Whereupon an adjournment was taken until 1:30 o'clock P. M.)

[fol. 441] (Thereupon Mr. John Gregg Paine resumed the stand for further direct examination.)

By Mr. Frohlich:

Q. Mr. Paine, there was introduced into evidence Exhibits Numbers 17 and 18, two documents showing the gross revenue derived by the Society from the State of Nebraska over a period of years, and the expenses paid by the Society in the State of Nebraska for some of those years, and I would like to have you clear up for the Court a matter that there was some confusion about. Let us take this tabulation here on Exhibit Number 18, 1937. Will you be good enough to look at Exhibit Number 17 and state from that exhibit what were the gross royalty receipts for that year, 1937, in this state?

Mr. Hotz: Objected to that as having been asked and answered, and the exhibit speaks for itself.

Mr. Frohlich: There was some confusion about that, your Honors; it will only take a minute.

Mr. Hotz: I will withdraw the objection.

A. $54,474.64 was gross revenue received from the State of Nebraska in 1937.

Q. Look at Exhibit Number 18 for the corresponding year, 1937, and state the items of expense on that, and tell us how you arrived at those expenses.

[fol. 442] A. There is General Expense in the first column of $7,707.23. That is the proportion of the total American Society operation applicable to the State of Nebraska.

Q. The total expense throughout the United States?

A. That is the Nebraska share of the total expense throughout the United States. The next column is $3,556.46 which is the commissions paid by the Society to the representatives in the State of Nebraska for the work which they

did here. There is $115.34 legal expense, which is the proportionate share of the total legal expense applicable to the State of Nebraska, making a total of $11,379.03, which is the total American Society expense applicable to the State of Nebraska.

Q. So if that expense of $11,379.03 is deducted from $54,474.64, it would leave approximately a balance of $43,000.00?

A. That is right, distributable to the members.

Q. And that money is distributed to members on the classification system described here?

A. Yes, sir.

Q. Now, the publishers print up several copies of these compositions as they are published, is that the custom and rule?

A. That is correct.

Q. Do they sell to jobbers or dealers directly?

A. Those that are sold they sell to either the jobber or the dealer directly, principally to the jobber if it is popular music, and principally to the dealer if it is standard [fol. 443] music.

Q. Can you name some of the large publishers of music in the United States?

A. Yes, there is the Music Dealers Service in New York City; there is the Theodore Presser Company of Philadelphia; there is Lyon & Healy of Chicago; Grunwald of New Orleans, and Sherman Clay of San Francisco, and Jenkins of Kansas City.

Q. Does Sears Roebuck sell music?

A. Yes, they sell great quantities of it, but I don't think as a distributor. I mean by a distributor one wholesaler who resells to dealers—they resell to the public.

Q. They buy from a publisher and sell by mail?

A. Yes, sir.

Q. That would also hold true of Montgomery Ward?

A. Yes, sir, and big chain stores.

Q. How about Woolworth?

A. Not Woolworth, but Kresge and Kress.

Q. Isn't it a custom for the dealers of music in the country to purchase music directly from the jobbers, a considerable amount of it, by mail?

A. Yes, dealers all over the country usually purchase from jobbers because they can purchase a combined order. They have a great number of different publishers.

Q. Are there many dealers of music in the State of Nebraska?

A. I don't know.

Q. Well, now, would the dealers in the State of Nebraska [fol. 444] purchase their music from these jobbers in various parts of the country?

A. Yes.

Q. You know that is the customary thing?

A. That would be the custom.

Q. They do that by sending in an order to Lyon & Healy, say, for example, so many copies of this composition, and this composition, and send them a check for it or have them billed for it, and have it come in by mail?

A. That is right.

Q. Once a publisher sells his music to a jobber he loses all further control over that music, wouldn't he?

A. Yes.

Q. The title and physical sheet music passes to the jobber?

A. Yes.

Q. And all the jobber has to pay is for the music and not account for anything else?

A. Yes.

Q. And the jobber sells it at a price he sees fit, and the publisher has no control over the price?

A. None at all.

Q. How do the orchestras purchase their music?

A. Well, the principal orchestras, the name orchestras, rarely purchase any music; they have it given to them by the publishers. They are specialists, the big main orchestras, nearly all specialists.

[fol. 445] Q. Take the little bands.

A. They buy, as a rule, by a mail order from the jobber or some large dealer. The small dealer doesn't have orchestrations.

Q. They have to purchase orchestrations?

A. Yes.

Q. If a publisher were compelled to comply with the statute he would have to put on the face of the musical composition the price for performing right and every other right he thinks he is entitled to, isn't that right?

A. Yes.

Mr. Hotz: Move to strike out the answer until an objection can be made.

The Court: Sustained; it may be stricken out.

Mr. Hotz: Object to the question as calling for a conclusion of the witness.

The Court: Objection sustained.

Q. Well, now, Mr. Paine, in what physical manner would a publisher note to a purchaser of his composition if this statute were in force, the manner of payment for the public performance for profit?

A. As I understand the statute, he would have to print on the piece of music the price that he expected to get from the performer for the performance of that, and when that performer purchased sheet music with that price on it all he [fol. 446] would have to do would be to go ahead and make whatever use he wanted to make of it. That is my understanding of the statute.

Q. You have read the statute, haven't you?

A. Yes.

Q. Would the publisher have to put on the composition a price for every species and kind of performing right?

Mr. Hotz: I object to that as calling for a conclusion of the witness, and the witness speculating.

The Court: Sustained unless you put the question in some different form.

Q. Can you state from your experience how a publisher would go about to comply with this statute?

Mr. Hotz: Just a minute. I object to that as not the best evidence, and calling for a conclusion of the witness.

The Court: Overruled.

Q. Please tell us from your experience and knowledge how he would do it.

A. Well, it is a tremendously complicated thing. I think that he couldn't possibly do it, but if he attempted to, these are the things he would have to do. I am going to illustrate by taking the "Hearts and Flowers" musical composition we all know. It was published originally in piano form, and the copyright was owned by Fisher, it was an enormously [fol. 447] popular composition, so that Fisher had put it out now in a great variety of forms. "Hearts and Flowers" is published for the first grade piano student, for the second grade piano student, for violin students and in violin transcriptions, for small orchestras, for concert arrangements,

and for large orchestras and bands. That would mean that in every particular one of those manifold forms in which that single composition is published they would have to put the price on of what they wanted for the performance of that particular form, and to sell it in the State of Nebraska they would have to require a report made from every single person publicly performing music, and I should think, under oath, of what music they actually perform, of where they purchase that music, and of what they paid for it at the time that they purchased it, in order to make sure that the performance fee had been paid at the time that the purchase was made. They would have to carry out an inspection.

Mr. Hotz: Just a minute. I object to further answer. I think the witness has answered the question.

The Court: He may proceed.

A. You ask whether the publisher could fix one price for all performances. To me it would be an enormously inequitable thing if he attempted to do it.

Mr. Hotz: Objected to as not responsive, and calling for a [fol. 448] conclusion of the witness.

The Court: The portion "enormously inequitable" may be stricken out.

Q. Would he have to fix one price for a dance hall?

Mr. Hotz: I object to that as calling for a conclusion of the witness.

The Court: Overruled.

A. He would have to fix one price for a dance hall, one price for a radio broadcasting, he would have to fix one price for use in motion picture theatres, he would have to fix a price for the organization that was going to perform it every night in the week, and the organization that was going to perform it once a month, so that as far as I have been able to see there would be pages printed up in connection with each piece of sheet music setting out the schedule of prices in connection with that.

Q. And would that entail additional costs in printing up the additional sheet music?

Mr. Hotz: I object to that as calling for a conclusion of the witness, and incompetent.

The Court: Overruled.

A. It would entail additional costs, and in addition to that the statute——

Mr. Hotz: Just a minute. I object to the witness volunteering. The question has been answered.

[fol. 449] The Court: Sustained.

Q. What would the cost be?

A. Well, on the present scale of printing, if it were an additional four pages, it would run twenty-one dollars a thousand—that is the union rate.

Q. So that the cost of publishing the composition would be materially increased?

A. Very materially increased.

Q. Wouldn't the publisher also have to withdraw all compositions now in the State of Nebraska if he wanted to assure himself of receipts from the performing rights?

Mr. Hotz: I object to that as calling for a conclusion of the witness, and not within the issues of this case.

The Court: Overruled.

A. The present sheet music now in the hands of the dealers in the State of Nebraska doesn't have that price on it. They would certainly have to withdraw all that.

Mr. Hotz: I move to strike out that portion of the answer, "They would certainly have to withdraw all that".

Mr. Frohlich: That is consented to.

The Court: It may go out.

Q. Has the publisher any control over the dealers in the State of Nebraska today with respect to copies that have been heretofore purchased from the publisher?

[fol. 450] Mr. Hotz: I object to that as calling for a conclusion of the witness, and not within the issues, and immaterial, whether he has any control over them.

The Court: Overruled.

A. The dealer has purchased that and is the owner of that property, and we have no control over that property.

Q. In addition to all these things you have described, Mr. Paine, what other steps would the publisher have to take to protect himself to see that he received the receipts from the public performance for profit of the compositions sold within the State of Nebraska?

A. He would have to develop an elaborate investigation service and system. He would have to have inspectors call on the various establishments to see that the music they performed was music they had actually purchased, and in order to do that it would take a very enormous and very elaborate system of investigation.

Q. As a practical matter, from your knowledge of the operations of the Society and business of the publishers, how many investigators would the publisher have to have in the State of Nebraska for that purpose?

Mr. Hotz: I object to that as calling for a conclusion of the witness, and highly speculative.

[fol. 451] The Court: It is speculative, but he may answer.

A. Well, there are three hundred and ninety-one different establishments. Some of those operate every day, some of them operate once a week, and some of them operate once a month. Those that operate every day would have to be called on every day. Those that operate once a week would have to be called on once a week, and those that operate once a month would have to be called on once a month, in order to make the investigation, and I don't see how that work could be done with less than thirty investigators in this state. I wouldn't attempt to do it with less than that.

Q. Have you been able to find anything in the statute which permits the publisher's representative in the State of Nebraska to walk into any establishment and demand the right to see a particular composition and see whether or not the purchase price has been printed on it, and whether purchased from the publisher with that price on it?

Mr. Hotz: Objected to as calling for a conclusion of the witness. The act speaks for itself.

The Court: Objection sustained.

Q. Don't many of the orchestra leaders and little band leaders in the State of Nebraska purchase their music from jobbers outside of the State of Nebraska?

Mr. Hotz: The witness is not shown qualified to answer.

[fol. 452] The Court: Objection sustained.

Q. Would the publishers have to employ counsel in the State of Nebraska to protect their rights against infringement?

Mr. Hotz: Objected to as calling for a conclusion of the witness.

The Court: Objection sustained.

Q. Tell us, please, under this statute how would a publisher protect himself against infringement in the State of Nebraska.

Mr. Hotz: I object to that as calling for a conclusion of the witness.

The Court: Objection sustained.

Q. Do the publishers make a practice of printing up so-called professional copies?

A. They do.

Q. What do they do with those copies?

A. They send those copies gratis to persons engaged in the public performance of musical works. Not all persons, but a select group of persons; those in key positions.

Q. Do publishers send those copies into the State of Nebraska as well as other states?

A. Undoubtedly.

Q. Now, under the statute what would the publisher have to do with respect to these professional copies?

Mr. Hotz: Objected to as calling for a conclusion of the witness.

Mr. Frohlich: It is important to show, your Honors, [fol. 453] the publisher couldn't give anybody a professional copy any more.

The Court: Read the question.

(Question read.)

Mr. Hotz: Renew my objection. Objected to as calling for a conclusion. The publisher could do whatever he wanted to do. If he wanted to give the public performance rights away, that is his business.

The Court: He may answer.

A. He would have, if he wanted to collect fees, to discontinue sending professional copies to the orchestras and other performers in the State of Nebraska.

Q. Would that affect the ability of the little orchestra and the little band leader to continue in business in the State of Nebraska and give his performance in this State of Nebraska?

Mr. Hotz: Objected to as calling for a conclusion of the witness.

The Court: Objection sustained.

Q. Now, you heard Mr. Buck testify here, Mr. Paine, that from time to time certain musical compositions are restricted by the publishers with respect to public performance for profit?

A. That is right.

Q. Now, he testified that a great many of those composi-
[fol. 454] tions were songs that were contained in light operas and musical comedies and other stage productions. That is right, is it?

A. Yes, sir.

Q. Could you tell us whether a publisher could restrict a composition under this statute?

A. No.

Mr. Hotz: Just a minute. I move to strike out the answer, and object to the question as calling for a conclusion of the witness.

The Court: The answer may be stricken out, and the objection sustained.

Q. Now, assuming that this statute prevents the restriction of these compositions, what would a publisher have to do in order to protect himself against the public performance for profit of a composition which is contained either in a motion picture or display?

Mr. Hotz: Objected to as calling for a conclusion, a legal conclusion. The witness has not shown himself competent to answer.

The Court: Overruled.

A. The publisher would have to do one of two things, either refuse to grant any performance rights or put the price so high for the purchase that it would not be purchased for performances.

Mr. Hotz: Just a minute. I move to strike out that, "it
[fol. 455] would not be purchased for performances". The witness doesn't know anything about it, and calling for a conclusion.

The Court: Motion denied.

Q. Take the average piano edition of a popular composition, the kind that a girl and boy walk into the store and

purchase and take home and play at the piano, would the publisher, if he sold that piano composition in the State of Nebraska, and if he tried to comply with this statute, be compelled to put on that composition the price for public performance for profit?

A. Yes.

Mr. Hotz: I move to strike out the answer, and object to it as not a proper question. The act speaks for itself.

The Court: The answer may be stricken out, and the objection is sustained.

Q. Would it be possible for a publisher to sell a single composition of any kind, shape, manner or form in the State of Nebraska without putting on it the public performance right for profit price if he tried to comply with this statute?

Mr. Hotz: The same objection, and calling for a conclusion of the witness.

The Court: Objection sustained.

Q. Now, about how many compositions would you say are contained in the catalog of a firm like Irving Berlin, Incorporated?

[fol. 456] A. In the neighborhood of ten thousand.

Q. So that if the publisher were to comply with this statute, and if Irving Berlin, Incorporated, wants to sell its compositions in the State of Nebraska for the purpose of public performance for profit, they have to file each one of those compositions with the Secretary of State of the State of Nebraska under the statute?

A. Yes, sir.

Q. And pay a fee of twenty-five cents on each composition?

A. Yes, sir.

Q. Which means they have to pay at once twenty-five hundred dollars if they want their compositions available in the State of Nebraska, isn't that right?

A. Correct.

Q. Could a publisher economically do that, considering the business he does in the State of Nebraska?

Mr. Hotz: Objected to as calling for a conclusion of the witness.

The Court: Sustained.

Q. Would the payment of that twenty-five hundred dollars affect the price charged by the publisher for the composition in the State of Nebraska?

Mr. Hotz: The same objection; calling for a conclusion of the witness, and argumentative.

The Court: Objection sustained.

Q. In your dealings with the broadcasters and under your [fol. 457] contracts with the broadcasters, has the American Society the right to audit the books of the broadcasters from time to time?

A. They have.

Mr. Hotz: Object to that because the contract speaks for itself, and they are here in evidence.

Mr. Frohlich: Withdraw the question.

Q. Pursuant to the contracts between the Society and the broadcasters does the Society from time to time audit the books of the broadcasters?

Mr. Hotz: It is same thing. He is trying to reach the same result through another question. Object to that as calling for a conclusion of the witness, and the contracts are the best evidence.

Mr. Frohlich: I haven't asked for anything in the contracts.

The Court: You asked "pursuant to the contract". Objection sustained.

Q. Does the Society audit the books of the broadcasters?

A. It does.

Q. Has that been done since 1932?

A. Yes; twice.

Q. And has the Society from time to time found deficiencies in the reports given to it by the broadcasters?

[fol. 458] Mr. Hotz: Objected to as immaterial and not the best evidence, and too general and speculative, what they found.

The Court: Overruled.

A. It has.

Q. Have the deficiencies been in substantial amounts?

Mr. Hotz: I object to that as not the best evidence.

The Court: Read the Question.

(Question read).

The Court: Overruled.

A. They have been in very substantial amounts—a deficiency of over seven hundred thousand dollars in the first audit, and the second audit not quite complete shows a deficiency of four hundred and thirty-eight thousand dollars to date.

Mr. Hotz: I move to strike that out as nothing to show any application to any parties to this suit in the State of Nebraska.

The Court: It may stand. I don't think the details should have been given.

Q. Have there been any deficiencies found in the State of Nebraska?

A. Yes.

Q. Can you tell us generally what amounts were found?

A. I wouldn't want to do that without having my records here.

[fol. 459] Q. Is the Society compelled to employ these auditors on a yearly basis?

A. Yes.

Q. These men do nothing but go around from station to station making an inspection of the books and reporting to you?

A. Correct; all certified public accountants.

Q. Do the printed catalogs of the publishers contain all of the compositions or copyrights owned by the publishing houses?

Mr. Hotz: I object to that as the witness has not shown himself competent to answer. We have a number of those catalogs here in evidence. They are depositions of the publishers taken, and they have spoken on that subject. This man is not a publisher.

The Court: I think he has shown a general knowledge of it. Overruled.

A. No, they do not. They show the current—the things that have current public acceptance.

Q. Each of these publishers own a great many copyrights that are very old, is that right?

A. Yes, sir.

Q. And when these musical compositions or copyrights have outlived their usefulness and no longer are in de-

mand, the publisher doesn't include them in his catalog, as a rule, does he?

[fol. 460] A. No, sir.

Q. So that any catalog supplied by any publishing firm to your own knowledge, would never be quite complete because it wouldn't include these very old compositions?

A. That is true.

Mr. Frohlich: You may cross examine.

Cross-examination.

By Mr. Hotz:

Q. You spoke about some popular pieces of music rearranged or written by composers not members of the American Society, and yet they are very popular, and one of them that you gave, I think, was the "Beer Barrel Polka", is that what it is called?

A. That is what it is called, yes, sir.

Q. Who owns the public performance right on that in its present form?

A. It is owned by Shapiro & Bernstein.

Q. Are they members of the American Society?

A. They are publisher members of the American Society.

Q. So that the American Society receives remuneration from the playing of that piece of music?

A. Yes.

Q. Even though the man that wrote it or composed it is not a member of the American Society?

A. Even though the man who writes it is not a member [fol. 461] of the American Society. In its original form it is available outside of the American Society license.

Q. What about the "Snow White" score?

A. That is published at the present time by Irving Berlin, Incorporated.

Q. Of course, Irving Berlin is a member of the ASCAP?

A. That is true.

Q. Through that source the ASCAP controls all the public performance rights?

A. That is right.

Q. And receives remuneration in the State of Nebraska when it is played in the State of Nebraska through that source?

A. That is right.

Q. Now, you had one other piece I think you mentioned, one or two others.

A. I mentioned "My Dear Miss Duchesne".

Q. What about that?

A. That is now published but I have forgotten whether it is by Witmark or Remick.

Q. Both, of course, are members of your organization?

A. Yes. In its present form it is available under the American Society license. In its original form it was available outside of the American Society license. I think I mentioned "My Reverie", Claude DeBussy's work, is in the public domain in the United States and available to everybody.

[fol. 462] Q. As originally written?

A. As originally written.

Q. What about the rearrangement?

A. It is now rearranged by Robbins, and that company has published a rearrangement and it is available under the American Society license.

Q. Has there ever been any rearrangement of the "Star Spangled Banner"?

A. No, but there has of "Yankee Doodle".

Q. Who publishes that?

A. The most popular arrangement of "Yankee Doodle" is published by Carl Fischer and made by M. L. Lake, and in the last analysis that we made it was performed by radio broadcasting 8 thousand times in a year.

Q. And Carl Fischer is a member of the American Society?

A. Yes.

Q. Through that you get public performance rights?

A. Correct. But "Yankee Doodle" anybody can play.

Q. You mean they can if they could get the original manuscript?

A. No; anybody. There are plenty of public domain publications of "Yankee Doodle"—hundreds of them.

Q. These musicians, singers, players, orchestra leaders, and so forth, must have music to perform, and they buy that through the publisher and jobber and so forth, wherever they get it?

A. The Century Edition can get all the Yankee Doodles [fol. 463] that are public domain, but if you like M. L. Lake's arrangement you pay the American Society.

Q. The purpose of sending out these professional copies that go out is to get the orchestra leaders and the people that play music to use the piece of music that is published by a certain publishing house, to get the trade and business?

A. To get the public to like it. The minute they like it, it has commercial value.

Q. Until it is played and used and the people hear it, they know nothing about it?

A. Not just hear it; they must like it.

Q. They can't like it until they hear it?

A. That is true.

Q. You did say something about "A Tisket A Tasket", one of the songs you gave.

A. I did remember saying that.

Q. That is a very popular piece?

A. Very popular.

Q. Who has the arrangement on that?

A. I think that is published by Bregman, Vocco & Cohn, but you can get "A Tisket A Tasket" in the non-copyrighted edition from the Ascher Publishing Company.

Q. But through the publisher you first mentioned the American Society receives the public performance rights?

A. On "A Ticket A Tasket"—if you use that one, yes.

Q. Now, when a charge is made by the American Society [fol. 464] for the public performance rights in the State of Nebraska to the radio stations, it is based, is it not, upon a certain percentage of their gross income?

Mr. Frohlich: I object to that. The contract speaks for itself; it shows how.

Mr. Hotz: That is a preliminary question. It does, and there is no doubt about that; there is no question about that, Mr. Frohlich, that is the way it is done.

Mr. Frohlich: Certainly there is a question about it, because your question is incorrect. We have nothing to do with the gross sales or business. The five per cent contract shows what we get.

Q. Now, Mr. Frohlich has just stated that—we will take WOW for example—they pay five per cent; WOW pays the American Society, for the public performance rights, five per cent for the time on the air. Let's have an explanation from you as to what that means, just very briefly, "time on the air"; what does that mean?

A. That means for the use of the facilities of the station for broadcasting purposes.

Q. By anybody?

A. By the advertiser.

Q. So when you speak about the Lang-Worth catalog, if WOW were using that catalog or any other catalog and [fol. 465] they received income for time on the air, the American Society would receive five per cent of that sum of money, would you not?

A. If there was a contract between WOW and the American Society requiring that.

Q. There is such a contract, is there not?

A. There is now, yes.

Q. That is true with every other broadcasting station in the State of Nebraska, isn't that right?

A. Yes, every station. We expect them to live up to their contracts, if that is what you mean.

Q. What they use or did on their time on the air, you get five per cent of it under the contracts now in existence in the State of Nebraska?

A. Correct.

Q. Excepting political speeches?

A. Correct; and religious programs.

Q. Now, unless they were paid for, they would be free, those programs?

A. That is right.

Q. I think the contract shows there is also a sustaining fee, is there not, that is paid in addition by each of the broadcasting stations?

A. That is correct.

Q. And that varies in accordance as these contracts will show?

A. Yes.

Q. Now, what about the news towers of the various broad- [fol. 466] casting stations that are put out; that is part of their time on the air, is it not?

A. Yes, sir.

Q. You get five per cent of that?

A. Yes, we get five per cent of all.

Q. Of all?

A. Of all the time on the air.

Q. Of the gross?

A. Yes. We make our repertoire available to every program they put on. If they don't use it, they don't have to.

Q. You don't have any copyrights on the news, of course?

A. No, but our catalog is available to that program.

Q. But whether it is used or not, it is five per cent of the time?

A. That is up to the station, whether they use it or don't use it; we have no control of that.

Q. Under your contracts they are required, local broadcasting stations in Nebraska are required, to have complete protective contracts with the network?

Mr. Frohlich: I object to that.

Mr. Hotz: I will withdraw the question. It is in the contracts.

Q. Let us take, for example, a dance hall in the State of Nebraska, a tavern or hotel or restaurant that has to employ an orchestra that plays music, and they pay that American Society a certain sum of money per year in ac- [fol. 467] cordance with these contracts mixed up in plaintiffs' Exhibit Number 16, the amount that is paid is a fixed sum per year, no matter what music they play at the dance or whether they play any of your music or not. If they do, that contract provides they shall pay you so much per year in accordance with the terms of the contract?

A. If they don't use any of our music, they don't have an American Society contract.

Q. But the price they pay per year, speaking now of a dance hall——

Mr. Frohlich: (Interrupting) I object to that.

Q. (Continuing) —or a hotel or a station of any sort that uses any music of the American Society and have a contract with you, they pay in accordance with that sum, irrespective of the amount of American Society music they might use or might not use?

Mr. Frohlich: Just a moment. I urge my objection, your Honors, please.

The Court: I presume that is all determined by the terms of the contract?

Mr. Frohlich: It is here.

The Court: Objection sustained.

Q. In the State of Nebraska is there a difference in the contracts with the radio stations if they own a newspaper and those that do not own a newspaper?

[fol. 468] A. I would have to see the contracts. There are some newspaper contracts. There are some few in the United States that are different than the regular commercial contracts.

Q. We have asked in this case that you produce a copy of the contract with the Norfolk station.

A. It is there some place.

Mr. Hotz: I didn't ask you to give me a whole handful of three hundred and ninety contracts; I asked you for that specific contract.

Q. One general question, Mr. Paine. In the newspaper owned radio station isn't the plan to charge them for the amount of American Society music they use, just the American Society music they use?

A. No; there are two hundred and sixty-some newspaper owned stations. Fifty-nine stations have what is known as the newspaper contract; the other two hundred and one have the regular commercial contract, but in those there is a difference.

Q. Would you tell us that difference to save time?

A. In the newspaper contract they give us a minimum annual guarantee, and in consideration of that minimum annual guarantee they are required to pay a percentage on the programs which use ASCAP music, and not on all programs. That is the only difference.

Q. You don't know whether that contract——

A. (Interrupting) I don't know whether this station has [fol. 469] that kind of a contract or not. I wouldn't know that unless I looked at it.

Q. The stations that do not fall under that classification and don't have a newspaper connection or ownership, they pay on everything, their whole gross income?

A. That is their income, but they have no minimum annual guarantee.

Q. Of course, you don't receive any public performance rights on income from dramatic programs, do you?

A. I don't know what you mean.

Q. I mean ordinarily now that is not covered by the American Society license, the dramatic productions?

A. If a radio advertiser buys time on the air and performs a drama, the American Society gets a license fee whether he uses music or not. That is up to him; our music is available to that program.

Q. Now, this deficit you talk about in Nebraska, I think you stated you were not able to give any definite figures in connection with that.

A. I can't.

Q. A deficit in what, just generally? I want to find out because I want to answer that with my witnesses. What are you driving at?

A. The contract calls for a certain definite sum of money that ought to have been paid us for the use of our music.

Q. Based on gross receipts according to the terms of the [fol. 470] contract?

A. When the audit was made we found that sum which the contract called for wasn't paid. The difference of what was paid and should have been paid was a deficit.

Q. You have no figures on what that happened to be, or what station in Nebraska, or when it was?

A. I could get those very readily.

Mr. Hotz: I don't think it is material, but I want to get your ideas on what it was.

Q. Now, you gave us some ideas on your direct examination of the workability of the Nebraska statute, and the Court allowed you to answer a few questions in that regard. I just want to put one or two general questions along that line. If the composer of the music and the publisher that he went to to have his music marketed, that is, put into marketable form, agreed upon a public performance fee that they wanted as between that composer and his publisher, and they sold that music within the State of Nebraska in accordance with the understanding that the composer and his publisher had, then there would be no necessity for the American Society in connection with any activity that it might have in the State of Nebraska in connection with that particular catalog?

Mr. Frohlich: I object to the question; it is hypothetical, and the statute speaks for itself.

[fol. 471] The Court: Objection sustained.

Q. I have asked this question many times with other witnesses, but I will have to ask it once more. You say that the catalogs that are made up by the different publishing houses, they might be required to be filed with the Secretary of State under one of the sections of the bill?

Mr. Frohlich: I object to that. There is no provision in the act of filing catalogs.

The Court: Let counsel finish his question.

Q. (Continuing:) Of course, it goes without saying that it would be within the province of the publisher to file such as he wished for sale in the State of Nebraska, popular music and those that had the current use in this state?

Mr. Frohlich: We object to that question. It is hypothetical and attempts to construe the statute. The statute speaks for itself. And furthermore, it is based on something not in the record or in this statute.

The Court: Objection sustained. Put it in some other form.

Q. On your direct examination counsel took as an example Irving Berlin's catalog, and we have Irving Berlin's catalog here in these depositions. You said that it contained some ten thousand pieces of music; you said that there were some in there that were not up to date or had no commercial value or commercial use, isn't that right?

[fol. 472] Mr. Frohlich: I object to that because he didn't say that.

Q. What did you say?

Mr. Frohlich: He said those were not in the catalog.

The Court: Let's not coach the witness. He probably knows what he said.

Q. I understood you to say, Mr. Paine, that in a catalog like Irving Berlin's there would naturally be quite a number of pieces that had no present commercial value.

A. But in the catalog, if you use that catalog meaning the whole group of copyrights which he owns, in the printed catalog, what I said was that he didn't include those musical compositions which are old and gone and on which there is no commercial value.

Q. In other words, the publisher ~~members~~ of your organization attempt from time to time to publish an up to date catalog that is usable?

A. That they believe is of interest to the public—that they still like.

Q. Exhibit Number 11 in the deposition, for instance, is one of them that is attached to one of the depositions in this case?

A. My glasses don't let me see that far.

Q. That is what I am talking about, there (indicating).

A. That is the Irving Berlin printed catalog.

[fol. 473] Q. By the way, you are the Mr. Paine, are you not, that was referred to by Mr. Buck yesterday when we inquired in connection with your position and your salary and so forth in connection with the American Society?

A. That is correct.

Q. And the Mr. Mills that was on the stand prior to your coming on the stand, was the Mr. Mills referred to by Mr. Buck in connection with his connection and his salary and so forth?

A. That is correct.

Q. I want into the record at this time, if you can give it, generally, Mr. Paine, the Board of Directors. They are set forth in the pleadings, but I just want to ask you who these directors are. The record doesn't show.

A. It is on the back, I think. Don't they show them on the back page?

Q. We will go through with this quickly. Who is Fred E. Ahlert?

A. He is a writer.

Q. Louis Bernstein?

A. A publisher.

Q. Saul Bernstein?

A. General manager of Irving Berlin.

Q. J. J. Bregman?

A. He is the president of the firm of Bregman, Vocco & Cohn, music publishers.

Q. Irving Caesar?

[fol. 474] A. He is a writer—"Tea for Two".

Q. Max Dreyfus?

A. Max Dreyfus is the president of the Crawford Music Company and Shapiro & Company, publishers.

Q. George and Walter Fischer?

A. George Fischer—they are not related—George Fischer is the president of the firm of J. Fischer & Bros., about a seventy-five year old music publishing house, publishing fine standard music—Deems Taylor's works.

Q. And Walter Fischer?

A. He is president of Carl Fischer, Inc., a very old publishing company; John Philip Sousa's works.

Q. Otto A. Harbach?

A. Professor Harbach is a writer of drama and of the librettos of operas; he wrote "Smoke Gets Into Your Eyes".

Q. Raymond Hubbell?

A. He is a writer composer of "Poor Butterfly".

Q. Jerome Kern?

A. He is a writer and a great one.

Q. He is a publisher too?

A. Not a publisher.

Q. Edgar Leslie, he is a writer?

A. Yes.

Q. Is George W. Meyer a writer?

A. Yes.

Q. Jack Mills?

[fol. 475] A. Mills Music Company, Inc.

Q. Edwin H. Morris is the manager of Harms?

A. He is not there any more. He has resigned since, and Mr. Herman Starr is there.

Q. He is identified with which big company?

A. With Harms, Inc.

Q. That is probably the biggest publisher of any?

A. That isn't the biggest publisher; that is the biggest catalog of used music. The biggest publisher is Theodore Presser by all odds, but there is so much in his catalog that he is touching music of that sort which is not used so greatly. But Harms has the greatest music catalog in the American Society repertoire.

Q. John O'Connor?

A. He is the president of the music publishing company, "Words and Music", owned by Fred Waring and Paul Whiteman.

Q. J. J. Robbins?

A. He is head of the Robbins Music Company, which controls Robbins, Fiest & Miller Music Companies.

Q. They are all big publishing companies in New York?

A. Yes, sir.

Q. Gustave Schirmer?

A. He is president of the oldest publishing house in the United States.

Q. In the world?

A. Not in the world. Gustave Schirmer, Inc. is a great [fol. 476] publishing house.

Q. Oley Speaks?

A. He is a writer—"The Road to Mandalay".

Q. Deems Taylor is a radio broadcaster and announcer?

A. And a composer of opera and symphony, and the composer of the most beautiful chamber music—"Through The Looking Glass".

Q. He is not a publisher?

A. He is not a publisher.

Q. Will Von Tilzer?

A. He is a publisher and president of the Broadway Music Corporation.

Q. That is also a big concern?

A. Not a big concern. Neither is "Words & Music" a big concern.

Q. Joseph Young?

A. He is now dead. He was a writer and wrote a great song that we remember, "Mammy".

Q. Has anyone taken his place, and if so, whom?

A. Not yet. There is a vacancy on the Board.

Q. That vacancy will be filled by the Board itself?

A. Yes, sir.

Q. It will choose somebody, and there will be a writer to come in to take his place from among the writer members?

A. That is right.

Q. Referring to your statement of seven hundred thou-
[fol. 477] sand dollars deficit in the accounting of broadcasting stations in the United States, you are including in this so-called deficit, are you not, sums which you claim should be paid by the stations that are called "free hours to networks", are you not?

A. Yes, surely.

Q. Tell us a little bit about "free hours to networks".

A. Well, I don't know why this is germane, but I don't mind telling you.

Q. I am only asking you because you talked about a seven hundred thousand dollar deficit, and the Court let it go in.

A. All right.

Q. Let's have a little more about it.

A. Now, the broadcasting stations originally when they entered into contracts with their stations that were going to be hooked up to make the chain, required the station to pay to the broadcaster fifteen hundred dollars a month for the use of sustaining programs which the central stations supplied to the chain station. When we collected five per cent from the station, we collected five per cent on that fifteen hundred dollars because that was a receipt obtained

by the station for the use of its facilities. Subsequently the chains entered into a new kind of arrangement whereby they said, "You don't have to pay us this fifteen hundred dollars any more. In lieu of the fifteen hundred dollars you give us a certain number of free hours." By that they meant, [fol. 478] "Let us broadcast an advertising program over your station for an hour or sixteen hours a week and not pay you anything for those." So we say——

Q. Let me interrupt.

Mr. Frohlich: Let him finish. I think a man is entitled to finish his answer.

Mr. Hotz: I think he has answered what I have called for.

The Witness: There is fifteen hundred dollars; the value of those free hours is fixed at fifteen hundred dollars.

Mr. Hotz: I object to that as argumentative.

The Witness: It isn't argumentative; it is a fact.

Q. That was a matter between the network and the local station was it not, made between the network and the local station?

A. Absolutely.

Q. Now, then you come in as the American Society and say you want your pay based upon those free hours?

A. They fixed the price of them; we didn't.

Q. There is some dispute and difference of opinion that has arisen on the interpretation of their license agreements in that regard?

A. Not as to all stations. There are a great number of stations that have raised that question. Why, I don't know, because it is very clear they are wrong.

[fol. 479] Q. The networks do not pay the American Society for the chain broadcasts as a network?

A. They pay each station so much money. The stations collect from the advertiser a total amount of money, and pay each individual station for the station time, and we collect from the station. The stations don't broadcast chain broadcasts for nothing.

Q. Now, is this seven hundred thousand dollars deficit you speak of, is that represented largely by this difference of opinion that I have spoken about with reference to this free time?

A. No; twenty per cent of it.

Q. And, of course, the provisions of that license contract, and in reference to this free time, and so forth, has never

been interpreted by any court decision or anything of that sort?

A. Oh, no; it is clear—there is no use suing them.

Mr. Hotz: That is all.

Redirect examination.

By Mr. Frohlich:

Q. Taking at random one of the broadcasting contracts between the Society and a broadcaster in Nebraska, the Omaha Grain Exchange, this contract provides that computing time on the air for which the Society charges five per cent, the broadcaster may deduct the advertising agency [fol. 480] fee or commission, as they call it here, not exceeding fifteen per cent. Do you know of your own knowledge whether that fifteen per cent is the usual charge to broadcasters or advertisers by these agencies throughout the country?

A. That is the standard percentage charged by advertising agencies for service that they render to the advertiser.

Q. When Chase & Sanborne put Charlie McCarthy on the air, Chase & Sanborne pays to the broadcaster a fixed amount, let us say five thousand dollars, or what it happens to be, and from that five thousand dollars there is deducted a commission of fifteen per cent, which is turned over to an advertising agency, isn't that right?

A. Correct.

Q. And that is prevalent throughout the entire business?

A. Yes, sir.

Q. By bringing the advertiser into it, the studio receives three times as much as the American Society for its entire repertoire, doesn't it?

Mr. Hotz: Objected to as leading and asking for a conclusion.

The Court: That is a matter of mathematics. Objection sustained.

Mr. Frohlich: That is all.

Mr. Hotz: That is all.

Witness excused.

[fol. 481] ERNEST PRIESMAN was called as a witness on behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. State your full name.
A. Ernest Priesman.
Q. What is your occupation?
A. I am in the orchestra business.
Q. You conduct an orchestra?
A. I have an orchestra.
Q. Do you reside in the State of Nebraska?
A. Yes, sir.
Q. Where?
A. Omaha, Nebraska.
Q. Now, how many years have you conducted an orchestra?
A. I have been connected with orchestras for the past ten years.
Q. Have you played at any of the hotels in Omaha?
A. Yes, sir.
Q. Have you played recently?
A. Yes, sir.
Q. How many men do you employ in your orchestra now?
A. Well, in the present orchestra, nine people.
Q. Including yourself?
[fol. 482] A. Yes, sir, including myself.
Q. Do you purchase music for distribution to your orchestra?
A. Yes, sir, I have occasion to.
Q. Do you also receive professional copies?
A. Indirectly I receive some professional copies.
Q. About how large a library of music do you maintain?
A. Well, the dance library we use usually consists of one hundred tunes.
Q. In addition to a dance library do you have a vocal library?
A. There are some standard things we carry, but the vocal library is included with the regular music.
Q. So that you have to have one hundred orchestrations, I take it?

A. We usually carry that along on each job, yes, sir.

Q. Do you get a good deal of that for nothing?

A. In our particular case, we don't get a lot of it for nothing. We get part of it for nothing.

Q. What proportion of the library you carry do you obtain gratis?

A. I would say in our particular case maybe ten to fifteen per cent is sent in through hotels as professional copies.

Q. Where do you purchase your music?

A. At various music stores, mostly right in Omaha, and sometimes we send out for it.

Q. Do you purchase any from jobbers?

A. At present we purchase right from the Lyon & Healy [fol. 483] retail store in Omaha.

Q. Have you ever purchased any music from any jobbers by mail?

A. I have had occasions to.

Q. How many musical compositions do you perform of an evening?

A. It would depend if it was a dance engagement or what type of engagement you are referring to. On a three-hour dance I would say we play dances in sets of ten at a dance, and if ten at a dance, approximately three tunes to a set.

Q. You also play encores and request numbers?

A. Of course.

Q. When you come into an establishment like the Hotel Paxton, does the proprietor have anything to do with the selection of the musical compositions, or do you do it yourself?

A. We do that out of the pieces we have there, and the requests given to us.

Q. The proprietor doesn't have to do anything about that?

A. Seldom.

Q. You, yourself, as an orchestra leader have never received a license from the American Society of Composers, Authors and Publishers, have you?

A. No, sir.

Q. And no other orchestra leader, so far as you know, has applied for or obtained such a license?

A. None I know of.

Q. You rely on the fact that the place in which you play is a licensed establishment?

[fol. 484] A. Yes, sir.

Q. When you purchase a composition for your orchestra, you can't use an ordinary piano copy, can you?

A. Not for your orchestra.

Q. You have got to have an orchestrated edition which contains music for each particular instrument in that orchestra?

A. Yes.

Q. What do you usually pay for an entire set of orchestrations?

A. From fifty to seventy-five cents.

Q. That covers the entire band, doesn't it?

A. Yes, sir.

Q. If you were compelled to purchase this music for your orchestra, and you were compelled to pay a performance price in addition to the price of the sheet music, could you profitably conduct your business?

Mr. Hotz: Just a minute. I object to that as calling for a conclusion of the witness. There is nothing in here about his earnings or anything of the sort. It is immaterial.

The Court: Overruled.

A. I would say in answer to that, at the present wage scales and prices it wouldn't be profitable. The cost has to be passed on to the customer.

Q. In other words, the additional cost of performing rights would have to be paid by yourself in the first instance?

A. Yes, sir.

[fol. 485] Q. And then you would have to get it by extra salary from the hotel?

A. It would have to be paid by the direct employer.

Q. Who employs your orchestra?

Mr. Hotz: Objected to as calling for a conclusion of the witness, and highly speculative who it would be paid by. It would depend on the negotiations.

The Court: Sustained.

Q. Do you keep any log or record of your performance?

A. As to which numbers we play?

Q. Yes.

A. No, sir, not in general.

Q. Are you familiar with the method or manner of conducting a business with other orchestras in the State of Nebraska?

A. I would say in general I do, yes, sir.

Q. Do they keep logs of the compositions or records of the particular numbers they play?

A. I don't believe they do as to what they play during each evening, unless it would be radio time or something of that kind.

Q. You say you play encores or request numbers. Is that customary in the modern dance entertainment?

A. It absolutely is—it is part of good business.

Q. In other words, after you have played a number, somebody in the audience may come along and say, "We would [fol. 486] like to have you play such a number", and you play it for them, if possible?

A. Yes, sir.

Q. You don't have to worry or make any attempt to find out who owns the copyright of such a request number, do you?

Mr. Frohlich: Withdraw the question.

Mr. Hotz: Let him answer the question.

A. We don't usually; we never have.

Q. If you had to play an evening's entertainment from music on which you had paid a performance right within the State of Nebraska, would you be able to play encores or request numbers?

A. It would be very, very difficult if we had to check everything.

Q. You first would have to check up and see if you had the music and had paid the price on it, is that right?

A. Yes, sir.

Q. When you purchase a sheet of music are you able to tell at that time in what kind of establishment you are going to perform in in the future?

A. I wouldn't say we would necessarily think of that or know definitely.

Q. What I mean is this, Mr. Priesman, you play in hotels occasionally, don't you?

A. Yes, sir.

Q. And dance halls?

[fol. 487] A. Yes, sir.

Q. And other places of entertainment and amusement for the public?

A. Yes, sir.

Q. You don't know at this time where you are going to play six months or a year from now, do you?

A. No, sir.

Q. And if you purchase a sheet of music which had on it a list of various prices for various forms and method of entertainment, and various kinds of public performance for profit, could you, as a practical matter and practical use, in advance, say that you are going to purchase music for this and this kind of entertainment, could you do that?

A. I wouldn't say, as a practical matter, you could do that.

Q. Would a statute which compelled you to purchase music under those conditions enable you to continue in business?

Mr. Hotz: Just a minute. I object to that as calling for a conclusion of the witness.

The Court: Objection sustained.

Mr. Frohlich: That is all.

Cross-examination.

By Mr. Hotz:

Q. About how much is your orchestra paid by week by an establishment which employs you and your eight or nine assistants?

A. On a weekly engagement, by the week?

[fol. 488] Q. Yes.

A. That price scale varies.

Q. At the Fontenelle Hotel, for example, have you ever played there?

A. Yes, sir.

Q. How much did you get?

A. I have never played steady engagements at the hotel. I have played at other hotels, and incidental engagements.

Q. What other hotels have you played at?

A. Paxton Hotel.

Q. How much did you receive for a week's engagement there?

A. Well, at the present time the price scale for side men run about a dollar and a quarter an hour on a thirty-hour week.

Q. How many men do you have?

A. Nine people; eight musicians and a vocalist.

Q. How much would that figure up for the week?

A. About three hundred and fifty dollars in round figures, I believe—that is what we are required to get.

Q. That is, the men?

A. Yes, sir.

Q. Now, the hotel makes a contract with you as the leader of the orchestra, does it not?

A. The contract at present is made with us acting as their agent to secure the services of musicians associations. We are their agent to secure music. In other words, [fol. 489] they are the employer, and we as contractors are not considered the employer, the way the contract is stated. It is very technical.

Q. And, of course, that includes the music that is played on the program, that three hundred and fifty dollars a week, that covers, naturally, the sheet music and orchestrations you use or your singers sing on that program, isn't that right?

A. It does at present, yes, sir.

Q. How many different hotels have you played in, in the past year, in the State of Nebraska?

A. As a steady engagement?

Q. I am not concerned about that.

A. In Omaha, I have played at the Blackstone, Fontenelle, Paxton and Rome, and all the first class hotels.

Q. Have you played any in Lincoln?

A. Yes, sir.

Q. Where?

A. The Cornhusker Hotel and the Lincoln Hotel, I believe—those were party dates, single engagements.

Q. Any out in the state?

A. Yes, sir.

Q. Where?

A. Played at Fremont, Nebraska, at Lincoln, Nebraska—I couldn't tell you over the exact last year. Since I have been in the business the last couple of years, it has included [fol. 490] Beatrice and Hastings, and all of the danceable towns.

Q. In the hotels?

A. If there are hotels, and sometimes in dance halls, and business in general.

Q. Mr. Priesman, do you know of any place where there is a record kept of number of orchestras, such as yours, or like yours, in the State of Nebraska, in operation in the state for playing music?

A. I don't know of any records where the list of organized bands are listed.

Q. Do you know of your own personal knowledge about how many there are in the State of Nebraska?

A. I am sorry, I couldn't say.

Q. In the City of Omaha, do you know?

A. I could approximate the professional or union orchestras.

Q. How many?

A. I would say there were probably ten to a dozen in various organizations in Omaha. However, that doesn't include the number of bands that play in Omaha. There are hundreds of bands playing in Omaha.

Q. They run up into large figures, don't they?

A. Yes, sir.

Q. They come there from elsewhere?

A. Yes, sir.

Q. Sent in by booking agencies, are they?

[fol. 491] A. Sometimes they are, and sometimes they book themselves.

Q. In the last two or three years there has been quite a springing up in the demand for dance music on account of the number of dance halls and places where dancing and that sort of entertainment takes place, has there not been?

A. I wouldn't say any greater in the last two or three years. I would say in the past. You might say business has gone down—it depends.

Q. I am talking about Omaha and Nebraska.

A. I wouldn't say there was any increase.

Q. It is greater than it was five or six years ago?

A. I wouldn't say so considerably.

Q. How old are you?

A. Twenty-four.

Mr. Hotz: That is all.

Redirect examination.

By Mr. Frohlich:

Q. Do these traveling bands come from outside the State of Nebraska?

A. Oh, yes, many of them.

Q. Various bands drift into Nebraska and play for a night, or two or three, and go out again?

A. Sometimes they are territorial bands and play from night to night.

Q. You said you did purchase some of your music through [fol. 492] mail order jobbers or houses, or somehow through the mail?

A. Yes, sir.

Q. Did you purchase by mail outside of the State of Nebraska?

A. Yes, sir.

Mr. Frohlich: That is all.

Mr. Hotz: That is all.

Witness excused.

[fol. 493] HARRY ELMER TAYLOR, was called as a witness on behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. State your full name.

A. Harry Elmer Taylor.

Q. Where do you reside, Mr. Taylor?

A. Omaha, Nebraska.

Q. What is your occupation?

A. Theatre manager.

Q. You manage a theatre in Omaha?

A. Yes, sir.

Q. What is that theatre?

A. The Ritz.

Q. How many years have you managed it?

A. Ten.

Q. And in that theatre do you exhibit motion pictures to the public?

A. Yes, sir.

Q. And do you also as a part of your motion picture entertainment furnish musical entertainment in the theatre?

A. No.

Q. Well, the pictures that come into your theatre have [fol. 494] music on them?

A. Yes, sir.

Q. And the music is heard by the audience when the picture is seen?

A. Yes, sir.

The Court: A sound track, you mean?

The Witness: Yes, sir.

Q. Do you also own any other place of entertainment?

A. We own the Music Box.

A. A dance hall?

A. Yes, sir.

Q. In the City of Omaha?

A. Yes, sir.

Q. A large dance hall?

A. Comparatively.

Q. About how large would the dance floor be?

A. I imagine about seventy-five by one hundred.

Q. Do you operate that dance hall?

A. Every night in the week, except Monday.

Q. In the operation of the dance hall do you avail yourself of the services of an orchestra?

A. Yes, sir.

Q. Do you do that every night?

A. Every night except Monday.

Q. How large an orchestra do you employ there?

A. Ten men plus a leader and girl singer.

[fol. 495] Q. What do you pay your orchestra weekly?

A. It varies from four hundred and sixty dollars a week to seven hundred dollars.

Q. Would you say that it would be safe to say six hundred dollars is an average price you pay for your orchestra each week?

A. Yes, sir.

Q. That would be at the rate of approximately twenty-four hundred dollars a month?

A. Yes, sir.

Q. Do you also have a license from the American Society of Composers, Authors and Publishers?

A. Yes, sir.

Q. How long have you had such a license?

A. Since we started three years ago.

Q. What do you pay the Society per month under the license?

A. Twenty dollars a month.

Q. Have you a license with the Society for your theatre?
A. Yes, sir.
Q. What do you pay the Society for your theatre?
A. Sixty dollars a year.
Q. In giving your entertainment in your Music Box do you keep a record or log of the particular compositions played there nightly?
A. No, sir.
Q. You rely solely upon your license with the Society?
[fol. 496] A. Yes, sir.
Q. And when the orchestra leader comes in with his orchestra, you don't determine what pieces he is to play?
A. No, sir.
Q. You feel he can satisfy the public demands?
A. Yes, sir.
Q. Do you know whether or not there are request numbers and encores every night in the establishment?
A. Yes, sir.
Q. Do you also employ an orchestra from time to time that comes in from out of the State of Nebraska?
A. Mostly we do.
Q. Mostly your orchestras are traveling bands?
A. Yes, sir.
Q. Now, in your motion picture theatre you do not play music by means of any orchestra?
A. No, sir.
Q. It is simply that the film and sound track on the film carries with it whatever music happens to be on the film?
A. Yes, sir.
Q. And, of course, that film is leased or rented by you from distributors of motion picture films, isn't that right?
A. Yes, sir.
Q. This film comes into your place from outside of the State of Nebraska?
A. Yes, sir.
[fol. 497] Q. Of course, we all know and you know most of the films are manufactured in Hollywood?
A. Yes, sir.
Q. And find their way into your theatre and other theatres in the State of Nebraska from time to time?
A. Yes, sir.
Q. Have you any control whatever over the music played on those film tracks?
A. No, sir.

Q. And in order for you to save yourself from infringement, do you rely solely on your license with the American Society?

A. Yes, sir.

Mr. Frohlich: You may cross examine.

Cross-examination.

By Mr. Hotz:

Q. Where is the Ritz Theatre?

A. 24th and Patrick, in the City of Omaha.

Q. What is your seating capacity of it?

A. Five hundred and eighty seats, or six hundred—along in there.

Q. Do you own the Music Box?

A. Yes, sir.

Q. Yourself?

A. Yes, sir.

Q. Where is that located?

[fol. 498] A. 19th and Capitol Avenue.

Mr. Hotz: That is all.

Mr. Frohlich: That is all.

Witness excused.

(Short Recess)

[fol. 499] Mrs. Anne Paul Nevin, was called as a witness on behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. State your full name, please.

A. Anne Paul Nevin.

Q. Where do you reside, Mrs. Nevin?

A. I reside in New York in the winter, and Blue Hill, Maine in the summer. I don't go abroad as I used to.

Q. You are the widow of Ethelbert Nevin?

A. I am.

Q. Can you tell us what year you were married to Mr. Nevin?

A. 1889, I think it was.

Q. Was your husband a composer?

A. Yes, sir.

Q. I show you, Mrs. Nevin, a list of compositions, and ask you whether these truly represent the compositions that were composed by your husband from 1874 down to 1901?

A. He died in 1901.

Mr. Hotz: We will admit, Mr. Frohlich, that the list of publications, of musical compositions, contained in the affidavit attached to her affidavit were publications of her [fol. 500] husband, without further identification, and composed by him.

Q. Among those compositions was there a song called the "Rosary"?

A. Yes, sir.

Q. Was there a song called "Mighty Lak a Rose"?

A. Yes, sir.

Q. Did those songs become famous?

A. I think so, if you judge by the number of copies that were sold.

Q. Now, Mrs. Nevin, are you presently a member of the American Society of Composers, Authors and Publishers?

A. I am.

Q. Was your husband in his lifetime ever in receipt of any moneys for the public performance for profit of any of his compositions?

Mr. Hotz: I object to that as incompetent, irrelevant and immaterial.

The Court: I think she may answer.

Q. Did your husband ever receive any moneys for the public performance for profit of his compositions?

A. I think not.

Q. Did he receive moneys?

A. You see, he has been gone many years.

Q. Did he receive moneys from the sale of sheet music of his compositions?

A. I think so.

Q. Did he receive money from the sale and exploitation [fol. 501] of mechanical royalties?

A. I am not sure about that; I think not.

Q. So that the only substantial revenues, so far as you

know, he ever received for any of his works was from the sale of sheet music?

A. Yes, sir, absolutely.

Q. He died, you said, in 1901?

A. Yes, sir.

Q. When did you become a member of the American Society?

A. I think it was—would it be 1925?

Q. Was it 1926?

A. I can't quite remember.

Mr. Frohlich: Will you stipulate it was 1926?

Mr. Hotz: Certainly.

Q. Ever since you have been a member of the American Society, Mrs. Niven, have you been in receipt of income from the Society?

A. Always.

Q. Has that been the main source of income you have been in receipt of for your husband's works as a composer?

A. Absolutely.

Q. Do you receive any money today from the sale of sheet music from your husband's compositions?

A. I think I do. Wouldn't that be in the American Society?

Q. Do you receive any money from any publisher for the [fol. 502] sale of sheet music today?

A. I don't quite understand—I think I don't. You don't mean the publishers?

Q. I mean the publishers.

A. Well, I get some from them.

Q. Does it amount to very much each year?

A. I think so.

Q. From the publishers?

A. A good deal.

Q. Do you also receive money from the American Society?

A. Yes, indeed I do.

Q. Does the money you receive from the American Society help support you?

A. It is practically my whole living.

Q. Are you willing to give up your contract with the American Society?

Mr. Hotz: Now, just a minute. Objected to as calling for a conclusion.

The Court: Objection sustained.

Mr. Frohlich: I want to point out to the Court in order for this lady to be able to receive any money for the sale of the public performance for profit in Nebraska she must give up that contract because the statute declares this is an illegal combination.

[fol. 503] The Court: That is a conclusion, and argument.

Mr. Hotz: That is, as far as the American Society is concerned, but not as far as she is concerned.

Mr. Frohlich: The question was whether she would be willing to give it up.

Mr. Hotz: It wouldn't make any difference.

Q. Mrs. Niven, have you ever had any experience in marketing, selling or exploiting any of your husband's musical combinations?

A. I have had very little—some.

Q. Are you able to look after the business end of the exploitation of any of this music?

A. I have done it so many years, and he has many foreign royalties.

Q. If you were compelled to act for yourself, without the assistance of the American Society, could you go into the State of Nebraska and protect yourself against the infringement of your husband's compositions within that state?

Mr. Hotz: We object to that as calling for a conclusion of the witness, and not proper evidence.

The Court: Objection sustained.

Q. Have you the financial means at this time, Mrs. Niven, to employ investigators to come into the State of Nebraska and to investigate establishments to see whether or not [fol. 504] your husband's music is played?

Mr. Hotz: We object to that as incompetent, and the witness showing herself not qualified to answer that qeustion. It is a legal question, and calling for a conclusion.

Mr. Frohlich: She knows whether she has financial means.

Mr. Hotz: That would be immaterial.

The Court: I think it is immaterial; objection sustained.

Q. Mrs. Nevin, do you know anything about the various places of amusement and entertainment where music is played?

A. Yes, I think I do.

Q. Have you any sufficient experience to place upon any of the musical compositions of your husband a price for the use of the compositions in any of these places of entertainment?

A. You mean for me to pick them over and do that? I couldn't.

Mr. Frohlich: That is all.

Cross-examination.

By Mr. Hotz:

Q. Mrs. Nevin, who is your publisher?

A. I have two publishers.

Q. Who are they?

A. The Presser people of Philadelphia and the Boston [fol. 505] Music Company of Boston, which is Schirmer of New York—of Boston; Schirmer of Boston.

Q. Now, those publishers are members of the American Society, that is, they are publisher members?

A. So far as I know, they all are.

Q. Now, in your dealings with your publisher, what man do you rely upon in the organization mostly as your agent and representative of your publishers?

A. You mean in the publishers?

Q. Yes.

A. I, of course, depend upon Gus Schirmer.

Q. You have known him for many, many years?

A. Very many years. And his father, of course, knew my husband, and he trusted him implicitly.

Q. They are one of the biggest publishers in the United States?

A. They are one of the biggest publishers in the United States, and a member of ASCAP.

Q. You receive, do you not, Mrs. Nevin, a royalty for the sale of the music?

A. Every three months.

Q. And you recall what that amounts to, about, do you?

A. I am afraid I don't. Well, you mean—you don't mean the American Society, do you?

Q. I am talking about what you get from your publisher.

A. I know I get a very good royalty, but I can't tell you the exact amount. For instance, the Boston Music Company

[fol. 506] pays me, and I don't have any contract with them; they pay me one hundred dollars a month.

Q. And then what else do you get?

A. Then, of course, the Presser people—I think most of their people they pay every six months, but I have mine every three months.

Q. How much is that?

A. It amounts to sometimes six hundred dollars and sometimes less.

Q. And then do you have other publishers too?

A. I think that is about all.

Q. Isn't there one more of Gustave Schirmer's house?

A. That is the same thing—it is the same.

Q. Now then, do you know enough about that to tell us if that is based upon so much per piece of music sold, three cents a copy?

A. I think so, it must be. I know it comes very regularly, and I am always glad to get it, and I get it, of course, through the American Society.

Q. We recognize the fact, Mrs. Nevin, that your husband's list of music is probably the greatest there is.

A. It is very great, I think. He began very early.

Q. It is used very extensively, is it now, over the radio?

A. I think so. At my husband's death, the "Rosary" sold at four hundred thousand, and now I think, according to the New York Herald Tribune, and a man in Washington, it is [fol. 507] selling in the millions. The truth is I don't know, and I don't know whether it is true or not.

Q. Who owns the rights on that, the "Rosary"?

A. Who gets it? I do.

Q. Who owns the publication rights?

A. Schirmer and the Boston Music Company and Presser, but it is all with the American Society.

Q. The public performance rights are with ASCAP? You understand, I guess, what public performance rights are?

A. Yes. I think I have signed something for it.

Q. You signed one of their contracts?

A. Yes, sir.

Q. In what classification have they placed you?

A. I think it is one of the high ones.

Q. Do you know if it is fifteen thousand dollars a year, or less?

A. I think it is fifteen thousand dollars per year.

Q. Your husband died in 1901, you say?

A. Yes, sir.

Q. Who handled your affairs in reference to all of your rights prior to 1926, including your public performance rights?

A. I think it was just in the hands of my publishers—Schirmer and the Presser Company, and at one time the John Page Company, and Presser has bought the Page Company now.

Q. You would sit down occasionally and discuss prices and terms, I presume, with your publisher?

[fol. 508] A. I am one person I think who is very close with everyone I deal with, with the publishers, all my publishers, and they even come and see me, which I think should be done by many, many people who are sometimes complaining they don't get the right royalty.

Q. Who is that?

A. It is the John Page Company, or Schirmer—I go down to see them, and the Boston Music Company, but, of course, that is Schirmer. But, of course, until the American Society came, my royalties were much lower.

Q. Your public performance rights came into an increasing amount after you became a member?

A. I think so. The truth is I know very little about the performance. The other part, I have.

Q. How long have you been in this higher class, this fifteen thousand dollar class?

A. Well, at first, of course, I didn't get so much, but some years ago they raised it. I never liked to speak of what I do get, because so many are in it, and I really never speak of it at all. It might cause a feeling on the part of those that don't get so much.

Q. You leave that entirely to the Board of Directors of ASCAP?

A. Absolutely.

Q. That is left to Mr. Buck and Mr. Mills and Mr. Paine?

A. And all the others, Mr. Mills and all of them. They have been of the greatest help to me.

[fol. 509] Q. You of your own knowledge, Mrs. Nevin, have no recollection you can give us here of the number of pieces of music that are sold for vocal and instrumental purposes by your publisher; you couldn't give us that?

A. No. I think I could get it for you, if you want it, but I couldn't just right now say offhand, because I have such

confidence in the American Society that I don't have to think one minute.

Q. That wouldn't be a part of their business; that would be Schirmer's business, the number of pieces that are sold by your publisher would be a matter between yourself and the publisher?

A. Yes, but that is all in the American Society.

Q. That part of it isn't, the royalties you get from Mr. Schirmer?

A. That is the ASCAP.

Q. You think that is the ASCAP?

A. We deal entirely with the ASCAP.

Q. That is your impression?

A. Yes; it is quite an impression.

Q. By the way, who represents you in your copyright matters in New York, what firm of lawyers?

A. I don't know any but the ASCAP.

Q. They handle that for you?

A. I think they handle everything.

Mr. Hotz: That is all.

Witness excused.

[fol. 510] OFFER OF DEPOSITIONS

Mr. Frohlich: No further witnesses, your Honors. All I have now are the depositions that were taken.

May it please your Honors, two depositions were taken pursuant to the notice, one for depositions in New York City in the summer of 1938, and after the depositions were duly certified they came back to the Clerk of the Court, and we have them here. The other two depositions were two witnesses, Jerome Kern and Sigmund Romburg taken in California last summer, 1938, and I have a copy of them here. The originals were certified and sent back to the Clerk of the Court and the Clerk has an entry on his docket showing they were received here in 1938, but he can't find them. I was wondering if I wouldn't be permitted to use my copy, subject to correction; it is a carbon copy. I suggest this in order to save time, because I realize these depositions are quite voluminous. I would like to offer them all to the Court in evidence as if the witnesses were testifying, subject to the objections that were made by opposing counsel,

and your Honors may rule on that when you come to the depositions. I think it would serve no useful purpose for [fol. 511] me to stand up for a day and read them.

The Court: Wouldn't it be better if you offered in evidence the depositions of stated witnesses taken under this notice or commission, together with the cross examination, subject to all objections?

Mr. Hotz: I call your Honors' attention to the fact that the cross examination of these various publishers is a material part of our case, we figure. There are objections made in connection with some of that testimony, and I am trying to figure out in my mind how to facilitate matters, but at the same time we want that cross examination.

The Court: Why not have the depositions offered and received subject to objections?

Mr. Frohlich: Both as to direct and cross examination.

Mr. Hotz: What I am getting at is, suppose some parts of this cross examination the Court would say was not proper, and if that is the case, in connection with some of these depositions, some of this cross examination, I want to supply other proof of the same thing.

The Court: Could you not offer it on testimony, if not proper cross examination?

[fol. 512] Mr. Hotz: But I wouldn't know it if you are going to take these away.

The Court: You can cover it in the statement to the record if you desire, in the event the Court holds that any of these objections are not cross examination. In that event, you desire and now offer that part of the cross examination as your own testimony. I am suggesting that.

Mr. Hotz: That will do it; that is satisfactory, I think.

Mr. Frohlich: I am willing to waive any objection. The whole record can be in as far as I am concerned, everything they elicited can come into this record, and all exhibits. The exhibits are mostly mine. These are my depositions. I am willing to withdraw any objection to any part.

The Court: The record may show that any and all objections interposed on cross examination on the ground that it is not proper cross examination, is waived by counsel.

Mr. Frohlich: Yes, your Honors.

I offer in evidence the depositions taken pursuant to notice in the City of New York of the witness Sigmund Spaeth, with all of the exhibits that were submitted, iden-

[fol. 513] tified and offered by both sides, and with all of the cross examination, subject to the stipulation already made, in which I have withdrawn any objection to the cross examination on the ground it is not proper cross examination.

Mr. Hotz: What about the other objections?

Mr. Frohlich: The Court can pass on the immateriality.

I make a similar offer of proof as to the direct testimony and the cross examination and all the exhibits, and the same waiver of objection on my part, of the witness Abraham Schwartz who was business manager of Irving Berlin, Inc.

I also make the same offer with respect to the testimony of Walter S. Fischer, president of Carl Fischer, with respect to the direct testimony and to the cross examination and the exhibits, and the same waiver of objection.

I also make the same offer with respect to the witness Irving Caeser, with respect to the direct examination and cross examination and all the exhibits, and the same withdrawal of objection and waiver.

I also make the same offer with respect to the deposition of Edwin H. Morris, with respect to the direct testimony, [fol. 514] the cross examination, the exhibits, and the waiver of objection.

I make the same offer with respect to the testimony of George W. Meyer, with respect to the direct testimony, the cross examination, the exhibits, and the waiver.

I make the same offer with respect to the witness Ella Herbert Bartlett, with respect to the direct testimony, cross examination, the exhibits, and withdraw all objections.

I make the same offer of proof with respect to the witness Will Von Tilzer, with respect to the direct testimony, the cross examination, all of the exhibits, and the same waiver of objections.

I make the same offer of proof with respect to the deposition of Edgar Leslie, with respect to the direct testimony, the cross examination, the exhibits, and the waiver of objections.

With respect to these witnesses I now state they are not within the State of Nebraska.

I make the same offer of proof with respect to the witness Jerome Kern, and Sigmund Romberg, taken in the State of California in 1938, and I make the same offer with respect to the direct testimony—there was no cross examination and no one representing the Attorney General's office in that

[fol. 515] deposition—and also ask that the exhibits be marked in evidence.

Mr. Hotz: My attention, may your Honors please, has been called to the form of this stipulation on the depositions that were first suggested, and that is that the withdrawal of the objections was limited.

Mr. Frohlich: No; as I understand it, the only limitation was as to whether or not it was proper cross examination. I think the Court has a right to pass the materiality and irrelevancy of a matter, which it is cross examination or direct.

Mr. Hotz: The only objections you have raised in your cross examination is the fact that it is not proper examination. Is that the only thing you waive, or not?

Mr. Frohlich: What else do you want us to waive?

Mr. Hotz: The rest of your objections.

The Court: The question as to materiality?

Mr. Hotz: Aside from the question of materiality there are other things here.

Mr. Frohlich: I waive every form of objection except the competency, materiality and relevancy.

[fol. 516] Mr. Hotz: That won't do.

Mr. Frohlich: I will give you competency; I don't care about that. But I think materiality and relevancy should be in there. I can't burden the Court with a lot of stuff that doesn't belong here. There were very few objections taken by us. That matter of objections, do you want everything to go in on both sides; have the objections withdrawn on both sides?

Mr. Hotz: No. These were your witnesses.

Mr. Frohlich: Certainly. I am willing to have a clean slate, everything to go in on both sides.

Mr. Hotz: Not at all. I am not going to waive the reading of these depositions at all.

Mr. Frohlich: I am trying to save time, that is all.

The Court: Have you made your offer?

Mr. Frohlich: Yes.

The Court: Is there any objection?

Mr. Hotz: Yes.

The Court: What is it?

Mr. Hotz: We object to the offer in reference to the cross-examination that has been offered because the stipulation in connection with waiving of the objections is not

[fol. 517] broad enough to cover the situation, and it postpones the ruling of the Court, your Honors, on the cross-examination until after the close of the case.

The Court: Do you wish to offer your cross-examination yourself?

Mr. Hotz: Yes, we would like to offer our cross-examination.

The Court: Offer it.

Mr. Frohlich: I will consent to have it come in.

Mr. Hotz: Offer the cross-examination of each of the witnesses in which the direct examination has been offered by Mr. Frohlich.

Mr. Frohlich: We consent to it.

The Court: The direct and cross-examination of the witnesses as shown by these depositions is received.

What else?

Mr. Frohlich: I just want to make the statement, your Honors, that all of the witnesses mentioned in these depositions reside out of the state, more than one hundred miles from this state, and they are not available for trial at this time, and not within one hundred miles of this court.

[fol. 518] The Court: I guess there is no objection.

Mr. Frohlich: With that, your Honors, the plaintiffs rest.

Mr. Hotz: In connection with the status of the record on these depositions, let the record show that these witnesses were, of course, the complainants' witnesses; in our offer of the cross-examination it isn't our intention in the manner in which these offers have been made, that the defendant should be bound by the statements made of those witnesses, excepting in reference to the matters on cross-examination.

The Court: You offer that as cross-examination and not otherwise?

Mr. Hotz: As cross-examination and not otherwise.

Mr. Frohlich: The plaintiffs rest.

(Whereupon, at the conclusion of the complainants' evidence, the defendants, in order to maintain the issues on their behalf to be maintained, presented the following evidence.)

Mr. Hotz: Might I read these cross-examinations?

The Court: I don't want you to take the time to read them [fol. 519] if we can avoid that.

Mr. Frohlich: I thought, your Honors, we had settled that.

The Court: Probably either side will state substantially what it contained and what their claim is with reference to the proof of these depositions. We wouldn't like to have you offer the cross-examination and read it without the other, because you announce your offer as only the cross-examination.

Mr. Hotz: We will pass it for the time being.

The Court: All right.

Mr. Hotz: The record shows there were a number of interrogatories propounded in accordance with the terms of the statute to the others, and they answered a large number of those interrogatories and supplied the information that was wanted. On balance of them the various witnesses stated that they would have it present here in the court room the day called for, if the Court ruled that it was material. There are sixty-three of those interrogatories. At this time I would like to read those interrogatories. I don't see how we can avoid that.

The Court: Very well.

[fol. 520] Mr. Frohlich: We can avoid it if I consent to them. I will consent that we could dispense with the reading of these interrogatories. There are four sets of them, and I will consent to have everything in there go in that is in. I objected to some of the interrogatories because I felt they were improper and asked a thing they were not entitled to. As to those, we can have a ruling of the Court. I have given them a tremendous amount of material in there.

The Court: Is some of it in the nature of repetition of testimony you already have?

Mr. Hotz: Some. For example, we asked for the list of the publisher members of their organization. We have got that in.

Mr. Frohlich: Whose have you got there; Bucks?

Mr. Hotz: Yes. These others are not very long; they are very short.

The Court: I assume you refer only to those you think now are material?

Mr. Hotz: Yes.

(Interrogatory Number 1 read by Mr. Hotz.)

The Court: I am wondering if it hasn't been covered pretty well by the testimony?

Mr. Hotz: Yes.

[fol. 521] The Court: Why not waive it now in view of the testimony already in?

Mr. Hotz: The purpose of that question, your Honors please, is, of course, to show the development of the Society.

The Court: That is already shown.

Mr. Hotz: No, it is not, we don't have it in there. It shows only from these exhibits here.

The Court: That is largely the testimony of Mr. Buck, isn't it?

Mr. Frohlich: They can develop that from Mr. Buck. Even Mr. Buck couldn't give them those jobs; it would be an enormous job, and would have to go back to 1914 and give them a list of the members.

The Court: Did I understand you to say you agreed they could introduce all of these and there was no objection to them?

Mr. Frohlich: I said I would agree to the present interrogatories, to all the exhibits and answers that are in there, with the exception as to those I objected to I want the Court to make a ruling. The Court will realize what my friend has asked for is a period of twenty-five years and would show nothing of a useful purpose. Mr. Buck took the stand [fol. 522] and showed great deal of the twenty-five years, and he was subject to cross-examination.

The Court: In view of the testimony already introduced and the present state of the record, the objection is sustained.

(Interrogatory Number 2 read by Mr. Hotz.)

The Court: That will be sustained.

(Interrogatory Number 3 read by Mr. Hotz.)

Mr. Frohlich: That has been answered.

Mr. Hotz: They have complied with that.

(Interrogatory Number 4 read by Mr. Hotz.)

Now, that they object to, they say.

Mr. Frohlich: Read the objection.

(Objection read.)

Mr. Hotz: Now, that asks for the list of the copyrighted musical compositions or arrangements owned or controlled by their author members.

Mr. Frohlich: That is Number 4, isn't it? Read the question again.

(Interrogatory Number 4 re-read.)

The man says he can't give it to you and doesn't know it.

The Court: Is that the answer?
Mr. Frohlich: That is the answer.

(Interrogatory Number 5 read by Mr. Hotz.)

[fol. 523] Mr. Frohlich: That is in evidence, also.
The Court: There is no objection to this?
Mr. Hotz: No.
The Court: Why not read right on?

(Interrogatory Number 6 read by Mr. Hotz.)

(Interrogatory Number 7 read by Mr. Hotz.)

(Interrogatory Number 8 read by Mr. Hotz.)

Mr. Frohlich: That Exhibit Number 5, your Honors, is merely a part of this great big box which was not received in evidence. This is bringing that down to date. I have no objection to putting it in evidence, but we couldn't give them any more, your Honors.

Mr. Hotz: I call attention of the Court to the fact that this is what we have been given as a substantial compilation of their compositions. I call the attention of the Court to the fact that it is here.

(Interrogatory Number 9 read by Mr. Hotz.)

(Interrogatory Number 10 read by Mr. Hotz.)

Mr. Frohlich: It doesn't say exactly that. Exhibit Number 11 has been confused with Exhibit Number 5.

(Interrogatories Numbers 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 read by Mr. Hotz.)

The Court: Do you think there is anything disclosed by [fol. 524] these answers not fully covered by the testimony either on direct examination or cross-examination of this same witness?

Mr. Hotz: Probably not; there are one or two things. The evident purpose we had in connection with those interrogatories was to show the enormity of the thing, they

are so vast, and the very fact that they could not furnish them. We thought it might have some probative force, I suppose.

What I would like to do, if the Court will permit it, is to take these with me tonight. It is 5:00 o'clock and I am supposed to go ahead and get some witnesses down here tonight from Omaha. I believe that if I could take these and sit down——

The Court: As a matter of fact you want to continue until tomorrow morning?

Mr. Hotz: No. More than that, I will spend the time, your Honors, if you will believe me, in really going through these interrogatories and seeing if I can't simplify this thing. The interrogatories were the result of a lot of lawyers wanting to ask questions and get their ideas in. A large number of persons are interested in it, and I must confess some of those I can't answer as well as I would like [fol. 525] to, and I think if I take the time this evening I will simplify this thing by morning and come in with two or three more, and maybe none, and present them to the Court.

The Court: You have nothing else to present this evening?

Mr. Hotz: No. May I take these out of the court room?

Mr. Frohlich: There is no objection.

The Court: The Clerk will check them with you.

(Whereupon an adjournment was taken until 9:30 o'clock A. M., Wednesday, September 20, 1939.)

[fol. 526] (At 9:30 o'clock A. M., Wednesday, September 20, 1939, Court convened pursuant to adjournment, all parties present as heretofore, and the following proceedings were had, done and entered of record, to-wit:)

Mr. Te Poel: If the Court please, the Clerk called our attention this morning to the fact the State Treasurer has died within the last few weeks, who was a defendant in this case, and has been succeeded by John Havekost, the duly appointed and qualified and acting Treasurer. The complainants now move that because of the death of the defendant Bass that John Havekost be made party defendant in this action in lieu of the defendant Bass.

Mr. Frolich: Plaintiffs consent.

[fol. 527] JOSEPH MALEC was called as a witness on behalf of the defendants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Hotz:

Q. State your name.
A. Joseph Malec.
Q. Where do you reside?
A. Omaha, Nebraska.
Q. What is your business?
A. Amusement.
Q. Do you have an amusement park in the City of Omaha or near the City of Omaha, and if so, what is its name?
A. I have a park under the name Peony Park.
Q. Where is that located?
A. It is located west of Omaha.
Q. What street number?
A. 78th and Dodge Streets.
Q. What is its business?
A. Dancing and swimming and picnicking.
Q. About how many persons attended your dance pavilion, indoor and outdoor, last year?
A. About one hundred thousand.
Q. Is there an association in the State of Nebraska of persons engaged in similar lines of business as yourself, [fol. 528] and if so, what connection do you have with it?
A. I am the president of the association of Nebraska Amusement Men's Protective Association.
Q. When was that organization formed?
A. The organization was formed in 1936.
Q. What was the purpose of its organization?
A. The purpose of the forming of the organization was to get relief from the ASCAP association.
Q. In what manner?
A. To seek relief from the power that the ASCAP exercised over all the people interested in playing music for public performance.
Q. In the State of Nebraska?
A. In the State of Nebraska.
Q. How long have you been in the amusement business?
A. Eighteen years.

Q. In your experience have you had occasion to get statistics and estimate the number of persons interested in dancing and that do dance in the State of Nebraska?

A. I would say about one-third of the population in the State of Nebraska dances.

Q. Did you organize or yourself individually have anything to do with the introduction of the bill that is before this Court, Legislative Bill No. 478?

A. Yes, I had.

Q. Just state what part you had in connection with it.

[fol. 529] A. I organized the amusement people in the State of Nebraska to form this bill. This bill was presented by Mr. Frank Brady.

Q. In the preparation and introduction of that bill through Mr. Brady did the broadcasters of Nebraska or the National Association of Broadcasters have anything to do with it; were they consulted at the outset?

A. No.

Q. Was it taken up with them at all in any way?

A. Later we asked them to join us in forwarding the bill that Mr. Brady introduced.

Q. Mr. Malec, are you an employer of music in your establishment for dancing purposes?

A. Yes.

Q. To what extent? Just about the number of orchestras and the amount of time your organization puts in in the employment of music.

A. Well, our establishment uses music during the summer time, six days a week, for a period of three months, and the rest of the year we use music twice a week.

Q. To what extent do you pay out money for orchestras and bands per annum at the present time?

A. Well, yearly we pay about fifteen thousand dollars—approximately around that figure for music.

Q. You have, do you not, an outside dance pavilion and an indoor dance pavilion?

[fol. 530] A. We have an outdoor dance pavilion and an indoor dance pavilion.

Q. Were there any other organizations at the time this bill was introduced that were interested besides yourself and your organization, and if so, who?

A. In introducing this bill we had the support of the Czech societies and of the German, and various individuals

that had something to do with the use of music directly and indirectly in the past years.

Q. Why were the Czech societies called in, if you know?

A. The Czechs have a great number of dance places throughout the state and they were interested.

Q. The same with the German society?

A. Yes.

Q. Did the theatre or motion picture operators have anything to do with it, and if so, state what?

A. I approached their association on it but they were afraid to come out openly and assist us in presenting the bill.

Mr. Frohlich: I move to strike out "they were afraid".

The Court: It may stand.

Q. Did you have any conversation with any member officially of that organization, that is, the motion picture theatre men's association, and if so, with whom and where with reference to this bill?

[fol. 531] A. I talked twice with Mr. Williams.

Mr. Frohlich: I object to any such conversation on the ground it is hearsay.

The Court: He is not giving any conversation.

Mr. Frohlich: He was just about to give a conversation.

Q. Was Mr. Williams their president?

A. Yes.

Q. Where was the first meeting held, and generally who was present at the time you undertook to sponsor a bill in the Nebraska Legislature?

A. The first meeting was held in Omaha.

Q. You were present at that meeting?

A. Yes.

Q. Were there any of the broadcasting people present at that time?

A. I called in just the dance people of the state at the time.

Q. Now, have you had any dealings with ASCAP, that is, Peony Park, Inc., and yourself personally, in the past years, and are you having any dealings with them at the present time?

A. Yes, I had dealings with the ASCAP for about eighteen years.

Q. Are you operating now under one of their licenses?

A. Yes.

[fol. 532] Q. What amount of money are you paying annually to ASCAP?

A. Two hundred and fifty dollars, I believe.

Q. Per year?

A. Per year.

Q. Who were your dealings with as far as ASCAP was concerned, what member of its organization?

A. Mr. Eugene Blazer.

Q. Now, did you operate for a time prior to your present contract without a license? Was there a time that you didn't have a license and paid them money?

A. Yes.

Q. How long a time was that, and how much did you pay them?

A. We started out years ago with the fee of sixty dollars. Then this fee was raised from time to time. Years ago there was no contract signed by us with Mr. Blazer.

Q. Did you ever have any controversy with ASCAP in connection with this amount of money that was paid by you for the public performance rights?

A. Yes, at various times I protested to Mr. Blazer about the fee asked by him for playing the music.

Q. And what did he say?

A. Well, just a statement for the yearly dues, and they said they were raised from sixty dollars to the present charge, and whenever I took it up with him as to why the added charge, well, several times he told me that I should be glad he doesn't charge me one thousand dollars; that he [fol. 533] was in charge of how much I am to pay.

Q. Did you or Peony Park or the members of your association ever take up with ASCAP in New York, or any of its Board of Directors through yourself or any national organization the matter of the terms or conditions of the contract that you now have with ASCAP?

A. No.

Q. At any time within the past few years have you refused to pay ASCAP?

A. Yes, I refused to pay them several times.

Q. And what happened?

A. I was always threatened with a suit, and I was sued on two accounts.

Q. In the United States District Court at Omaha?
A. Yes, sir.
Q. For infringements?
A. Yes, sir.
Q. And those suits were dismissed, were they?
A. Yes.
Q. And you signed the contract?
A. Yes.
Q. Now, why did you sign the contract with ASCAP? Why do you deal with them at all?

Mr. Frohlich: I object to that as calling for a conclusion, and speculative.

The Court: I think he may answer. You brought out [fol. 534] proof that it wasn't necessary; that they had public domain to draw from.

A. Just couldn't get along without the music, so there was nothing else for me to do but sign.
Q. Do you know about what percentage or amount of the kind of music that your organization uses is controlled by ASCAP through the public performance rights?
A. Well, I have been told by Mr. Blazer that practically all the music is controlled by the ASCAP.
Q. Speaking now of popular dance music?
A. Yes.
Q. And of your own personal knowledge, what are the facts as you have found them?
A. I think he speaks the truth.
Q. At the time this bill came on for hearing in the legislature do you know whether or not there were public hearings held before various legislative committees in connection with it, and before its final passage, or not?
A. Yes.
Q. Did you attend any of those meetings?
A. Yes, I did.
Q. Did you have an opportunity to observe whether or not other persons attended it, and if so, generally who, without going into too much detail?
A. Going over the bill before the committee, the assembly hall was filled to capacity, and I know that there was great [fol. 535] interest among many people that traveled a long distance to be there at that meeting, from various points.
Q. That lived in Nebraska?

A. That lived in Nebraska.

Q. Was ASCAP represented at those hearings?

A. Yes.

Q. And did they present their side of the matter?

A. Yes, they did.

Q. Do you know whether the matter was debated on the floor of the Legislature before the bill was passed?

A. Yes.

Q. Did you hear it?

A. Yes.

Q. You were present?

A. Yes.

Q. You heard the various sides presented by various legislators?

A. I did.

Q. Do you know what the final vote on the bill was?

Mr. Frohlich: I object to that.

The Court: Sustained.

Mr. Hotz: Did I understand that counsel objected on the ground of incompetency, and if so, I will concede that?

The Court: As I understand it, there was no objection at all. The bill was passed and I don't think it makes much [fol. 536] difference how much majority it had.

Q. When you employ music, Mr. Malec, what control do you exercise as a proprietor over the musicians in regard to the style and kind of music they play?

A. I exercise no power over the music that the orchestra brings along when they play their engagement.

Q. How do you negotiate with your musicians?

A. Well, some bands are booked directly, and some bands we get through their bookers.

Q. Booking agencies?

A. Booking agencies; yes.

Q. The point I want to bring out, Mr. Malec, is whether or not if these musicians are individual musicians or employees of yours, and do you pay each one separate or do you just give a check to the booking agency or to the band leader for the contract price for the term that they play?

A. The men are never individually paid. The pay goes to the contractor or the leader of the orchestra.

Q. You do not control the amount of money each individual musician gets?

A. No, I don't.

Q. Would you be able to run and operate your establishment in the State of Nebraska without music?

A. I couldn't do that—I would have to have music.

Q. Would you be able to run and operate your establishment without ASCAP?

[fol. 537] Mr. Frohlich: I object to that as not qualified, and highly speculative. The witness is not qualified to testify to that.

The Court: Overruled.

A. I could not run without the music of ASCAP.

Q. What is the principal objection you have, Mr. Malec, in your dealings with ASCAP? What are you complaining about, what is the chief difficulty and why did you organize and have this bill introduced in the State Legislature; what is the trouble?

A. I felt that the unlimited power exercised by the representative was detrimental and unjust to the business, and dangerous.

Q. In what manner?

A. The attitude and position Mr. Blazer took in telling me that he would have the right and power to ask one thousand dollars as a fee for a park to pay.

Mr. Frohlich: Can you fix the time and place of that conversation?

The Court: About the time and place.

The Witness: Oh, Mr. Blazer made statements of that type several times in the past years.

Q. When did he make them?

A. He would always make them at a time when we would get into—about the time when he was sending us a statement and I would refuse or argue this fee with him, telling him we had difficulties these days to carry on our busi-[fol. 538] ness, and he would take the attitude that we were very fortunate that he wasn't charging us more.

Q. Do you have an opportunity at the present time to deal openly for music with any other persons that you know about, any publisher or catalog or anything of that sort?

A. Well, at the present time I don't know if I could deal with anybody else as long as we are paying this fee to ASCAP.

Q. I didn't have that so much in mind, Mr. Malec; I said do you desire to select your music from the catalogs of dif-

ferent publishers and choose your own style and class of music? Would you like to do that?

A. Yes, I would prefer that.

Q. And are you able to do that now under your arrangements with ASCAP?

A. I don't think so.

The Court: Mr. Malec, do you know of any competitors of this ASCAP organization who are in the market with music for musical selections?

The Witness: I don't.

The Court: Have you been solicited by representatives through the mail or in person or music concerns offering to sell music?

The Witness: About three years ago I received a letter from Warner Bros. They were telling me in the letter that [fol. 539] they wanted a fee of a hundred and fifty dollars from the Park for playing music—their music, but at that time we just ignored the letter, and there was nothing more heard by us from Warner Bros.

Q. When was that?

A. I would say about three years ago.

Q. What was the result of that, if you know? Did you get any notification in connection with that matter from ASCAP?

A. No. I received a letter from Warner Bros.

Q. What did they say?

A. They were telling me they were divorcing themselves from ASCAP, and they wanted us to pay them a hundred and fifty dollars for playing their music.

Q. I mean after that did they go back in ASCAP?

A. I understand they did.

Q. You never received any more letters from them, anyhow?

A. No.

Q. How many members of your organization are there in the State of Nebraska?

A. About two hundred and forty.

Q. You are speaking now of the Amusement Men's Protective Association?

A. Yes.

Q. Of which you are president?

A. Yes, sir.

[fol. 540] Mr. Hotz: I think that is all.

Cross-examination.

By Mr. Frohlich:

Q. Mr. Malec, when did you go into business in Peony Park?

A. Oh, I had Peony Park for about twenty-four years.

Q. You were there in 1921?

A. Yes.

Q. Did I understand you to testify you paid ASCAP moneys, but never had a contract in the early days?

A. There were some days we did not have a contract.

Q. Did you have a contract in 1921?

A. I could not say.

Q. I show you this document and ask you whether you recognize the signature?

A. Yes.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 42.

Q. It is your signature?

A. It is "Malec Bros." on there.

Q. In your handwriting?

A. Yes, sir.

Mr. Hotz: Objected to as immaterial.

The Court: Overruled.

Q. You had a similar contract in 1922, did you? Look at this document and look at the signature and see if it is yours?

[fol. 541] A. Yes, sir.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 43.

The Court: Is there any reason for encumbering the record with that? It is similar to others.

Q. Mr. Malec, under this first contract, plaintiffs' Exhibit Number 42, you paid thirty dollars a year, is that right? Look at it.

A. I thought it was sixty dollars—I had forgotten.

Q. And under your second contract in 1922 you paid fifty dollars a year, didn't you?

A. Yes.

Q. Your business was growing, wasn't it?

A. Yes.

Q. You don't want this Court to believe that you were as large an establishment in 1921 and 1922 as you are today?

A. No.

Q. You were a small dance hall in those days, weren't you?

A. Well, we have done a lot of business during the summer time.

Q. Did you employ orchestras in those days at substantial salaries?

A. No.

Q. How did you furnish music to your patrons?

A. We had to pay for the music.

Q. How did you operate the music, by what means; with an orchestra?

[fol. 542] A. With an orchestra.

Q. A small orchestra?

A. Well, nine to ten pieces.

Q. In those days?

A. Yes, sir.

Q. What did you pay the orchestra, on the average?

A. Well, in those days five to six dollars a man a night.

Q. How much would that run into a week or month?

A. Ten men would be fifty-five dollars, something like that, a night.

Q. It would be about three hundred dollars a week?

A. Yes, sir.

Q. Fifteen thousand dollars a year?

A. Well, around those figures.

Q. You increased your business as you went along, didn't you?

A. Some years we did, yes.

Q. What admission did you charge in 1921?

A. One dollar a couple.

Q. And on the average how many people came into your establishment a week?

A. Well, in those days we danced four nights a week.

Q. You only operated four nights?

A. Four nights.

Q. And how many people came in of an evening?

A. Well, anywhere from, say, sixty couples up to two [fol. 543] hundred and fifty or three hundred couples on Saturday night.

Q. Do you now operate on four days a week?

A. We now operate two nights a week.
Q. In the summer time, how do you operate?
A. Operate six nights a week then.
Q. In winter time?
A. Two nights a week.
Q. What do you charge admission now?
A. Forty cents a person.
Q. Eighty cents a couple?
A. Some nights thirty cents; some nights forty cents; Saturdays, fifty cents.
Q. How many people come into your establishment on a week night?
A. Again, it will run probably one hundred couples and up to four or five hundred couples on Saturday nights; six hundred couples sometimes.
Q. What gross business did you do in 1921 and 1922 and 1923 and those years, approximately?
A. I couldn't recall that.
Q. Well, did you do as much as twenty-five thousand dollars a year?
A. I say that is going pretty far back—I don't know what business we did do.
Q. Have you no recollection of what you did in 1925, 1926 or 1927?
[fol. 544] A. I wouldn't want to say the figures.
Q. Well, you testified you now do about one hundred thousand a year, is that right?
A. One hundred thousand attendance a year, one hundred thousand paid customers.
Q. Did you do one hundred thousand attendance in 1921 and 1922?
A. No.
Q. You did considerably less, didn't you?
A. Yes.
Q. Your business increased over the years, isn't that right?
A. Yes.
Q. And from time to time Mr. Blazer asked you to pay larger sums, didn't he?
A. Yes.
Q. You knew there were other dance halls in and around Omaha? You are familiar with the territory, aren't you?
A. Yes.

Q. You know you have competitors in this territory, isn't that right?

A. Yes.

Q. You know you have some large competitors and some small competitors?

A. Right.

Q. You knew right along the large dance halls were paying more than the small dance halls, isn't that right?

[fol. 545] A. Yes, sir.

Q. You expected they should pay that, didn't you?

A. I didn't expect them to pay, the small ones.

Q. Well, didn't you expect a small dance hall to pay proportionately, and a larger dance hall to pay more?

A. Yes. Some paid, and some didn't pay anything at all.

Q. You had a large dance hall, didn't you?

A. Yes.

Q. You were one of the leading dance halls in the State of Nebraska, isn't that right?

A. That is true.

Q. You charge an admission to the Park in addition to the dance floor, don't you?

A. Yes, sir.

Q. What do you charge now?

A. Ten cents in the summer time. Now, the season is over.

Q. So that a customer has to pay you ten cents, twenty cents a couple, to get in the Park, and eighty cents to dance; that is one dollar, isn't it?

A. Tuesday nights they pay twenty cents to get in the Park, and get in to dance for fifty cents; that makes seventy cents a couple.

Q. Now, you said on Saturday nights you have had as many as four hundred people in the place?

A. Four hundred couples.

Q. That would mean an increase, approximately, between three and four hundred dollars, isn't that right?

[fol. 546] A. Yes.

Q. The chief expense is the orchestra, isn't it?

A. Yes.

Q. You still pay about fifteen thousand dollars a year for that orchestra, is that right?

A. Yes.

Q. You also sell refreshments in the Park?

A. Yes.

Q. And you make a profit out of that?
A. We hope to.
Q. You sell drinks?
A. Yes.
Q. And sell food?

Mr. Hotz: You don't sell hard liquor, do you?
The Witness: No.

Q. You sell beverages and food?
A. Yes.
Q. Now, you organized this Amusement Protective Association of Nebraska, didn't you?
A. Yes.
Q. When did you organize it?
A. 1936, I think.
Q. Now, before you organized that, did you have any correspondence with any other body or association regarding ASCAP?
[fol. 547] A. I had a lot of conversation with men operating different places.
Q. Did you have any correspondence with anybody on the subject?

Mr. Hotz: Just a minute. I object to that unless counsel states with whom.

Q. That is what I am trying to find out.

The Court: Overruled.

A. I don't think so.
Q. Did you get any letter from the National Association of Broadcasters?
A. No.
Q. Did you get any letters from anybody representing the National Association of Broadcasters?
A. None prior to our organization.
Q. Well, did you get them after the organization?
A. No.
Q. Did you get them at any time?
A. I don't believe we had any correspondence from the broadcasters.
Q. Who prepared the bill presented to the Nebraska Legislature?
A. Mr. Brady.
Q. Who is he?

A. One of the Representatives, State Representatives.

Q. Did you ever see the bill before it was presented?

A. Yes.

Q. Where and when?

[fol. 548] A. I seen it before it was presented, of course.

Q. Who showed it to you?

A. Between Mr. Brady and myself and a lot of other people interested in the bill.

Q. And then did you in March, 1937 circularize the members of your Protective Association with reference to the bill?

A. Yes.

Q. I show you a document and ask you whether that is the document you sent out to your members?

A. Yes, that is one of them.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 44.

Mr. Hotz: Objected to as immaterial.

The Court: Overruled.

Q. Do you remember this part of the letter, "Our first big problem is the promotion of the bill 478 which will protect us against the payment of the so-called license to play copyrighted music at public performances for profit. We have been forced to pay the American Society of Composers, Authors and Publishers long enough, and we believe that if we all do our part we will be able to keep this graft out of the State of Nebraska." Do you remember that?

A. Words to that effect.

Q. You dictated this, didn't you?

A. Yes, sir.

Q. This was a form of graft in your estimation, wasn't it?

[fol. 549] A. That is what it says there.

Q. You were paying two hundred and forty dollars a year for this graft, weren't you?

A. Yes.

Q. You were paying fifteen thousand dollars for an orchestra, weren't you?

A. Yes.

Q. The orchestra played music for you at each performance for your patrons?

A. Yes, sir.

Q. For two hundred and forty dollars graft that you were paying you had a license to a great many musical compositions, didn't you?

A. That is what Mr. Blazer said.

Q. Nobody ever sued you for a copyright, did they?

A. I was threatened practically every year.

Q. Were you threatened by anybody outside of the American Society for infringement of a copyright?

A. No.

Q. You never paid a cent of damage for infringement of a copyright, did you?

A. No.

Q. As a matter of fact, you didn't bother your head about the music you were playing in your establishment?

A. Yes, sir.

Q. Well, you left it to the orchestra leader, didn't you?

[fol. 550] A. Yes.

Q. You import a lot of bands outside of the state?

A. Yes, sir.

Q. You still do that?

A. Yes, sir.

Q. You just gave the orchestra leader carte-blanche and told him to go ahead and play what he wanted, didn't you do that?

A. Yes, sir.

Q. Are you a musician?

A. No.

Q. Do you know anything at all about music?

A. Some.

Q. Did you ever keep a log or record of the pieces you played?

A. No.

Q. Did you ever tell your orchestra leader to confine himself to any particular kind of music?

A. I told him the tempo of music I would like to have him play.

Q. You told him you wanted dance music?

A. Yes, sir.

Q. And you left it to his discretion what he would play?

A. Yes, sir.

Q. Did you ever look at the sheets of music to see who owned the copyrights?

A. Oh, I believe I looked at some sheet music.

Q. When?

[fol. 551] A. Occasionally if I get around to see what number they are playing.

Q. Didn't a time come when you discontinued paying ASCAP any money for a license?

A. Yes.

Q. And you were sued for infringement by Mr. Blazer on behalf of the members of ASCAP?

A. Yes, sir.

Q. That one suit went on for how long a period?

A. Well, the suit was started but it wasn't finished.

Q. How many months did it drag along?

A. Well, it was during that time we were introducing that bill, probably three months.

Q. During those three months you were not paying ASCAP a penny, were you?

A. No. It was all pending.

Q. During that three months you were running your establishment, weren't you?

A. Yes, sir.

Q. While running the establishment you were having an orchestra play music?

A. Yes, sir.

Q. During those three months when no license from ASCAP was had, did you take the trouble to investigate the kind of music being played in your establishment?

A. No.

[fol. 552] Q. Didn't you know as a matter of fact that a great many compositions played belonged to members of ASCAP?

A. I think they did.

Q. You knew that. It didn't make any difference to you, did it?

A. Not at the time, no.

Q. Did you pay anybody for that music?

A. I think I settled it afterwards.

Q. Did you pay any author, composer or publisher a penny in all your life outside of ASCAP for the use of any music in your establishment?

A. No.

Q. Did you ever make an effort to find out whether any author, composer or publisher had his music played in your establishment? Did you ever make any effort to find that out?

A. Oh, I was told that the music was all handled——

Q. (Interrupting:) Did you ever make an effort to find out who owned any music in your establishment?

A. No.

Q. Did you ever make an effort to pay any composer, author or publisher a license fee for the use of music in your establishment?

A. No.

Q. Assuming that the ASCAP cannot do business in this State under the present law, and you want to continue running your business, how would you go about protecting yourself against infringement suits? What would you do?

[fol. 553] A. Well, if the whole State of Nebraska was situated as I would be, I don't think it would make much difference.

Q. What would you personally do to protect your business establishment and your investment if there were no ASCAP today?

A. I don't know. I think I am at the mercy of ASCAP.

Q. Suppose you wouldn't be at the mercy of ASCAP and there was no ASCAP in the State of Nebraska, what would you do about furnishing music to your patrons? Would you still have an orchestra?

A. I don't know what I would do.

Q. In other words, if there were no ASCAP you couldn't run your business, isn't that right?

A. I guess that is right.

Q. Would you make any attempt to get music from other sources?

A. I would have to.

Q. Have you ever made any attempt in your life to get music from the public domain or music that belonged to others than ASCAP?

A. No, I didn't.

Q. Now, if there were no ASCAP and you wanted to perform this music, you wouldn't want to infringe on anybody's rights, would you?

A. No.

Q. You are a law abiding citizen, aren't you?

A. Yes, sir.

[fol. 554] Q. And want to do business legally and properly?

A. Yes, sir.

Q. And if there were no ASCAP in the State of Nebraska or anywhere, what would you do to protect yourself against infringing on somebody's rights with respect to music?

A. Well, we would have to play music that ASCAP has nothing to do with.

Q. Well, whose music would you play?

A. I believe there would be some authors come forward contributing their knowledge to the musical world.

Q. Now, you know there are a great many compositions that are not copyrighted, don't you?

A. I think there are some, yes.

Q. And as to the compositions that are not copyrighted by members of ASCAP, you would have to negotiate separate licenses with these people, wouldn't you?

A. We would have to buy music that we know doesn't belong to ASCAP.

Q. And you would have to negotiate separately with the owners of copyrights for the privilege of playing the music, wouldn't you?

A. I think our orchestras would have to.

Q. Either you or the orchestra?

A. Yes, sir.

Q. How many numbers do you play in a night?

A. Probably thirty-five.

[fol. 555] Q. You play about thirty-five numbers one night, and play some of the same numbers the next night. How many numbers a week?

A. Multiply that by six—two hundred numbers, but most of them are repeated again.

Q. Would it be fair to say between one hundred and two hundred numbers?

A. Yes.

Q. If there were no ASCAP and you had to negotiate with respect to one hundred to two hundred numbers each week, how would you have to commence your negotiations?

A. I don't think it would be necessary to have as many numbers.

Q. Suppose you cut it down a half, you would have to negotiate for some reasonable time prior to the performance in your establishment, wouldn't you?

A. I expect so.

Q. You would have to employ somebody for that, wouldn't you?

A. Oh, I think things would work out somehow.

Q. Would you, yourself, be willing to give up your time for negotiating a license for music in your establishment?

A. No, I wouldn't have the time for that.

Q. You would have to employ somebody for that purpose, wouldn't you?

A. Yes.

Q. You would have to pay a salary for that, wouldn't you?

[fol. 556] A. I expect so.

Q. What would you think you would have to pay some man in your establishment to clear your copyrights?

A. Well, Peony Park wouldn't want to go into the music business.

Q. You wouldn't want to go to too big an expense?

A. No.

Q. But if no ASCAP, and if you had to clear the rights, wouldn't you have to employ somebody at a substantial salary?

A. If there were no ASCAP, I think the state would get some music—you could get a great deal of music.

Q. Isn't it a fact that today with ASCAP there is a great deal of music which doesn't belong to ASCAP?

A. I don't know how much music I could get today. I was told by Mr. Blazer that ASCAP controls practically all the music.

Q. He told you that?

A. Yes, sir.

Q. Did you make any effort to find out whether that was true or not?

A. He told me they controlled about a million and a half numbers.

Q. A million and a half numbers?

A. A million numbers, yes.

Q. Did you ever make any effort to find out whether there was any other music outside of ASCAP?

[fol. 557] A. I expect there are some musical compositions not controlled by ASCAP.

Q. You know there is, don't you?

A. The popular music is all controlled by ASCAP.

Q. You didn't make any effort because you didn't have to?

A. That is right.

Q. The ASCAP license protected you, didn't it?

A. I was on the payroll.

Q. For that two hundred and forty dollars you got complete protection against all infringement?

A. Yes, sir.

Q. And you feel you did?

A. Yes, sir.

Q. You were never bothered or paid any damages?

A. Right.

Q. You felt that paying two hundred and forty dollars against fifteen thousand dollars for an orchestra, was graft?

A. Yes, sir.

Q. You said that?

A. Yes, sir.

Q. You still feel it is?

A. Yes, sir; I feel it is unjust.

Q. In other words, you wouldn't want to pay anything for it?

A. I would want to pay it some other way.

Q. How would you want to pay it some other way, and what way?

A. In such a way that no man could tell me he can charge [fol. 558] me whatever he wants and I have to pay it, or else.

Q. Well, did Mr. Blazer ever ask you for one thousand dollars for a contract?

A. He said he could ask me.

Q. He didn't tell you he wanted you to pay it; he didn't tell you he wanted you to pay one thousand dollars?

A. He told me I ought to pay one thousand.

Q. Did you ever make a contract for one thousand dollars?

A. No.

Q. He told you he could charge one thousand dollars, isn't that right?

A. Yes, sir.

Q. He never asked you to pay one thousand?

A. No.

Q. You never paid one thousand dollars?

A. No, I never paid one thousand dollars.

Q. You were very resentful every time he increased your rates over the years?

A. Right.

Q. You argued with him bitterly about it?

A. Yes.

Q. In all these years did he jump your rates very high?

A. I asked him for a reduction the last three years, because business was not what it was four or five years ago, but I couldn't get it.

Q. What do you take in a year in dollars and cents, this [fol. 559] last year, 1938?

A. We lost money in 1938.

Q. Did you lose money in 1937?

A. We made some money but not very much.

Q. How much did you make?

A. We made about four thousand dollars net.

Q. What was the gross amount of money you took in in 1938 in dollars and cents, approximately?

A. I don't know. We probably took in around seventy or eighty thousand dollars.

Q. And you say out of the seventy or eighty thousand dollars you lost money?

A. Yes.

Q. Did you draw a monthly salary?

A. Yes.

Q. What did you draw?

A. Three hundred dollars a month.

Q. Thirty-six hundred dollars a year?

A. Yes, sir.

Q. Did any other member of your family draw any money out of that company in 1938?

A. Yes.

Q. Who?

A. My brother.

Q. How much?

A. The same amount.

[fol. 560] Q. Between you, you drew out seven thousand dollars in the way of salaries out of the business?

A. Yes, sir.

Q. Did anybody else draw any money out of the business?

A. We have sixty-five people working for us.

Q. You say you lost money on the gross business that year?

A. 1938, yes.

Q. In 1937 did you draw a similar amount?

A. Yes.

Q. Did your brother draw the same amount?

A. Yes.

Q. You made four thousand dollars in addition?

A. Yes, sir.

Q. In 1936 what was the gross business you did in that year?

A. Somewhere near the same figure.

Q. You had the same drawings?

A. Yes.

Q. Did you make any money that year?

A. A little.

Q. How much?

A. Four or five thousand dollars.

Q. As a matter of fact, you have been making a profit in addition to your drawings practically every year, haven't you?

A. In that we have swimming and other things.

Q. Taking everything into consideration in that Park, [fol. 561] you have been making money there, haven't you?

A. Some, yes.

Q. You have been running that park for over twenty years, and it is a profitable business today, isn't it?

A. Not today.

Q. Would you say in 1939 it was unprofitable for you?

A. I don't know how this will be, but not very profitable, I don't believe.

Q. Have you been drawing your weekly drawings?

A. Yes, sir.

Q. And is your brother drawing his?

A. Yes, sir.

Q. Is anybody else drawing anything in 1939?

A. We are the officers.

Q. And you completely control the company?

A. Yes, sir.

Q. Have you been paying any license fee in 1939?

A. I think we paid.

Q. You paid in 1938?

A. Yes, sir.

Q. Would you say the payment of two hundred and forty dollars in any way affected your business?

A. It is two hundred and forty dollars.

Q. It hasn't hurt your business any, has it?

A. Well, we may be forced to operate only one night a week this winter.

[fol. 562] Q. That is true practically every winter, is it not?

A. We used to run four nights a week.

Q. Isn't it due to general conditions around Omaha?

A. Possibly.

Q. It isn't due to the two hundred and forty dollars you are paying, is it?

A. There is still two hundred and forty dollars there, and we are doing less business.

Q. Now, suppose there were no ASCAP in Nebraska, and the individual members of the Society, the people who write and compose and publish music of the Society, the music you play every night, wanted to do business in Nebraska and sell you the right to perform for profit, and suppose you wanted to purchase that, as a matter of fact, you would have to purchase music, wouldn't you? You wouldn't close your establishment because ASCAP went out of business in the State of Nebraska, would you?

Mr. Hotz: Object to that as having been gone over, and the question has about four or five independent parts.

The Court: Yes, I think the question is improper; it is compounded.

Mr. Frohlich: I will withdraw it.

Mr. Riddell: Furthermore, if the Court please, it is improper cross-examination.

Q. If there were no ASCAP in Nebraska you wouldn't [fol. 563] want to shut your doors, would you?

Mr. Hotz: I object to that as immaterial.

The Court: It is immaterial, but you may answer.

A. I wouldn't want to, no.

Q. You would want to negotiate for a license with people who compose, copyright and publish music which is now the repertoire of the ASCAP, wouldn't you?

Mr. Hotz: Objected to as having been gone over.

The Court: It is immaterial and fully covered. Objection sustained.

Q. Have you a list of the members of the Amusement Protective Association of Nebraska?

A. No, I haven't.

Mr. Hotz: It is available to the Secretary, but not to him.

Q. What dues are paid by these members to the Association?

A. No dues. It is just a civic association formed by us people that are interested in this fight against the ASCAP.

Q. Does this association have any bank account?

A. No.

Q. Does it have any funds at all?

A. No.

Q. Nobody supplied you with any money at all?

A. We had some money to get out this literature to our [fol. 564] different people.

Q. How much did it cost you to get this literature out?

A. It cost quite a bit. We have sent out three hundred and fifty, probably four hundred, circular letters and cards and so forth.

Q. Did you send out more than this one in evidence?

A. Yes.

Q. A great many more?

A. We sent out two or three.

Q. Did you employ anybody to do any work in the field?

A. You mean traveling?

Q. Yes.

A. No.

Q. What did it cost you to get the circulars out?

A. Oh, I don't know now just what it cost me.

Q. Can't you give me an approximate figure?

A. Each time, forty-five or fifty dollars—each time we sent it out.

Q. Altogether, how much?

A. Two hundred and some odd dollars.

Q. Who supplied that?

A. Us men in the business.

Q. By contributions?

A. Yes.

Q. No dues?

A. No.

[fol. 565] Q. Just contributions?

A. Contributions.

Q. Did you have a man named Paul Halpine out doing work in the field for you in connection with the circular?

A. Mr. Halpine was probably of some help to us during the bill.

Q. Did he get any salary from anybody connected with your organization?

A. No.

Q. Does any other member of your family draw any money from this enterprise you operate?

Mr. Hotz: Objected to as not proper cross examination, and immaterial.

The Court: I think it is immaterial. Objection sustained.

Mr. Frohlich: That is all.

Redirect examination.

By Mr. Hotz:

Q. This Exhibit Number 44 contains at the top a list of the officers and directors of the association concerning which you were talking, does it not?

A. Yes.

Q. Who is H. A. Marble, whose name is signed to it?

A. H. A. Marble is the secretary of the association.

Q. And lives in Omaha?

[fol. 566] A. Yes, sir.

Q. Now, these men in this association were made up from Matt Kobalter of Lincoln, was he one?

A. Yes.

Q. Mr. Joseph Smith from Hastings?

A. Yes.

Q. And Bert Glover of Grand Island?

A. Yes.

Q. And William Barclay of Plattsmouth?

A. Yes, sir.

Q. George Sharpnach of Lincoln?

A. Yes.

Q. Roy F. Gordon of Bennington?

A. Yes.

Q. H. H. King of Norfolk?

A. Yes, sir.

Q. H. A. Marble of Omaha, and yourself?

A. Yes, sir.

Q. They constituted the Board of Directors, did they?

A. Yes, sir.

Q. Those men were all interested in the same line of business, generally, as yourself?

A. Yes, sir.

Q. I think you stated in response to a question by Mr. Frohlich about food and so forth, and drink out there, and

I interrupted. You do not hold a hard liquor dealers license, [fol. 567] do you?

A. No.

Q. You don't sell hard liquor on the premises of Peony Park, and never have?

A. No.

Q. Is there another association also in the State of Nebraska that has dance halls and taverns of that type? These taverns, are they separate from your beer taverns and so forth?

A. Yes, sir.

Q. Do they have an association?

A. Yes, sir.

Q. Of their own?

A. Yes, sir.

Q. You are not a beer tavern and your organization is not the beer tavern association people?

A. No.

Q. Did they cooperate with you in connection with this bill?

A. No.

Q. The men you have just spoken about, whose names I have just called out, they are all residents of the State of Nebraska, to your own personal knowledge, and reside here and operate a business interested in music?

A. Yes, they are.

Q. And were interested in this bill?

A. Yes.

[fol. 568] Q. And are all members of this association?

A. Yes, they are.

Q. And all the members of the association are residents of the State of Nebraska?

A. They are.

Q. And carry on a business here?

A. Yes, sir.

Mr. Hotz: That is all.

Recross-examination.

By Mr. Frohlich:

Q. Don't you sell beer in Peony Park?

A. Yes, sir.

Q. Don't you also supply set-ups for hard liquor?

A. We sell beverages.

Q. You supply that to patrons?
A. We sell beverages.
Q. You furnish White Rock and gingerale for people, and ice to people?
A. Not ice no more.
Q. Do people come into your establishment with liquor, and drink it in your establishment?
A. That is possibly the case in some instances.

Mr. Frohlich: That is all.

[fol. 569] Redirect examination.

By Mr. Hotz:

Q. They don't do that with your permission?
A. No.

The Court: That is so immaterial.
Mr. Hotz: That is all.
Mr. Frohlich: That is all.

Witness excused.

[fol. 570] JOHN J. GILLIN, was called as a witness on behalf of the defendants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Hotz:

Q. State your name.
A. John J. Gillin.
Q. How old are you, Mr. Gillin?
A. Thirty-four, sir.
Q. Where do you reside?
A. I reside at 517 South 38th Avenue, Omaha, Nebraska.
Q. What is your business?
A. I am manager of radio station WOW.
Q. How long have you been identified with the radio business?
A. Since 1926.
Q. In what capacity at the beginning?
A. In 1926 when I finished an A. B. course at Creighton University I started working for the National Radio Advertising, Inc.

Q. Where?

A. In Chicago, as manager of their Chicago office.

Q. What were your duties?

A. My duties were to solicit advertising for national spot radio campaigns, to build program ideas and to sell those ideas to advertisers, as well as also build programs for [fol. 571] the advertiser.

Q. Was that a comparatively new field at that time, that line of industry and business?

A. It was comparatively new from the standpoint of national spot business. There were only two national spot organizations in business—one was Scott Howe Bowen and the National Radio Advertising, Inc.

Q. What is national spot advertising?

A. National spot advertising is when an advertiser usually wants to test the radio out before he uses the network; he takes and places a program in certain spots which we commonly call "markets", like Omaha, St. Louis, Kansas City or Boston. He tests his program out in those markets, either by electrical transcription or live talent. If the program is successful he extends the campaign to other markets by electrical transcription or live talent, or purchases a network.

Q. How long after 1926 did you continue in that line of business?

A. Until 1929, when I returned to Omaha to take a course in law at Creighton University.

Q. Did you graduate from that course in law?

A. I graduated in 1931.

Q. During the time you were in law school did you still continue to be identified with the radio industry?

A. I wrote the continuity for Kozak, Inc., and also at [fol. 572] the same time helped on the Blue Network, and called the Maytag hour from Newton, Iowa; also announced at radio station WOW.

Q. And that continued until 1931?

A. At which time I was made program director, and in 1932 made general manager.

Q. That is what you are now?

A. Yes, sir.

Q. Have you had any musical education?

A. I had four years of piano, my last two years of grade school and the first two years of high school, and six years

of vocal, my four years of high school and the first two years in college.

Q. What is a memory tune, and does that have any significance in the radio business?

A. Well, to me it has a lot of significance, because I believe any musical program of any significance on the air today has at least one memory tune. For instance, a very popular program is the Kraft Cheese program, called the "Kraft Music Hall", featuring Bing Crosby and other stars. His main spot in his program is built around a memory tune, a tune which recalls memories to people who hear it. In other words, a tune popular in 1922 and still is a leading tune on the air today and played quite often, like "Remember" or a tune of that type. That is what is commonly called a memory tune. If you have heard his pro-
[fol. 573] gram you hear him build up the memory tune by saying, "For instance, in 1922, Jack Johnson and Jess Willard fought for the world's championship, and Willard beat him at that time", or Schnozzle Durante is on Broadway with a new show, and the star motion picture at that time is so and so, and then he goes into his tune by saying, "Do you remember", and singing.

Q. That is called a memory tune?

A. No, sir.

Q. Are you a member of any association of broadcasters in the State of Nebraska, and if so, what?

A. I am a Director of the Nebraska Broadcasters Association, and past president of the same, and also past vice-president of the same.

Q. Do you hold any office in the national organization?

A. I was vice-president, first vice-president, of the National Association of Broadcasters, and I have been a member of its Board since 1934, for six years—the sixth year on the Board.

Q. Now, when this Bill No. 478, which is the subject matter of this lawsuit, was introduced, did you, as manager of WOW station, or of any of these organizations in reference to radio, in which you are interested, or an officer, did you have anything to do with the instigating of that bill or starting of it in the first instance?

A. No, sir.

[fol. 574] Q. Or the drafting of it?

A. No, sir.

Q. Or did you ask anyone else to do it in your behalf?
A. No.
Q. When did you first learn about the bill, I mean in reference to what stage had it proceeded in the legislature?
A. It had been introduced in the legislature when I heard about the bill.
Q. Mr. Gillin, what are the principal sources of supply of music in the United States?

Mr. Frohlich: Just a moment. I object to that as this man hasn't qualified himself as an expert.
The Court: Objection sustained.

Q. Let me put it this way: What is the principal source of supply of music for radio stations within the United States?

Mr. Frohlich: I again object to that.
The Court: Overruled.

Q. I didn't mean that from a composer's standpoint, but from the user's standpoint.
A. The principal source of supply is ASCAP, and SESAC, the Society of European Stage Authors and Composers, Inc. SESAC, according to the survey which was made at the instigation of the Board of Directors of 1935 of the National Broadcasters had about fifty-five hundred copyrights. That survey was made by James Baldwin [fol. 575] under our direction and under the direction of the committee which I headed.
Q. That is the Society of European Stage Authors and Composers, Inc., is that right?
A. Yes, sir.
Q. Not controlled by ASCAP?
A. No, sir.
Q. It is independent?
A. Yes, sir.
Q. Was that survey reduced to writing?
A. Yes, sir.
Q. And made available for the public?
A. Yes, sir.

Mr. Frohlich: Wait a minute. To which one are you referring?
Mr. Holtz: This one here, August 18, 1937.

Q. That was made available?

A. It was made available through the National Association of Broadcasters.

Q. Now, that is one source.

A. I would say another source is the music which is in the public domain.

Q. We know something about that, but so that there can't be any mistake about it, public domain means music that either has never been copyrighted or the music copyrighted and the copyrights having expired, is that right or not?

[fol. 576] A. That is right.

Q. Under the copyright law, if you will pardon me, it is twenty-eight years and it may be renewed twenty-eight years under the law, so it would mean then that public domain would be such music as was no longer protected by copyright?

A. That is right, sir.

Q. Do you know anything about the extensiveness of that source of supply of music, and generally just what it consists in?

A. That source of supply is very extensive. However, in its present extensive form it is not usable for radio.

Q. Why?

A. Unless it is especially arranged by somebody to bring it up to date. For instance, take a tune like "A Tisket A Tasket" which was brought out and modernized, I would say, and placed on the radio by one of the ASCAP publishers, and because of the different orchestras playing it on the networks it became a very popular number.

Q. Is that a part of the business that the publisher members of ASCAP are engaged in, is that one of the things they do?

A. Oh, certainly.

Q. When they do that, they come under the protection of ASCAP, as you understand it?

A. That is right.

Q. Would you give us, if you could, the names of pieces that are in the public domain that would not come under any present modernizations used generally? I don't mean [fol. 577] extensively, but a few pieces.

A. Well, I believe that there is a lot of music in the public domain that copyrights have not been renewed on. However, if an ASCAP publisher makes an arrangement of that particular tune and places it in the hands of certain or-

chestra leaders and they play it, why, that is known as an ASCAP tune under that arrangement.

Q. Has ASCAP ever furnished to WOW a catalog or list of the copyrighted and vocal and instrumental music which it claims to have?

A. No, it never has.

Q. Did you ever ask for it?

A. We have asked twice for it.

Q. What did they say?

A. I believe the first letter I wrote to ASCAP was in 1932, written to Mr. Greenberg and Mr. Greenberg answered and said their catalog was so voluminous and had a million and a half copies that they couldn't possibly send it.

Mr. Frohlich: The letter is the best evidence.

The Court: Overruled.

Q. And then again did you take it up with them?

A. I have asked for catalogs and I believe the other radio stations have asked for catalogs.

Q. Leave out the other radio stations unless referring to your personal knowledge of the Nebraska stations. Maybe [fol. 578] that has been a matter of discussion in some of your state meetings, has it?

A. It has been, because we have never been able to get ASCAP's catalog, and we don't know what we are buying or paying for.

Q. Explain that to the Court; why is it?

Mr. Frohlich: I object to his explanation of why.

Mr. Hotz: Withdraw the question.

The Court: The question has been withdrawn.

Q. Has the matter of what you were buying from ASCAP, as you put it, been the subject matter of discussion with the state broadcasters in reference to the music that ASCAP is alleged to own and control and claimed to own and control?

A. Yes, it has. There hasn't been a state meeting of the association but what there hasn't been a discussion of that particular group of publishers of ASCAP.

Q. What, if anything, have you tried to do about it?

A. Well, after this particular bill No. 478 was introduced in the legislature I thought the Nebraska broadcasters association should back the bill as far as the state is concerned, in the state.

Q. Now, from your personal observation, Mr. Gillin, and as the manager of WOW station in connection with what is known as popular music, present day popular music, about what percentage of that would you say was controlled by ASCAP?

[fol. 579] Mr. Frohlich: I object to that as he is not a qualified witness.

Q. You keep the logs, don't you?

A. We keep the logs, but not program logs. The only thing I can see, I believe, from everything I have been able to understand in our discussions, is that eighty-five per cent——

Mr. Frohlich: I am making an objection to what he believes and thinks.

The Court: Objection sustained.

Q. Well, what is the basis for your knowledge, Mr. Gillin, of the number of copyrighted compositions of music, and vocal, that ASCAP has, what would be the basis for your knowledge of the percentage of the total of popular music as distinguished from standard music?

A. The basis that I would have would be a survey made with the National Broadcasting Company in which I think during a certain portion of the time it was established that eighty-five per cent of the music was ASCAP music.

Q. How was that survey conducted?

A. From the program logs of the National Broadcasting Company by their own program department under the supervision of John Royal, vice-president in charge of programs.

Q. Were you a member of that committee?

A. I was not a member of the committee that made the survey, no. I was a member of the committee trying to find out how much ASCAP works were being used by the [fol. 580] networks at that time.

Q. Would that percentage apply to your own station WOW?

A. I believe it certainly would, because we are a member of the basic Red Network of the National Broadcasting Company.

Q. Explain to the Court the difference between public and standard music.

Mr. Hotz: Withdraw that question.

Q. WOW is a member of the network that is known as the National Broadcasting Company network?

A. WOW is a member of the basic Red Network of the National Broadcasting Company, and has been a member of same since 1926, at the time the network was formed.

Q. Do you have a contract with them?

A. Yes, sir, we do.

Q. Which specifies your relationship?

A. Yes, sir, we do.

Q. Does that pertain largely to musical compositions that come in over a wire?

Mr. Frohlich: I object to that, if there is such a contract.

Mr. Hotz: We have got it.

The Court: It is just a preliminary question.

A. One of the very important clauses of that contract——

Mr. Frohlich: I object to that.

Mr. Hotz: I don't want that.

[fol. 581] Q. Does it pertain to musical compositions and everything else that comes over the wire?

A. Yes, sir.

Q. And it specifies the different rights and so forth?

A. Yes, sir.

Q. Now, are there any other stations in the State of Nebraska that are so hooked up with the national network?

A. We are the only National Broadcasting outlet in the state at the present moment.

Q. Now, who are identified with the Columbia System, which we all know is another similar network?

A. Radio KOIL, Omaha, and KFAB, Lincoln.

Q. What about the other stations in the state of Nebraska?

A. Those three stations, WOW, KFAB and KOIL, are the only network outlets in the state at the present moment.

Q. There are seven other stations in addition to the three you have mentioned?

A. There are seven other stations in Nebraska, and they are what we commonly call independent stations—that is the term set out in the Association of National Broadcasters, because they have no network affiliations.

Q. Those stations that originate their programs in their studios, in other words, the musicians and signers come

right in there, and so far as the music is concerned, that originates in their studio, is that right?

A. That is right.

[fol. 582] Q. Do you have any music locally that originates in your studio?

A. We do, yes, sir.

Q. How much in dollars and cents do you pay per annum for that music which originates in your studio?

A. Are you asking about musicians now?

Q. Yes.

Mr. Frohlich: That is paid to him?

Mr. Hotz: To the musicians.

A. This year we will pay some twenty-nine thousand dollars to musicians.

Q. For music that originates in your station?

A. Yes, sir, in our studio.

Q. About what percentage of the time, so far as music is concerned over your station of so-called radio time, does such activity take up, that is, the activity of the local musicians?

A. There are usually two quarter-hour programs a day from one orchestra of five pieces, which is called the "Sophisticated Ranger", and never more than two half-hour programs from the studio orchestra, which is a contract orchestra through agreement with the American Federation of Musicians, which don't play over an hour a day. They are required to rehearse two hours a day, and play one hour a day for that amount of money.

Q. Can you give us something as to the percentage of time that consumes, forty per cent, thirty-three and a third [fol. 583] per cent, or forty-five per cent, or what?

A. You can't say each day. For instance, the ranger group is on at 6:45 in the morning, and at the present time 11:45 to 12:00, and an orchestra is on from, say, 11:30 to 12:00 midnight, or 11:00 to 12:30 A. M. For instance, yesterday you had Hitler's speech, and that particular program was out, but it never amounts to more than an hour and a half at the most over our station that the musicians play each day by live talent orchestra music; that is, at the present time.

Q. And KOIL also has local musicians that play right in the studio, play and sing music also?

A. Oh, yes. They have a contract also.

Q. Now, what amount of money did you pay to ASCAP last year, WOW?

A. Last year we paid to ASCAP twenty-two thousand eight hundred dollars.

Q. What is the basis for that amount or charge?

A. The basis for that charge has never been known. We believe it is a very arbitrary charge.

Mr. Frohlich: We object to that. The contract is in evidence.

The Court: The answer may be stricken out as not responsive.

Q. And by the basis of the charge, Mr. Gillin, I mean——

[fol. 584] A. How was it arrived at by ASCAP?

Q. I don't mean that, but I want to know now how the twenty-two thousand eight hundred dollars came to be that amount; why not thirty-two thousand dollars, why not eighteen thousand dollars?

A. That represents fifteen hundred dollars as sustaining fee to the Society, that is, ASCAP, and five per cent of our gross revenue after fifteen per cent agency commissions for national advertising or local advertising agencies have been deducted. That five per cent represents five per cent of all programs, whether they are musical programs or not. That is including news broadcasts where no music is ever played, dramatic programs where no music is ever played.

Mr. Frohlich: I move to strike out the last part of the answer. The contract speaks for itself.

The Court: The motion is denied.

A. (Continuing) The dramatic programs where no music is ever played, and only excepts the five per cent on programs that are of a political nature and of a religious character.

The Court: I think that is all in evidence before.

Q. Is that contract satisfactory to you?

A. No, it is not satisfactory to us.

Mr. Frohlich: I object to that. The contract is in evidence. Whether it is satisfactory or not is immaterial.

[fol. 585] The Court: It may not be very material, but the objection is overruled.

Q. You may answer.

A. The contract is not satisfactory to us, because we believe ASCAP sells their catalog on a very unfair basis.

Q. Why did you sign it?

A. We had no other recourse but to sign it.

Q. Why?

A. Because of the fact that we have a national statute, a copyright act, that says if we infringe on any music there is two hundred and fifty dollar damage fee, and we know we can't get along without ASCAP's music, at least at the present time. We would infringe at some time along the line, and how many times, we wouldn't know, and we have got a contract with the National Broadcasting Company which specifies that we have got to have an ASCAP license or we can't get a program from them.

Mr. Frohlich: I object to that unless he produces the contract in evidence.

Mr. Hotz: Mr. Mills testified to that.

Mr. Frohlich: He didn't testify to any contract between the National Broadcasting Company and WOW.

The Court: It may stand.

Q. Calling your attention to defendants' Exhibit Number [fol. 586] 45, which states that it is a National Broadcasting Company contract with WOW Life Insurance Association, Omaha, Nebraska, radio station WOW, dated December 2, 1936, and which is a photostatic copy, I will ask you if that is an exact copy of the original of that instrument?

A. It is, sir.

Mr. Hotz: You don't raise the objection, Mr. Frohlich, as I understand it, that it is a photostatic copy?

Mr. Frohlich: No, sir.

Q. You are operating under that now?

A. Yes, sir, we are operating under this contract.

Q. In that contract does it pertain to music?

A. Yes, sir.

Mr. Hotz: Offer in evidence defendants' Exhibit Number 45.

Mr. Frohlich: No objection.

Q. Now, Mr. Gillin, when you stated a moment ago that the contract was entered into between yourself and ASCAP, and which is in evidence here, was necessary because you

had to have it, was it necessary also because the music that was controlled by ASCAP was necessary for the operation of your station from a practical standpoint of sellers of radio service or not?

Mr. Frohlich: Objected to as calling for a conclusion.

[fol. 587] The Court: It does, but I think it may go in.

A. Because of two reasons—first of all we know we cannot get along without ASCAP music at the present time, and because our contract with the National Broadcasting Company specifically states we must have an ASCAP contract.

Q. Just explain that, why that is, as you understand it, with the National Broadcasting Company from a practical standpoint, without getting into the technical phases of it.

A. Well, the National Broadcasting Company, the network, does not clear at the source in regard to the ASCAP catalog.

Q. What does "clear at the source" mean?

A. If a program emanates from New York and includes music of the ASCAP catalog, that music is not cleared at the source or emanating point of the program. That is why we have to have a contract in Omaha to protect ourselves from any infringement suits that may be brought by this Society.

Q. In other words, the National Broadcasting Company under their contract with ASCAP, when that music comes out in Nebraska, they have made a settlement or deal with ASCAP, is that right?

A. We have to pay ASCAP five per cent of the receipts on any network that comes over our station.

Q. I think it was testified by Mr. Mills and others that the network pays nothing to ASCAP for their chain service, is that right?

[fol. 588] A. For the network service they pay a sustaining fee for the three network stations that emanate, like our fifteen hundred dollars, but they don't pay any commercial fee on the program emanating and going out over the network stations affiliated with the network.

Q. That fee is collected from the stations throughout the nation, including WOW and the rest of the stations in Nebraska that make use of that network?

A. That is right.

Q. We will have somebody here to testify on KOIL of the Columbia System. Is that the same with them?

A. I can't testify what their contracts are with Columbia.

Q. What do you know about the practical operation of WOW station in Omaha, the mechanical parts? I want to know how the music comes in here and how it is broadcast, just briefly, if you can describe that machinery and that equipment, and where it is located in Nebraska, and as much as you can of it. I am talking about the wire that comes in from New York, and what would come over that wire from New York if you did not have the broadcasting station in Nebraska, WOW; explain that.

A. The National Broadcasting Company leases a specially built wire for radio broadcasts from the A. T. & T. and then sends a program or talks or dramatic programs over that wire to the affiliated stations of the basic network.

Q. Confine it to WOW.

A. The basic network from New York or Hollywood ar- [fol. 589] rives at the local Northwestern Bell Telephone Company and is then sent to our studio at 17th and Farnam.

Q. By what?

A. By a trunk wire leased by the National Broadcasting Company from A. T. & T., where it goes through our amplifying units in the studio and then goes to our transmitter by special wire we lease from the Northwestern Bell, where the program is impressed on our frequency motor.

Q. What did you call that?

A. Frequency.

Q. And impressed on what?

A. Frequency motor.

Q. What is the frequency motor?

A. It controls our frequency, and it is then sent out for consumption to the public. When a program is sent out it is still in radio frequency. And when it reaches your receiving set in your home its frequency is changed into the tones and music which you hear.

Q. If it were not for your station and machinery and equipment in the station in the City of Omaha, Nebraska, and that wire just came into the room, or into any other room, could anybody get any value out of it?

A. They would have to have a receiving set to get any value out of it.

Q. Now, WOW has the receiving set and transmitter in its Omaha establishment?

[fol. 590] A. I mean by that if the line came into a hotel room, for instance, if we were going to have a program from NBC and send it over special leased wire to the court room in Lincoln to have the Court hear that program, if they had a loud speaker here they could hear that program, if they were listening to it off the line, but if they had no loud speaker here, they couldn't hear it. You can attach it to this post, but you have got to have the loud speaker to get the program.

Q. Do you know the number of radios there are in the State of Nebraska installed in homes and elsewhere in the state?

A. No, I couldn't give you that figure.

Q. You don't know that?

A. Not the exact figure, no.

Q. Do you know near enough so as not to be too distant, approximately?

A. I don't want to make a guess.

Q. Where would that information be available?

A. We have the information in our files, but I don't remember the figure.

Q. You could get that for us, couldn't you?

A. Yes, in ten minutes by telephone.

Q. You will do that before you conclude here?

A. Yes.

Q. When this music comes out from New York over this wire that you have just spoken of into your studio for the purpose of being rebroadcast to the public, are you [fol. 591] able to control the numbers that are played?

A. We never know what numbers are going to be included in a program. We very seldom hear of it, unless it is a special program. We don't know who will be the guest artist or what he will sing or what orchestra will play. We have no control over the program that emanates from NBC.

Q. That is where ASCAP enters into that situation, is that right, and why it becomes necessary for you to have a contract with ASCAP?

A. Well, the National Broadcasting Company makes us sign a contract that includes a clause which says we must have an ASCAP license, and that is why we have one. As far as the National Broadcasting Company is concerned. On our local program we would still have to have a license.

Q. That is specified in defendants' Exhibit Number 45?

A. That is not specifically shown in Exhibit 45, but it was in our contract of 1932, and changed in this contract, but it means ASCAP, because the National Broadcasting Company clears at the source, and all other performing right societies——

Mr. Frohlich: Why not read that section?

A. (Continuing): This section says, "You agree to maintain for your station such licenses, including performing right licenses, as now are, or hereafter may be, necessary for your station to broadcast the programs which we furnish to you hereafter."

[fol. 592] Q. There is music, of course, that comes out over this wire from New York that is not ASCAP music?

A. Oh, yes, there is music being broadcast by network that is not ASCAP music.

Q. In connection with that music you are not required to pay any attention to public performance rights and methods of infringement, isn't that right?

A. We never have.

Q. Why is that, again?

A. Well, because of the fact that ASCAP's license is supposed to protect us.

Q. I mean these other programs of music that is not ASCAP music, why do you not have to pay any attention to those?

A. Because they are cleared at the source, NBC headquarters, New York, Chicago or Hollywood.

Q. That is not true with ASCAP?

A. That is not true with ASCAP.

Q. By clearing at the source you mean they have made arrangements with the users of the music?

Mr. Frohlich: I object to that as calling for a conclusion, and not a single fact in evidence to show that.

The Court: You might say, "What do you mean by clearing at the source?"

Q. Answer that; what do you mean by "clearing at the [fol. 593] source"?

A. By clearing at the source I mean that any liability would be taken care of at the source, and payment of any sum of money for the right to broadcast that particular music would be paid at the source at which it emanates.

Q. You are talking about infringement of copyrights?
A. Specifically.
Q. And you are talking about copyright fees?
A. Yes.
Q. And public performance rights and everything else?
A. That is right.
Q. I want to get at the negotiations leading up to this contract that is in evidence here now with ASCAP, between ASCAP and WOW. How were the terms and conditions of that contract arrived at as between your organization and ASCAP?

A. ASCAP sent us the contract and asked us to sign the contract through their Omaha office, which is Mr. Blazer. We held it up because we received a wire in 1932 from Mr. Loucks; he negotiated with Mr. Mills or Mr. Paine for extension of the contract, I believe, to September 1st, until the time that the negotiations would be settled, and we received a wire in the early part of January from ASCAP and it said specifically if we didn't sign the contract before January 15th, that was the deadline, we would then give ASCAP a cause of action for infringement suits against the station.

Q. Was the contract in satisfactory form for WOW at that time or not, when you signed it?
[fol. 594] A. Not to us.
Q. Why not?
A. There were no discussions about the contract so far as the station was concerned at all. It was just sent to us and they said, "Here is your contract; sign it or else."
Q. What were the objectionable features?
A. The objectionable features are that you are paying five per cent on everything that goes out over our facilities of a commercial nature, whether news, dramatic programs or what it is, and we have always tried since 1932 as an industry to ask ASCAP to give us a contract on a per program basis. In other words, for the amount of music that ASCAP controls, and that we use, if we use ASCAP music on that program. In other words, if the program includes ASCAP music, we will pay for it the same contract as the newspapers have today. If it doesn't include ASCAP music, we don't want to pay for it, because we are either paying for public domain music or somebody else's music then and ASCAP is still getting the money for it.

Q. That is the condition that exists today as far as your WOW station is concerned, and no doubt other stations in the State of Nebraska?

A. That is right.

Q. So that if I understand it, in conclusion of your testimony, WOW's contract with ASCAP today is not the result of trading and negotiating which resulted in a satis- [fol. 595] factory contract to your organization?

Mr. Frohlich: I object to that.

A. No.

The Court: Objection sustained, and the answer stricken.

Q. Some mention was made of a Lang-Worth catalog here in the direct examination on the other side. What is the Lang-Worth catalog?

A. The Lang-Worth catalog is the old N. A. B. bureau of copyrights of some twenty hours of music and eighty hours of music out of the original one hundred hours of music. Mr. Langloise and Mr. Wentworth who own the catalog now, were able to get together from the public domain and other particular sources of music that does not carry any copyright fees. Once you purchase the Lang-Worth catalog it is free from any copyright fees, but it is only one hundred hours of music, and a radio station cannot just use one hundred hours; it is not sufficient to carry the bulk of its program.

Q. Mr. Mills made the statement, and I think Mr. Buck did the same, that WOW or one of these stations here in the State of Nebraska, if it wanted to, it could run and operate without ASCAP music. Is that true from your viewpoint or not?

Mr. Frohlich: I object to that as characterizing another witness' testimony.

[fol. 596] Mr. Hotz: Well, he said that.

The Court: Overruled.

A. WOW could not run without an ASCAP contract. We are willing to pay ASCAP for the music we use.

Q. I think you testified you never had furnished to you a catalog showing the ASCAP music, and that you had asked for it?

A. Yes, sir.

Q. And they never furnished it?

A. No, sir.

Q. I will call your attention to this book I have had the court reporter mark Exhibit Number 46, and will ask you to state if that is the catalog of the SESAC Society of European composers you spoke about having some fifty-five hundred pieces of music in it?

A. Fifty-five hundred. That is the N. A. B. report, sir—a special edition sent out.

Q. About how many pieces of music are there in the Lang-Worth catalog?

A. I wouldn't be able to specifically state how many numbers are in there, but there are one hundred hours of music available to broadcasters at the present time, of which no copyright fees are attached.

Mr. Hotz: Offer in evidence defendants' Exhibit Number 46.

Mr. Frohlich: No objection.

[fol. 597] Q. That is not a catalog but is a survey by the National Association of Broadcasters, this Exhibit Number 46, but it does contain the names and the pieces of music in SESAC?

A. It contains the names and pieces of music as of that date.

Q. Of date August 18, 1937?

A. Yes, sir.

Q. Where does most of the music that is in Exhibit Number 46 originate—where did it originate?

A. Most of the music in that catalog originates in Europe of certain publishing houses that have not received a license from ASCAP, and have made no overtures to ASCAP to receive a license from ASCAP.

Q. It is mostly foreign music?

A. Foreign music.

Q. Most of it is foreign music?

A. Most of it.

Q. Is it of any great commercial value?

A. No, it is not of any great commercial value. The SESAC library's only commercial value at the present time comes from the hill-billy tunes in it, like M. M. Cole and so forth which SESAC picked up.

Q. Do you know who the associated music publishers are? That was referred to by Mr. Mills as having music for your station?

A. Yes.

[fol. 598] Q. Who are they and what did they put out?

A. The Associated Music Publishers, if I am right, now has—I am trying to think of two organizations; one of them gives you the right to play certain music and transcribe certain music, and the other one has a library, and I can't differentiate between the two, which is the exact name of the two.

Q. The Associated Music Publishers is the library?

A. The Associated Music Publishers have a library of music that they sell to radio stations, like Lang-Worth and so forth.

Q. Is that a recorded library for records?

A. It is a transcription library of very fine music.

Q. Does it license the performance rights, or don't you know that?

A. We do not have the Associated Music Publishers library service, but I don't think there is any difference to the Source or the World whereby if you have a commercial program you have to pay five per cent of that particular program, that is, sale of time.

Q. Does it amount to any considerable amount of music?

A. It is a nice library, but not the library the Source or World is. It is fine music, but not as extensive as the Source or World. In other words, the Source has about three thousand numbers in it today, and I don't think the Associated has half that many.

[fol. 599] Q. Would those combined with others that you speak of, be sufficient to run and operate your station?

A. I say we can't get along without ASCAP, unless public domain music is arranged by broadcasters in suitable form for playing over the air, to be able to say, "Here, we have got enough music", and that is very, very hard to say because you never know when you are going to infringe upon an ASCAP publisher. I know at the present time if we took a fifteen minute program each day and put in it nothing but SESAC hill-billy tunes, and another fifteen minutes with Lang-Worth, all right, that is a half an hour of these that we could run on the average from day to day of copyrighted free music.

Q. Add to that this Associated Music Publishers and the World.

A. Those are transcription services on which we still have to pay five per cent on the receipts. If we have a program with Lang-Worth, which is copyrighted free music, in the morning at 6:45 A. M., and your client decides to take Lang-Worth because it is cheaper than the Source, still you have to pay five per cent of the receipts to ASCAP, and it is not ASCAP's music.

Q. Mr. Gillin, another question: When this bill was pending in the legislature, after it was introduced, did the National Broadcasters or the association as such have anything to do with it at all?

A. No, the National Broadcasters had nothing to do with it.

[fol. 600] Mr. Hotz: That is all.

Cross-examination.

By Mr. Frohlich:

Q. What is the call letter of your station?

A. WOW.

Q. What is the corporate operating station?

A. Woodmen of the World Life Insurance Association.

Q. How long have you operated that station?

A. Since 1923, April 8th.

Q. How long have you been connected with them?

A. Since 1930.

Q. During all this period since 1930 were you also personally a member or connected in any shape, manner or form with the National Association of Broadcasters?

A. I went to the first meeting in 1932 and was elected to the Board in 1934.

Q. So that in 1932 you attended the first meeting of the National Association of Broadcasters?

A. Right.

Q. You knew the National Association of Broadcasters was in negotiation at that time with ASCAP, didn't you know that of your own knowledge?

A. I say there were discussions in the matter.

Q. There were discussions at that time, were there?

A. Yes, sir.

[fol. 601] Q. These discussions were going on between the

National Association on behalf of all the broadcasters who were members of that body, isn't that right?

A. Until a certain point in which you didn't recognize them any more, and sent out your contracts.

Q. Will you please answer my question? Weren't these discussions going on by the National Association of Broadcasters on behalf of its members? Yes or no.

A. Yes, they were.

Q. And wasn't WOW and the Woodmen of the World Life Insurance Association at that time in 1932 a member of the National Association of Broadcasters?

A. Yes, sir.

Q. Did you, yourself, participate in any of these negotiations or discussions with the Society in 1932?

A. No, sir.

Q. Did a time come later when you did participate in discussions on behalf of the National Association of Broadcasters with the American Society?

A. No, but there was a time when I sat on the Board on which all negotiations or discussions were taken up with the Board and a special committee, of which I was a member—the executive committee.

Q. You knew way back in 1934 and 1932 and all those years that there had been a discussion between the National Association of Broadcasters and the American Society with respect to a per piece system, a broadcast system [fol. 602] and a blanket license system, you knew that, didn't you?

A. I already testified to that; yes, sir.

Q. There was a lot of discussion going back and forth all those years, and the broadcasters brought out the suggestion of the per piece system, that they would like the per piece system?

A. We made a demand for the per piece system and the per program system, and were never able to get it.

Q. You got the blanket license system?

A. Yes, sir, but it covers everything on our program schedule; we pay for everything.

Q. Let us take the program system. Wasn't there a discussion between your association and the American Society which went into the practical operation of such a system; were you present at any of those discussions?

A. On the per piece system?

Q. On the program system.

A. I have been at all those negotiations as far as the Board is concerned. The committee reported back to the Board, and the Board took it up and discussed it at great length, yes.

Q. If the program system were operated, how do the broadcasters want it to be operated, in what manner?

A. We want to pay the same as any other newspaper station today, on the music used on the air. That is, if we [fol. 603] have dramatic program, for instance, and there is no ASCAP music on that program, we don't want to pay you for the music we use. If it is a news program, and you have no copyright on news, we don't want to pay you for that program.

Q. Didn't your association sit in on discussions with respect to newspaper contract that was formulated in 1932?

A. I don't think they sat in directly. I think certain members of the National Association of Broadcasters went out and made their own deal, like the networks did in 1932 with you gentlemen.

Q. As a matter of fact, didn't the National Association of Broadcasters approve of a newspaper form of contract?

A. Later they did, yes, because of the fact they wanted to hold all portions of the industry together.

Q. In 1932 the situation was more or less experimental in your industry, wasn't it?

A. We had had a contract, I think WOW, for a number of years with ASCAP, and every other station did too.

Q. It was a young industry and had not been in business long prior to 1932, WOW?

A. I had had discussions with ASCAP over the payment in 1926 of fees on the Maytag program.

Q. The plan with respect to the newspapers hadn't been worked out prior to 1932?

A. No, sir, not to my knowledge.

Q. That was worked out in 1932 with the knowledge and approval of the National Association?

[fol. 604] A. The contract was made first and later approved to hold everybody in the industry so that there would be no breaking up of the industry, of the National Association of Broadcasters.

Q. So that at that time in the year 1932, or shortly there-

after, the National Association approved of this newspaper contract and felt that it was fair and just?

A. They had to do it or the newspapers would have formed their own organization.

Q. They really approved of the contract, didn't they?

A. Yes; they had to.

Q. It was approved by the association?

A. Under everybody's protest.

Q. Now, the National Association sat in with the Society with respect to the commercial contract between the Society and the various broadcasters throughout the country, isn't that right?

A. There has been a committee appointed every time a contract has come up, but were never able to get a satisfactory agreement.

Q. Wasn't there a committee representing the National Association of Broadcasters in a discussion and negotiation with ASCAP in 1932?

A. Yes, there was until Mr. Levy and the networks went out and made a deal with you gentlemen, and we had to take it or else.

[fol. 605] Q. Didn't that committee represent the entire association and each member of the National Association?

A. That is right, and Mr. Levy—there should be a full explanation.

Q. I didn't ask you for a full explanation. I simply want the facts. After the National Association had approved of the commercial contract, your station was notified that there had been an agreement between the American Society and the various broadcasting stations, isn't that right?

A. No. The networks made their contract, and the gentlemen that were running the National Association then from the executive standpoint in Washington wired us, and they wired every other station. The networks made a deal with ASCAP and they were leaving it up to us, and the demand came from your office to either sign on January 15th or there would be infringement suits.

Q. Were you ever notified by any person on behalf of the National Association away back in 1932 that an agreement had been made between ASCAP and the association?

A. No. The only agreement that was made was the letter that was sent out by Mr. Loucks stating he had an

agreement with Mr. Mills extending the contract under its present basis from September 1st until negotiations or discussions were arrived at a satisfactory point. That is the only thing we received.

[fol. 606] Q. Subsequently your station signed an agreement with ASCAP?

A. We signed it before January 15th.

Q. January 15, 1933?

A. January 1, 1933—between January 1st and January 15th, sometime in between that time.

Q. So far as you know, the other members of the National Association signed a similar agreement?

A. They had no recourse but to sign.

Q. They signed it, didn't they?

A. Sure.

Q. The agreement was perfectly satisfactory at that time to the National Association, wasn't it?

A. No.

Q. Did the National Association advise you not to sign any such agreement?

A. They said if you do not sign it, you are doing it at your own risk.

Q. Now, Mr. Gillin, I understand you to testify that last year you paid to the American Society approximately twenty-two thousand dollars?

A. Twenty-two thousand eight hundred dollars.

Q. Of which fifteen hundred dollars was a sustaining fee?

A. Right.

Q. And the balance of about twenty-one thousand dollars was five per cent of the time on the air you sold?

A. That is right.

[fol. 607] Q. What did your station take in in gross receipts in 1938? These figures you have given us represent 1938?

A. Yes, 1938—twenty-two thousand eight hundred dollars. I have it here. Do you mind if I read it to you? $472,451.21.

Q. That is the amount your station took in in cash from advertisers for the sale of time on the air during the entire year 1938, isn't that right?

A. That is the gross amount of money taken in for time, for talent and for everything that we did.

Q. For the sale of time on the air, is that right?

A. This is our gross receipts and it includes talent fees. If we sell a singer to somebody, it includes that service. We may send out a troup of actors out to Nebraska, and it includes that.

Q. I didn't ask you for those figures.

A. It includes a lot of things.

Q. Are you able now to give this Court the amount of money that your station took in in 1938 for the sale of time on the air?

A. No, I can't give the exact amount, but I can give them the gross receipts for time and every other function of the station; that is all I can do. I think you will find that this particular amount here, if you will deduct your fifteen hundred dollars sustaining fee which we pay you, and then take——

[fol. 608] Q. (Interrupting) Let us do that.

A. Well, the whole thing, after you get your fifteen per cent off, and deduct talent and commercial programs of political and religious character and get down to that, and all expenses, it would not be within the scope of the five per cent tax levied on the station. You have got your five per cent, and that five per cent is right.

Q. What did you pay to the advertising agency during 1938?

A. I can't give you that figure—it is fifteen per cent.

Q. Of what?

A. Of the gross sale of time on the air—only time; no talent.

Q. Don't you know that figure?

A. You mean the figure in time?

Q. The time on the air.

A. I know the gross figure. I will tell you why I don't know that, because I am manager of the station and our particular station is merely a department of the Woodmen of the World Life Insurance Association. Whatever the sale of time of the station is, I never look at it because it goes to the auditing department of the Woodmen of the World Life Insurance Association. At the end of the month I get what the station made net, and I also get at the end of the year what the station grossed. That is all I get and that is all I am supposed to know. Mr. Bradshaw, president, or Mr. Patterson, or Mr. Shepherd can tell you exactly what out time sales were, but I can't.

[fol. 609] Q. You as general manager negotiate for the deals where the advertisers do business with you?

A. Right, but I don't know how much money the corporation made or the time sales grossed.

Q. What did you receive from the National Broadcasting Company for the hook-up?

A. That is all included in this figure.

Q. In what figure?

A. In the four hundred thousand dollar figure.

Q. Just give us that figure again, please.

A. $472,451.21.

Mr. Hotz: And the amount you paid ASCAP was $21,800?

The Witness: Twenty-two thousand, eight hundred paid to ASCAP in 1938.

Mr. Hotz: Multiply that by twenty.

The Court: Multiply by twenty and you will have the total.

Q. Now, you testified you don't keep logs of the particular musical compositions you play, is that right?

A. We are keeping logs of the program in which we are playing only copyrighted music to find out how much we can play if we had to, but not keeping logs on the amount of ASCAP music because we don't know what their catalog is.

Q. Do you play any transcription records at all?

[fol. 610] A. Yes.

Q. You know that the Federal Trade Commission recently propounded a rule that all of you stations should file with it a complete log of each and every musical composition played in that manner?

A. They just retracted that rule last week.

Q. You know the chief objector to that rule was the National Association?

A. Why, naturally, it would take four more auditors to work in the station, in every station in the United States.

Q. These four auditors would be required to keep track of the records played by transcription?

A. Required to take part—every program and selection and so forth was wanted on the log.

Q. In other words, you would have to increase your clerical staff in order to keep track of this rule of the Federal Trade Commission with respect to the transcription records only, is that right?

A. Sure, you would have to increase it.

Q. By how many employees would you have to increase your staff?

A. I don't know. We have seventy-two now, and I don't know how many it would be increased to.

Q. How many hours of transcription do you have a day?

A. Well, we have forty-five minutes—about an hour and five minutes a day of transcriptions.

Q. A little over an hour?

[fol. 611] A. Yes.

Q. About how many hours do you broadcast?

A. Nineteen and a quarter hours a day.

Q. About eighteen hours of general broadcasting, and one hour of transcription records?

A. That is right.

Q. Suppose you had to keep a record of each and every musical composition that came into your studio, transferred or broadcast by your studio, for the eighteen hours a day, would there be a necessity for additional employees?

A. Certainly, but we would be willing to do that.

Q. Please don't volunteer.

A. I think I ought to explain why we would be willing to do it.

Q. Please, I don't want it.

A. Neither do I, but I will give you the full picture of it.

Q. We will get the full picture of it. If you were running a program system you would have to report either to ASCAP or to any individual owner of copyrights or any other society what programs contained their music, wouldn't you?

A. That is right.

Q. In order to do that, you would have to keep a fairly accurate log of each and every program emanating from your studio?

A. Right. We would pay only for what music we could use.

[fol. 612] Q. You would have a record of each and every composition on the program?

A. Certain stations do that in the United States, because they save money.

Q. Wouldn't it entail a tremendous expense to you?

A. Not when we pay you for something else.

Q. Wouldn't keeping track of the musical compositions

and programs in detail for the purpose of reporting properly, entail very substantial increase in your operations?

A. Yes, but it would be less in the long run, because we wouldn't have to pay on all programs of a commercial nature.

Q. Wasn't it pointed out in the negotiations in 1932 by Mr. Mills and Mr. Paine to the broadcasters that the operation of the program system would be tremendously expensive to the broadcasters? Wasn't that shown to them?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No. We have asked for it since 1932, and we are still asking for it in the present discussions.

Q. If you were operating on the program system you would have to report to the owners of the copyrights with respect to each and every composition played on each and every program, wouldn't you?

A. I believe that could be worked out differently.

Q. Wouldn't you have to report it?

A. We could buy a catalog, whether it was Schirmer or [fol. 613] Berlin and so forth, and we would buy it for a certain price. If the price was too great we would go over to Jesse Lasky, or Metro-Goldwyn-Mayer and say, "We would like to buy your catalog."

Q. I didn't ask you what you would buy. I want to know as a business proposition in the practical operation of your studio whether, if you were operating on a program system under which you were paying the owners of the copyrights of musical compositions, you wouldn't have to keep accurate records of each and every program and report that to the respective owners?

A. That is right. About eight hours a day of our particular program schedule now, Mr. Frohlich, is N. B. C. commercial programs of a dramatic nature, four hours a day of music from N. B. C. cleared at the source. There would be only about three hours a day you would have to keep tab on. What do I have a program director and two assistants and a production manager for?

Q. If the music from N. B. C. is not cleared at the source, and came into the studio, wouldn't you likewise have to report that music to the copyright owners?

A. Certainly, we would.

Q. Wouldn't that entail substanial expense to your organization?

A. Yes, but I believe it would be a saving of expense under what we are paying now.

[fol. 614] Q. You mean you wouldn't have to hire additional people?

A. I say some.

Q. You would have to pay salaries?

A. But not as heavily.

Q. You would have to pay these people salaries?

A. Yes, certainly. We have a contract department and a program department that is pretty competent.

Q. When you furnished these statements to the owners of the copyrights after you had made your program inspection and had broken down each and every program, wouldn't you expect that they would have the right to check up the accuracy of your reports?

A. Certainly, sure.

Q. If on a program system, you would expect that the owners of these copyrights would want to check up to see if you were giving accurate reports?

A. We would want them to.

Q. It would entail expense on their part?

A. Yes, sir.

Q. Wouldn't it be the natural and practical thing in your business, inasmuch as you have got to take the music from them, that they would pass that expense onto you? Isn't that the picture of the proposition, they would pass that onto you?

A. Certainly.

Q. Taking that into consideration with other expense you [fol. 615] would have, wouldn't that increase the cost of your operations considerably?

A. But it would decrease the amount of money we are paying because we wouldn't pay them for news broadcasts, which means a substantial amount of money, or dramatic programs eight hours a day.

Q. You are making the assumption that you would continue to pay five per cent on such programs, aren't you?

A. No; I never said that. In all our discussions, nothing has been reached as yet, because you gentlemen will not discuss it with the National Association. You haven't said any figure, except you must pay more.

Q. Did we ever tell you you would have to pay more?

A. Yes.

Q. When?

A. I was told——

Q. Who, on behalf of the American Society, told you you would have to pay more?

A. The ASCAP—I beg your pardon, the ASCAP did not, but Ed Klauber did.

Q. Is he an official of the Columbia System?

A. Right.

Q. Did anybody on behalf of ASCAP tell you in words and substance you would have to pay more?

A. No, but Mr. Klauber has been discussing the thing with you and reported back to the Directors of the N. A. B.

[fol. 616] Mr. Frohlich: I move to strike that out.

The Court: It seems to be about as pertinent as the rest of it. It may stand.

Q. Now, as I understood it, you were unable to tell whether or not you were infringing on the music owned by ASCAP members or not?

A. No, because we have never received their catalog.

Q. Your orchestra brings into the studio musical compositions from which they perform, don't they?

A. That is right.

Q. And at the foot of each musical composition, on the first page, you have noticed the copyright notice, haven't you?

A. Yes.

Q. And you have seen the name of the publisher or the owner of the copyright?

A. We play a little non-copyrighted music, too.

Q. You know the name of the publisher and the copyright proprietor?

A. I know, but why should we go into that because we have got a contract now with ASCAP.

Q. I am not asking that. I say, you know that is shown on each musical composition?

A. Yes sir.

Q. All you have to do is look at the foot of the page at the notice and see whether the name on that notice is included in the membership list of ASCAP?

[fol. 617] A. On a lot of transcriptions we play we don't know whether we are infringing or not.

Q. In those transcriptions do you play some copyrighted musical compositions?

A. We don't know. They come from N. B. C.

Q. Don't they come into your studio?

A. Yes.

Q. If you were trying to avoid infringement, couldn't you examine the music?

A. Certainly.

Q. You would find that there, wouldn't you?

A. What?

Q. You would find the name of the owner of the copyright.

A. On the transcription? Not on the transcription.

Q. There is nothing on the transcription?

A. Nothing on the transcription says it is copyrighted by the owner, author and composer.

Q. Well, couldn't you obtain from the person supplying the transcription the name of the owners of the copyright, couldn't you get that from them?

A. I imagine we could.

Q. In other words, the transcriptions are not published, are they?

A. No. We buy them from N. B. C. for a hundred and seventy-five dollars a week.

Q. You don't know how they get them?

[fol. 618] A. We know they transcribe them themselves and sell them to us.

Q. N. B. C. has been trying for a long time to build up a library of copies not owned by members of the Society?

A. Most of the music they have transcribed is ASCAP music, that we have in our library.

Q. Do you mean to tell me that N. B. C. takes ASCAP music and makes a copy of it?

A. No copies of it, but they are in the form of transcriptions, and they charge us a hundred and seventy-five dollars a week for the use of those transcriptions.

Q. Are they printed?

A. Phonograph records.

Q. You were speaking of transcripton records now?

A. That is right.

Q. When you pay that hundred and seventy-five dollars, it doesn't indicate how much or how little of those records you use?

A. No.

Q. You can dip into all the records and use as much or as little as you please?

A. That is right, but we only play what we think we should play.

Q. In other words, you are paying N. B. C. for the records a blanket license, aren't you?

A. That is right. We are not paying a blanket license on [fol. 619] those records, no. We don't own those records. We pay a hundred and seventy-five dollars a week for the use of those records, but they own them. It doesn't include any copyright fee. We still have to pay you five per cent on top of that.

Q. Do any network programs originate in your station?

A. Not at the present time. We used to emanate three per week on the basic Red Network.

Q. Under your contract at the present time with the National Broadcasting Company, these network programs originate outside of the State of Nebraska, don't they?

A. Right.

Q. And they come into the state as you have described, by telephone wires?

A. Yes.

(Whereupon an adjournment was taken until 1:30 o'clock P. M.)

[fol. 620] (Pursuant to adjournment, Mr. John J. Gillin resumed the stand and testified further as follows:)

By Mr. Frohlich:

Q. Now, Mr. Gillin, did I understand your testimony this morning to state that your station had a license with SESAC at this time?

A. Yes, sir.

Q. Now, what year did it first obtain a license from SESAC?

A. I don't remember the exact year. It certainly isn't as long as ASCAP.

Q. Could you give us the approximate period or date of year?

A. It was about the time when they took over the copyrights of the Cole Publishing Company, and the reason they bought it was because they needed some hill-billy numbers.

Q. When would you say that happened?

A. Well, I don't know when they took it over.

Q. Prior to your taking a license from SESAC had you played in your station or performed any of the numbers that are covered by SESAC catalog?

A. Not to my knowledge, but we may have through the National Broadcasting network service, but not locally, I don't believe.

Q. Of course, if you played any of those through the National network service, you were infringing on the SESAC music?

A. No, because the N. B. C. clears at the source.

Q. Under their arrangement with SESAC they alone are [fol. 621] liable for any infringements over any stations on which they hook up that particular program?

A. That is right. In other words, they cleared at the source.

Q. In other words, you were perfectly free then?

A. Yes, sir.

Q. I show you this defendants' Exhibit Number 46, and direct your attention to the number 758 under the word SESAC on the front page. Can you tell us what that signifies?

A. No, I can't.

Q. Did you know that SESAC made a claim against the National Association of Broadcasters, and that it was going to bring suit for publishing this volume or book, defendant's Exhibit Number 46?

A. I think they made a claim, but they never sued N. A. B. on it.

Q. Did you know the claim was based on the fact that this book did not contain all the compositions which SESAC claims it owns or controls?

A. They may have claimed it, but they didn't bring suit, Mr. Frohlich.

Q. How did you get in possession of this document?

A. It isn't my document.

Q. Who furnished that to you?

A. The defendants' attorneys.

Q. You mean Mr. Hotz?

[fol. 622] A. Mr. Hotz had the document. I believe we have got the same document at the station, but I didn't bring it down.

Q. Are you sure that you have that document?

A. I think we have.

Q. Was this circulated publicly, do you know?

A. I think it was circulated to those stations that desired it, just like any other publication.

Q. Was it circulated to members of the National Association of Broadcasters?

A. Mr. Frohlich, any publication of the N. A. B. report comes out once a week, that is the official organ and publication of the National Association of Broadcasters, the N. A. B. Reports. Now, the N. A. B. Reports go out to every member of the National Association of Broadcasters.

Q. You know this defendants' Exhibit Number 46 contains a facsimile of the contracts which are entered into between the broadcasting stations, including all of the network stations and SESAC, you know that, don't you?

A. A facsimile of all the contracts?

Q. A facsimile of their form of contract.

A. I have never looked over that. I didn't know that.

Q. Will you look at this document that is part of Exhibit number 46 designated Exhibit 1?

A. Yes, sir.

Q. Is that document a facsimile of your contract with SESAC?

A. I would have to read it over very thoroughly and get [fol. 623] our contract at the station with SESAC and compare it very thoroughly before I would say it does.

Q. Is your contract available?

A. It is at the station and I can get it for you.

Q. I wish you would. Did you ever read this sentence on the first page of this report of defendants' Exhibit Number 46: "Because of the equivocal terms and phrases contained in the SESAC's license agreements (copies of which are marked Exhibits 1 and 2 are attached to and made a part of this report), we were unable to determine from that instrument specifically what the SESAC had to offer"; did you ever read that?

A. I don't remember reading it, no.

Q. Do you know that in this document, Exhibit 1, being the form of contract which is mentioned in the sentence I just read to you, there is this clause——

A. I have never read that contract.

Q. No. 7 in the contract——

The Court: If he hasn't read it, he wouldn't know what the clause is.

Mr. Frohlich: Well, we can get that from his contract.

Q. Your station has fixed rates which it charges to advertisers for its service and facilities?

A. Yes, sir.

Q. Now, those rates vary from time to time, don't they?

[fol. 624] A. Yes, sir, it varies at the particular hour of the day. In other words, from 6:30 to 8:30 A. M., and 8:30 A. M. to 6:00 P. M. there is a certain rate, and from 6:00 P. M. to 11:00 P. M. there is a certain rate, and then the early morning rate goes back into effect.

Q. Have you ever seen this magazine, "Radio Advertising"?

A. Yes.

Q. Is that an accurate and truthful survey of the rates of the various broadcasters?

A. I believe it shows what the broadcasters charge for their time at the present time. If that is the September issue, it would be accurate so far as I know.

Q. And in the September, 1939 issue, which I am going to show you, did you supply the information to the magazine with reference to your rates?

A. Certainly.

Q. Now, I call your attention to page 143 of this magazine, and ask you whether that accurately represents the various rates of your station WOW?

A. Yes, sir, it does.

Mr. Frohlich: I would like to offer in evidence plaintiffs' Exhibit Number 47, this one page.

Mr. Hotz: Objected to as not proper cross examination.

The Court: Overruled.

[fol. 625] Q. Are you familiar with the other rates charged by the broadcasters in Nebraska?

A. No. I have got our story to tell, and that is enough.

Q. You have no idea of the accuracy of the rates of the other stations?

A. No.

Q. Now, on this Exhibit Number 47 there is this statement: "Week days, 6:00 P. M. to 11:00 P. M., one hour, $320.00." That is correct, isn't it?

A. That is correct.

Q. That is the rate to the advertisers for use of one hour of station facilities for that period of the week day?

A. Yes, sir.

Q. From 8:30 to 6:00 P. M. you charge for one hour $160.00?

A. Right, sir.

Q. And from 6:30 A. M. to 8:30 A. M. you charge for one hour $100.00?

A. Yes, sir.

Q. On Sundays you charge for one hour $320.00?

A. Yes, sir.

Q. And from 7:00 A. M. to 6:00 P. M. on Sunday, $200.00?

A. Yes, sir. That is for an hour's broadcast—a continued hour broadcast.

Q. Are you familiar with the rates that were charged by your station in 1929?

A. I just don't remember. I think it was $70.00 a quarter [fol. 626] hour—most of our programs are sold on the quarter hour basis. We have a few half hours at $165.00, but most of them are sold on quarter hours for spot and local programs.

Q. Isn't it a fact that in 1929 your rate for week days from 6:00 P. M. to 11:00 P. M. was $190.00?

Mr. Hotz: Objected to as not proper cross examination and immaterial.

Mr. Frohlich: I want to show the increase in these rates over the years.

The Court: He may answer.

A. May I explain why we raised the rates, your Honors?

The Court: Yes.

A. The rate in 1929 is that what you stated?

Q. 1929.

A. Was how much, sir?

Q. $190.00.

A. At that time our national network rate was $190.00. Now N. B. C. charges the advertisers $320.00 and ask us to conform to it, and that is why we charge $320.00 an hour.

Q. Will you show me anything in this table of rates, Exhibit Number 47, which differentiates between the rates charged by the network hour and the rates for advertisers on your station?

A. Yes.

Q. Where?

A. There isn't in here, but there is in the book. I will [fol. 627] show you in the book the basic Red Network on page number 16 of this Exhibit Number 47. On page 16 the basic rate for a quarter hour on the network at night, WOW, is $128.00 per hour. Our basic rate for spot is $95.00 per quarter hour.

Q. I am not asking you about spot.

A. Well, now, I am saying this spot programs, not network. That is not our network rate.

Q. On page 143 of this document which has been put in evidence as plaintiffs' Exhibit Number 47, the following appears: "The following rates apply to national advertising. For local advertising rates consult station management."

A. That is for national—can I interrupt here?

Q. Yes.

A. Those rates are for a national advertiser who wants to use the entire coverage arrangement that WOC can give to him on a program they will send us, or electrical transcription. The national network rates apply back on page 16 when a program emanates from New York over the basic network of N. B. C. There is one spot program and one network program.

Q. Take the advertiser in Omaha who wants to use your station for one hour on a week day at any time between 6:00 P. M. and 11:00 P. M., what rate do you quote him for that one hour?

A. We charge him the same rate for an hour as the [fol. 628] network rate, but the other rates are lower.

Q. You charge him $320.00, is that right?

A. Yes. And our other rates are lower.

Q. In 1929 for that same hour you would have charged him $190.00, is that right?

A. The same as the National network for the quarter hour.

Q. In 1929 the National Broadcasting Company, when they sent a hook-up hour into your station in Omaha, paid you at the rate of $190.00, is that right?

A. Yes, sir.

Q. And tonight, if they send a program in through your station on a hook-up, they pay you $320.00, is that right?

A. In 1929 they paid us for any broadcast emanating from New York on the basis of $50.00 an hour revenue to

us. Today that revenue is a little bit more than that—it is about twenty-six per cent of the $320.00.

Q. I would like to get the figures in 1929 when the broadcaster sent a hook-up program into your station in Omaha. He paid you how much?

A. $50.00 an hour.

Q. For one hour for a week day between 6:00 P. M. and 11:00 P. M.?

A. Yes, sir,

Q. Today the National Broadcasting Company pays you how much for that one hour in dollars and cents?

A. Twenty-six per cent of $320.00, whatever it is.

[fol. 629] Q. Roughly, about $80.00, isn't that right?

A. Right.

Q. There has been an increase for that one hour in moneys you receive from the National hook-up?

A. That is right.

Q. That is true all down the line on all hook-up programs you receive?

A. Yes, except sixteen free hours we give them each week.

Q. So that for sixteen free hours they have increased your rate on the hook-up generally, isn't that it?

A. We pay actually to N. B. C., if you charge it on the hourly basis, sixty thousand dollars a year for our sustaining basis, whereas we were paid fifteen hundred dollars a month, which was much less when we take our time charges and add it up.

Q. Is your revenue from National hook-up time on the air today greater than your revenue from that same source in 1929?

A. I would say there is a difference of about two thousand dollars a month revenue.

Q. In other words, about twenty-four thousand dollars a year?

A. About twenty-four thousand dollars a year.

Q. Just on the hook-up alone?

A. That shows it in your check very definitely.

Q. What did you receive annually in gross receipts for 1938 from the National Broadcasting Company?

A. I can't tell you that.

[fol. 630] Q. You are the general manager of this company, aren't you?

A. Mr. Frohlich, I told you before I am manager of the

radio station. The radio station is a department of the Woodmen of the World Life Insurance Association, just like the receipt department and just like the insurance department for each particular state—they operate in forty-eight states, and I do not have any access to the general report of the station except at the end of the year they tell me how much the station grossed. If the president of the company that hired me don't want me to know what they are getting in net receipts in their station, it is all right with me, and I would prefer to have it that way, and as a loyal employee I should expect that.

Q. Isn't the revenue from the National Broadcasting Company the largest single item of revenue you receive?

A. No, sir.

Q. Which item is greater?

A. The local and national spot items are greater.

Q. When you speak——

A. (Interrupting) And those are for dramatic programs and news programs.

Q. How can you tell that the spot program is greater if you have no access to the books?

A. Because of the number of contracts we have.

Q. Would the number of contracts mean to you that the revenue, gross revenue, from those contracts is greater [fol. 631] than the money you received from the National Broadcasting Company?

A. It is in this respect, the National Broadcasting Company has more time over our station, there is no doubt about that, than we have locally to sell, but we get more money in return for our spot program than we do for the time allotted to the National Broadcasting Company. For instance, your Honors, for a spot program we get $95.00 for a quarter hour, but we don't get $95.00 every quarter hour on the network.

Q. How many hours a day of your nineteen hours do you devote to hook-up programs from the National Broadcasting Company?

A. I would say about twelve hours of the nineteen.

Q. And the revenue you derive from that source is quite substantial, isn't it?

A. Not as substantial as the other revenue.

Q. And you want to tell us now you don't even approximately know what that revenue was for 1938, in gross?

A. No; I am not supposed to know.

Q. What are you supposed to know in that company as general manager?

A. I am supposed to know everything that happens in that radio station with regard to running it properly, but I am not supposed to know about the revenue. That is for my employer to know.

Q. You are the man that goes out and obtains advertising, aren't you?

[fol. 632] A. Yes, sir.

Q. You do manage the advertising?

A. I do, but as soon as I get the contract, the job is done and I forget about his paying up at the auditing department.

Q. You know what the advertiser pays for a spot program, don't you?

A. Yes, sir.

Q. Can you tell us those figures in gross for 1938?

A. No, sir. It is around four hundred and seven thousand dollars.

Q. Where did you get that four hundred and seven thousand dollars?

A. I got that from the chief accountant of the Woodmen of the World Life Insurance Association by telephone so that I would have it if you wanted it.

Q. Well, now, who were some of your important advertisers for 1938 and 1939?

Mr. Hotz: I object to that as improper cross examination.

The Court: Objection sustained.

Q. By the way, this plaintiffs' Exhibit Number 47 is a standard work in the radio industry?

A. It is not a standard work in the industry. It is the publication of a company that puts out rates of the broadcasting stations, like it puts out the rates of the newspapers [fol. 633] for advertising.

Q. It is consulted by the people in the industry?

A. It is consulted by advertising agencies when they go about a particular spot campaign, they look in that organization's publication to find out which station he wants his products advertised over.

Q. It is a reliable publication?

A. Certainly, it is.

Q. It is reliable, isn't it?

A. Yes, or it wouldn't live as long as it has, certainly. I also talked about page 16.

Mr. Frohlich: I offer in evidence the entire document.

Mr. Hotz: Objected to as encumbering the record.

The Court: It seems so.

Mr. Hotz: Let him tear out the pages.

Mr. Frohlich: I will put in evidence pages 16 and 140 to 143, inclusive, because they contain the data with respect to Nebraska broadcasters, just those pages.

Mr. Hotz: Objected to as immaterial.

The Court: Overruled.

Q. You said something about a spot program or a spot announcement. What is a spot announcement?

A. An announcement of one hundred words or less broad-[fol. 634] cast for an advertiser over the facilities of our station to exploit his products.

Q. What is your present rate for a spot announcement?

A. It depends on the time of day.

Q. Take week days from 6:00 P. M. to 11:00 P. M.

A. A spot announcement of one hundred words would be fifteen dollars. For a chain break-in between two dramatic programs it would be fifteen dollars.

Q. And between two musical programs?

A. We have none at the present time, except two quarter hours.

Q. I am speaking of between 6:00 P. M. and 11:00 P. M.

A. Let's see. From 6:00 to 11:00 P. M. at the present time if we put on an announcement between musical programs, the rate is twenty-five dollars, and we can get about six of them in.

Q. How much do you get for the entire day for spot announcing?

A. In gross revenue?

Q. Yes.

A. I don't know.

Q. Do you pay ASCAP any part of that money?

A. We certainly do; five per cent.

Q. Do you pay ASCAP for any church, religious, educational or political programs?

A. We used to put on political programs until you gentlemen finally decided you thought it would be well not to [fol. 635] let the politicians alone. As far as spot announcements are concerned during the day or during the evening, during dramatic programs when no music is played at all, we still have to pay you five per cent.

Q. You pay five per cent for all the time on the air for which you receive revenue, don't you?

A. Right, whether any of your music is used or not.

Q. The four hundred and seven thousand dollar figure you gave us included all spot announcements, didn't it?

A. It includes every revenue WOW has, whether from talent or time on the air, no matter what it is, for script writing, for anything we have, that is the gross. Every service of the station is included in that gross amount.

Q. Who prepares the programs in your station?

A. Mr. Harry Burk, Mr. Lyle DeMoss, production manager, and myself.

Q. Don't you employ any musical arranger?

A. We do.

Q. What is his name?

A. The musical arranger we have at the present time is Mr. Ledington.

Q. What do you pay him?

A. The orchestra pays him out of the amount we give the orchestra. That is something for the contractor of the station to pay Mr. Ledington.

Q. Is he permanently stationed in your station?

[fol. 636] A. Just as long as the orchestra wants to hire him.

Q. Have you different arrangers from time to time?

A. I think so—it is up to him.

Q. These men are skilled in music?

A. I think they are. They are musicians and make a livelihood of arranging music.

Q. They are able to do a pretty good job, aren't they?

A. I think they are.

Q. You testified on direct examination that the public domain music was very extensive?

A. It is or you wouldn't be using it yourself.

Q. As a matter of fact, the public domain contains the finest music in the world right now, doesn't it?

A. I wouldn't be competent to say it is the finest music. I think you or Mr. Paine would be better able to say. It is more extensive than your catalog, far more extensive, and as far as I am concerned I believe that if we had your organization of publishers to arrange like you have, we would have one of the finest libraries in the world, too.

Q. Well, now, with this large, extensive public domain reservoir to dip in, have you, as a broadcasting station,

ever tried to make any suitable arrangements from those public domain pieces?

A. We are doing it at the present time.

Q. Well, did you ever try to do it over the years to any extent?

[fol. 637] A. Just started it now—started about three months ago.

Q. And how do you do it?

A. Why, that is up to our particular program department. I believe we find out what is in the public domain and pick out an arrangement.

Q. And there is no trouble finding out what is in the public domain, is there?

A. No.

Q. And all you have to do is to take a piece in the public domain and turn it over to a skilled arranger?

A. It is pretty slow.

Q. Well, slow or fast, he can make a modern arrangement?

A. Yes.

Q. He can take any kind of a song and put it into swing music or a fox trot suitable for modern dancing?

A. You must realize one thing, and that is we have just started this; in fact, the industry has just started a program like it, because of the fact that we want to get away from the oppressive rates we are paying you.

Q. You can take a great many thousands of compositions now?

A. Our station only?

Q. When I say your station, I am speaking of WOW.

A. If we hired four or five thousand men to make special arrangements. Maybe you have that many.

Q. However, if you hired a sufficient number of arrangers, you could take all the public domain music and make suit-

[fol. 638] able arrangements for your radio needs, isn't that so?

A. Over a period of time we might be able to do that, but 1941 is coming awfully fast and when our contract is up with you.

Q. If you did that it would involve the expenditure of some money, wouldn't it?

A. Certainly; you have got to pay a man for his work.

Q. The reason you haven't done it up to now is that you have found it much cheaper to pay ASCAP to do that?

A. No. We have tried it twice and the network scuttled it both times. We started a public domain free from copyright music. First of all it was—I forget the name of the corporation we formed—in the N. A. B., and the second one, the Bureau of Copyrights, and we started that and it was scuttled, and I hope we are going to get this one over the hump.

Q. I am not talking about the N. A. B. but about your station.

A. You have got how many publishers in your organization?

Q. You are not cross examining me.

A. You have got thousands of arrangers, and it is very difficult for one radio station to get enough music in their files to present programs and compete with other radio stations at the same time and not have an infringement suit from you.

Q. Will you listen to the question? If WOW were willing to spend the money and hire suitable arrangers and men [fol. 639] skilled in music, couldn't you take a great many thousand compositions presently in the public domain and make them into arrangements that are suitable for your radio needs?

A. If we wanted to spend a million and a half dollars, sure.

Q. Isn't it a fact that you don't want to do it, and that it is much cheaper to pay ASCAP than do that?

A. No; we are going to do it, if you gentlemen don't treat us better than you have, and we are willing to spend a million and a half dollars to get to a point where we can actually go into the field, unless ASCAP says, "We want to negotiate rather than discuss".

Q. Now, you have commenced to do that as an industry, haven't you?

A. Yes, because of the oppressive rates you have placed upon us, whether we use your music or not.

Q. The National Association of Broadcasters has now formed a corporation for the purpose of doing that very thing, isn't that so?

A. To relieve ourselves of the oppressive rates you have placed upon us.

Q. And you are selling stock in that corporation to its members, including WOW?

A. That is right.

Q. Have you already purchased any of that stock?

A. No.

Q. The object of that corporation now is to provide from [fol. 640] the great fund of the public domain music sufficient music for your radio stations needs?

A. And also see if we can't purchase the catalog of Mr. Irving Berlin at a particular price if he leaves your organization. All we are interested in is the copyright performance rights; we are not interested in the music. If we get the copyright performance rights from the different publishers, they can have all the revenue and we will be perfectly satisfied.

Q. If you were able to arrange the public domain music in sufficient quantities you wouldn't get a catalog of the publishers now members of the Society, would you?

A. If we arranged the music?

Q. If you got sufficient public domain music for your needs you wouldn't need the publishers?

A. I beg your pardon. We have made popular your music and exploited your music with our facilities at no charge to you, and advertised your music for years and made it popular, and we can't say to the public it is out of the window like that.

Q. Would you want to continue using our music?

A. Certainly, at equitable rates at, we will say, so much per program and put it on a per program rate, and we will pay you that.

Q. If there were no ASCAP at all, would you still want to continue using music now owned by ASCAP members [fol. 641] and the repertoire?

A. Certainly.

Q. You would want it?

A. Yes, sir; that would be fair. I will tell you why; I would like to tell you why.

Mr. Hotz: I think the witness ought to be permitted to answer that.

The Court: I think not.

Q. In the event there were no ASCAP at all in the United States, and all the music was in the hands of the copyright owners of the American Society, you say you want to continue using that music in your radio station operations? Please tell the Court how you are going about to protect yourself against infringement in your operations.

A. Well, there is no ASCAP now?

Q. No.

A. I would go to Irving Berlin and ask him the price on his catalog, and I would go to the other members of your publishing organization and the other publishers and ask them for a price, and if there price was equitable we would play their music; if not equitable, we would deal with somebody else.

Q. Suppose there were no catalogs, how would you get the individual pieces of music?

A. If there were no catalogs?

Q. Yes.

[fol. 642] A. In other words, a restraint in trade?

Q. If there were no ASCAP and you wanted to use ASCAP music.

A. I say if there were no ASCAP the catalog owners are certainly going to try to get revenue for those catalogs, and we would buy them and pay for them—they are going to do business with us.

Q. Suppose some of those people want a great deal of money from you, what would you do?

A. We would pay for it if we thought it worth it.

The Court: This is getting into remote speculation.

Q. Did you ever see this advertisement of Lang-Worth in the Broadcasting Magazine of July 15, 1939?

A. It is the largest public domain recorded library in the world. Yes, I saw that.

Q. Do you agree that is the largest?

A. It has one hundred hours, that is all, just one hundred hours, that is all, Mr. Frohlich, and that certainly isn't enough to run a radio station today.

Q. They now propose to have two hundred additional hours.

A. That would make three hundred hours, but still it would not be enough to run a radio station on.

Q. Not on Lang-Worth alone, but it is a pretty substantial number of hours from one source?

A. A stop gap for about three weeks.

Q. You would run——

[fol. 643] A. (Interrupting:) I mean by putting in a lot of other programs of a talking nature and so forth. You couldn't run a program on any station—it is worth about fifteen minutes a day at the present time.

Q. Did I understand you to testify this morning you don't originate any programs in your studio; they are transmitted or broadcast elsewhere?

A. At the present time, no.

Q. Do you pick up music in and around the State of Nebraska and broadcast it from your studio?

A. No.

Q. Well, did you ever hear of the Music Box?

A. Yes.

Q. That is a dance hall in Omaha?

A. Yes.

Q. Have you been broadcasting any music from that dance hall over your station?

A. Yes, sir.

Q. I show you this little program and ask you whether that has been circulated around Omaha?

A. No. This was on September 14th—it was September 14th of last year. I told you last year we had three programs per week over the network. That was orchestras from Omaha—two from our studio orchestra and once a week from the Music Box—that was last year.

Q. You don't do that this year?

[fol. 644] A. No.

Q. Now, when you sell your time on the air to an advertiser, you try to convince him you have a very large listening audience, don't you?

A. Why, certainly we do.

Q. As a matter of fact, that is a most important sales argument, is it not?

A. That is our audience appreciation; otherwise, the advertiser is not going to advertise.

Q. In how many states are your broadcasts heard?

A. If broadcasting a local program?

Q. Yes.

A. I think it will reach the northern part of Kansas and the western part of Iowa and reach a portion of Nebraska, and it will reach a portion of South Dakota and I think a portion of lower Indiana and of Minnesota, and that is about all.

Q. Will it reach Detroit, Michigan?

A. No. They might be able to hear our sky-wave there, like you are able to hear Los Angeles, but that is a fluke as far as broadcasting is concerned.

Q. Today is Wednesday, September 20th, isn't it?

A. Yes, sir.

Q. On your program of the Music Box you will note, Wednesday, September 20th, 27th and October 4th. Please look at that.

A. Yes, sir.

[fol. 645] Q. Does that refresh your recollection whether that is last year's program or this year's program?

A. I will tell you this, that the advertising of this particular Music Box on here is wrong, if it is this year because we are not emanating any programs on the N. B. C. network at the present time, because the only time we did that, N. B. C. made such a rumpus.

Q. I didn't ask you that; I asked you whether it was over your station.

A. Yes, but not N. B. C.

Q. Is it your testimony that station WOW did broadcast a program emanating at the Music Box this year?

A. Network programs? If you are talking about programs from the Music Box that were broadcast locally, yes, but we don't broadcast over the network from the Music Box.

Q. So you are mistaken when you said this was distributed last year?

A. No; I said that the advertisement was wrong if they state on there we are broadcasting over N. B. C. from Omaha, because we are not and have not since last spring.

Q. But you are broadcasting over your own station?

A. We are broadcasting from the Music Box over our own station, but not on any network.

Q. When you broadcast from the Music Box you don't make any inquiry as to what musical compositions come over that Music Box program at all, do you?

[fol. 646] A. No, because we have an ASCAP license and it protects us, it is supposed to. Nobody ever brought suit—we don't know whether it does or not.

Q. Does this advertisement represent an advertisement issued by your station?

A. Yes, sir.

Q. How recently?

A. That advertisement, I think, was issued in the fall of 1937 or the fore part or the first part of 1938.

Q. Does it purport to show the coverage of your station in the surrounding territory?

A. That is where we have most of our coverage, in the six cities we dominate as far as appreciation is concerned.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 50.

The Witness: Mr. Frohlich, Mr. Searle of the Central States will disagree with that seriously.

Mr. Hotz: I object to this plaintiffs' Exhibit Number 50 as not proper cross examination, and tending to encumber the record. The exhibit I am referring to is nothing more nor less than an advertisement of the WOW station.

Mr. Frohlich: It shows the extent of the operation of this station, and the field it covers.

[fol. 647] The Court: It may be received.

Mr. Frohlich: Also offer in evidence this program of the Music Box, plaintiff's Exhibit Number 51.

Mr. Hotz: Objected to as immaterial.

The Court: I don't see the materiality of that.

Mr. Frohlich: Withdraw that offer.

Q. Have you ever read "Radio Day"?

A. No. I have read "Radio Daily" quite often.

Q. Are you familiar with some of the statistical figures of the industry?

A. No. I am familiar with our own figures from the standpoint of coverage, as I have already given you. I am not competent to speak about stations throughout the United States.

Q. Have you ever seen these figures I show you, before?

A. No, sir.

Q. Did you ever have an author and composer in the State of Nebraska come into your station and ask to have one of his songs played on your station?

A. Yes, sir.

Q. How recently did one come in?

A. Not over six months ago.

Q. Do you know the name of the particular author?

A. Yes.

[fol. 648] Q. What was his name?

A. He is a judge in the City of Omaha, Judge Palmer.

Q. He asked you to play one of his numbers?

A. That is right.

Q. Is he a member of ASCAP?

A. No.

Q. Did you play one of his numbers?

A. No.

Q. Prior to that request have there been other requests from time to time of citizens who are residents of the State of Nebraska and who have come into your station?

A. Yes, sir.

Q. Have you on occasions played such compositions?

A. They have come to us with this in mind, if we would play their selection they would be very, very willing to let us play it free so that they would be able to sell some sheet music.

Q. On the occasions that you played these compositions they were played without any performance fee?

A. That was their offer.

Q. And you accepted the offer?

A. We accepted the offer. It was not published by one of your organization.

Q. Did you ever in your life pay any composer or author a penny for performing his compositions over your station outside of ASCAP?

[fol. 649] A. Yes.

Q. And SESAC?

A. Yes.

Q. Whom did you pay?

A. I believe a gentleman out in Montana. We wanted to play his selection on a special salute and we paid him a certain amount of money, I forget what it was—he asked us to pay for it, and we did.

Q. Do you remember what you paid for it?

A. I think around one dollar or something like that.

Q. Did you ever pay any more than one dollar to an author or composer?

A. I don't think so. The general conception of the composers is that they can't get on the air unless they are members of your particular corporation, and they certainly don't want to take any exception to your organization because of the fact that they would like to belong to it some day so that they could collect fees too.

Q. Did you ever play any Davis & Schwegler music?

A. Yes.

Q. You don't pay for that, do you?

A. For the copies, yes.

Q. You pay for the transcription record?

A. We pay for the orchestrations, and they want us to

play it so that they can compete with you, and that is the reason why we play it for them.

[fol. 650] Q. You don't pay them any fee for performing for profit in your organization, do you?

A. We will have to pay them if we continue to use their music.

Q. Are you paying them presently?

A. No. They said, "Here, play this for a while and see if it becomes popular, and if there are many requests for it, and if you do, we will come back and strike a bargain."

Q. You do popularize some of them by playing them?

A. Certainly, for years.

Q. And you can popularize a great many other compositions by playing them constantly?

A. Yes.

Q. You could take the compositions in the public domain and make them quite popular, if you wanted to?

A. Yes, but it would take a million and a half to do it.

Q. You don't want to spend a million and a half dollars, is that right?

The Court: This has been gone over so often gentlemen.

Q. Did you ever receive any communication from ASCAP offering to give you an index of musical compositions?

A. A card file, but that is not your catalog.

Q. Did they offer to give you a list of musical compositions which were publicly used by radio broadcasters?

A. They will send any radio station now a catalog of [fol. 651] tunes by placing stickers on what ASCAP thinks is popular. That is not what we believe is popular. We make it popular for you. We want your catalog and then we can do business with you, but we don't know what we are buying from you gentlemen.

Q. Have you ever accepted the offer of ASCAP to take one of these collections of musical compositions?

A. You mean this card file?

Q. Yes.

A. Which is sent out to radio stations?

Q. Have you ever taken them up on it and asked for it?

A. I think it is laying around some place, but it is nothing to us.

Q. It was offered gratis?

A. If we bought files and kept them up and so forth. It

was like paying for books fifteen dollars a month and paying for them in seven years.

Q. Do you know how many compositions there are in that list at the present time?

A. No, I have never inquired because it wasn't the catalog—I want your catalog.

Q. Have you ever been sued for infringement by anybody for performing without any right or authority any musical composition on the air?

A. We were joined in one suit in 1932, a certain composer in Europe sued us as well as the National Broadcast- [fol. 652] ing Company for broadcasting over our station; that was the only time. We were threatened by Warner Bros. when they dropped out of ASCAP, and we had to pay them an additional nine hundred dollars for the use of their music until we got their own catalog straightened out and deleted.

Q. This suit in 1932 was by a composer not a member of ASCAP?

A. No, but the National Broadcasting Company made settlement with him.

Q. Have you ever been sued by anyone for infringement of any compositions owned or controlled by members of ASCAP?

A. No, except that Warner Bros. threatened us with suit for infringement at the time you claimed they were still in your group, but still we had to pay them nine hundred dollars.

Q. As a matter of fact, you know Warner Bros. were out of the membership of ASCAP for a six-months period?

A. Yes, but you claimed that any suits brought you would be pleased to fight.

Q. And were any suits brought?

A. No, because you made a deal with Warner Bros. and got them back in, and you got Joe Malec back in.

Q. During the period Warner Bros. was out of ASCAP did you continue to use any of their compositions?

A. For the first three months we did, and then last three we didn't.

Q. When you did, you knew you had no right to do it? [fol. 653] A. We certainly did; we paid three hundred dollars a month for it.

Q. There is a station in Omaha called KOIL?

A. Yes, sir.

Q. Do you know of your own knowledge whether the transmission comes in from Nebraska or from Iowa?

A. You mean network service or their own transmission?

Q. Yes.

A. Their own transmitter is located on the Iowa side of the river.

Mr. Frohlich: That is all.

Redirect examination.

By Mr. Hotz:

Q. Mr. Gillin, attached to some of the depositions that were taken there are a large number of catalogs that were called for in the interrogatories and in the depositions of the various publishers of ASCAP music, one of them is Exhibit Number 5 to the depositions and another one is 7-A, thirteen booklets of Carl Fischer, another one is Exhibit 2-B of Fischer, another one is 2-C of Fischer, and Exhibit Number 7-O of Carl Fischer, and another one Exhibit 7-E of the same publishing company, another one 7-F, another one 7-G from the same company, and 7-A and 7-D and 7-K, 7-L, 7-M, and then in Irving Berlin's another one 5-A, and I will ask you to just tell us briefly without exam- [fol. 654] ining those what those are? Take, for example, the first one here, the copyrighted musical works of Irving Berlin, Inc.

The Court: Doesn't it already appear in the testimony?

Mr. Hotz: Not what I want to bring out, your Honors please.

A. It states it is a catalog of copyrighted music of Irving Berlin, Inc.

Q. It has been testified to here that the copyrights are owned by Irving Berlin in this catalog, that is, the composers and Berlin have made a deal and the copyrights are vested in this organization, Irving Berlin, Inc., so far as these numbers are concerned. Now, the question was asked you in connection with the event of ASCAP being dissolved or going out of business or being declared an unlawful monopoly, what then would you do, for example, in connection with Irving Berlin music if you wanted Irving Berlin music. Who would you then deal with if you didn't have ASCAP to deal with?

A. With Irving Berlin, Inc.

Q. For the public performance rights?

A. Yes, sir.

Q. And what about the other publishing houses?

A. I would deal with them each individually.

Q. And would you attempt to negotiate and select from his catalogs the pieces you wanted the public performance [fol. 655] rights and attempt to negotiate for the price that they would charge for public performance rights in the State of Nebraska for those pieces?

A. Yes, sir.

Mr. Frohlich: I move to strike out the answer, and object to the question as already having been testified to.

The Court: I think it has been. Sustained.

Q. That would be true in connection with all these other catalogs of the members of ASCAP called for in this suit, and some of which have been furnished, is that right?

A. Yes, sir.

Q. In other words, it would throw open to you an opportunity to go and shop and deal from one of these big publishing houses to the other and pick out what you wanted in connection with vocal and instrumental music for public performance purposes, is that right?

A. It would open up the competition of these particular publishers for their particular catalogs on the air.

Q. Is there a difference in the style and kind of music these various publishing houses put out, some better and some not so good?

A. I think one catalog, obviously, is worth more than another.

Q. Do the different publishing houses have different styles of music, different kinds?

[fol. 656] A. I imagine they do, but I have never examined that closely. When you are going out to compete in the open field you are going to decide what catalogs you are going to buy, and you are going to buy a certain type of music to take care of the desires of your radio audience.

Q. Would it be beneficial to your organization to have the right and privilege of building up your own musical library from the published works of the publishing houses so that you wouldn't have to go into the publishing business?

Mr. Frohlich: I object to that.

The Court: Objection sustained as argumentative, calling for a conclusion, and speculation.

Q. In connection with the question that was put to you by counsel on cross examination about the power and authority of the committee of the National Broadcasting Association, the last committee in dealing with ASCAP for contracts, I do not think you answered whether or not that committee of the National Association of Broadcasters has any authority or power to deal for WOW or any of these stations in Nebraska and bind them to any agreement of any nature or kind with reference to that.

Mr. Frohlich: Just what committee do you mean?

Mr. Hotz: The last committee he spoke about.

[fol. 657] Mr. Frohlich: He spoke about committees in 1932.

The Court: That is so indefinite. Objection sustained.

Q. Was there a committee in 1934 that you spoke about?

A. I spoke about a committee appointed by the Board of Directors to carry out the discussions with ASCAP in regard to renewing the ASCAP contracts of 1932 and 1934.

Q. When was that appointed?

A. The first one in 1932 and the second one in 1934, and third one appointed, I imagine, around four or five months ago.

Q. In that last committee that was appointed have they any authority to bind station WOW in connection with any dealings it might have with ASCAP?

A. No. In explanation I should say this as to what authority the committee has. The committee is appointed by the Board of Directors to carry on discussions with ASCAP, and if they believe that they have got a contract from ASCAP where we can pay on a program that is to be paid for at the source, and the broadcasters will pay ASCAP for only such music as they use on their programs, that is, ASCAP music and records, on a per program basis, then they will come back to the industry and offer it to each individual broadcaster, and then it is up to that broadcaster whether he wants to take that contract with ASCAP or not. [fol. 658] In other words, it was appointed to carry on for the industry, but it has no right to act for any individual broadcaster in the United States.

Q. And that goes for the Nebraska stations?

A. Every station in Nebraska.

Q. In order to prepare music for use of WOW station from the public domain, would it be necessary—I am speaking now for WOW alone—for you to enter into the publishing field?

Mr. Frohlich: I object to that. It has already been testified to.

The Court: Sustained.

Q. Does it take special machinery and equipment to publish musical compositions?

A. Yes, a great lot of it.

Mr. Frohlich: I object to that.

The Court: Objection sustained, and the answer stricken out.

Mr. Hotz: That is all.

Recross-examination.

By Mr. Frohlich:

Q. Look at this again. Isn't this the exact copy of the contract?

A. I wouldn't want to say unless I took the contract and compared it with you. I will be glad to send it to you, and let the Court compare it.

[fol. 659] Mr. Frohlich: That is all.

Mr. Hotz: We wanted the number of radios in use in the State of Nebraska.

The Witness: I will be glad to send that to you.

If it please your Honors, I was subpoenaed by ASCAP and I would like to be released.

Mr. Frohlich: You are released of your duties.

Witness excused.

[fol. 660] Raymond Hedges, was called as a witness on behalf of the defendants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Hotz:

Q. State your name.

A. Raymond Hedges.

Q. What is your business?
A. Manager of a hotel.
Q. Which one?
A. Capitol Hotel.
Q. Lincoln, Nebraska?
A. Lincoln, Nebraska.
Q. How long have you been in that capacity?
A. A little over a year.
Q. Have you in the past year as manager of that hotel had any dealings with the representative of ASCAP, and if so, when and give your experience?
A. I did in February of 1939.
Q. With whom did you deal?
A. Eugene Blazer.
Q. Give the facts surrounding your transaction that you had with him.
A. Mr. Blazer called on me sometime in February, I for-[fol. 661] get the exact date, at the hotel, and asked if we were having music in our coffee lounge of an evening. I informed him we were, and he told me he was the attorney-at-law, I believe, representing ASCAP, and he went on to explain what ASCAP was, and that in order for us to continue our music we would have to pay a sum of a hundred and twenty-five dollars.
Q. How many pieces of music did you have in there?
A. Four pieces of music.
Q. What did you do?
A. We discontinued the music—times were tough and we couldn't afford to pay the hundred and twenty-five dollars.
Q. Did you again start up that music later on?
A. Yes.
Q. When?
A. Around in April.
Q. What was the experience at that time?
A. We ran about a week before we were called on again.
Q. By Mr. Blazer?
A. Yes, sir.
Q. What did he say at that time?
A. He told us at that time if we did not pay the hundred and twenty-five dollars we would be sued by ASCAP.
Q. Then what did you do?
A. We discontinued music and haven't had music since—we couldn't afford it, and cut out the music in the hotel. [fol. 662] We can't afford to pay a hundred and twenty-five

dollars to ASCAP, because it is tough enough to pay the musicians. You have to watch all those things.

Mr. Hotz: That is all.

Cross-examination.

By Mr. Frohlich:

Q. What did you pay your musicians?
A. The union scale.
Q. How much is that?
A. $24.50 a week set up by the union.
Q. For one man?
A. Yes, sir.
Q. How many men were there?
A. Four men.
Q. That is a total of almost one hundred dollars, isn't it?
A. Yes, sir.
Q. And at the rate of a hundred and twenty dollars a year, it would be almost three dollars a week?
A. Yes, sir.
Q. You couldn't afford to keep music in your establishment for three dollars a week when you were paying your musicians one hundred dollars?
A. In addition, no.

Mr. Frohlich: That is all.

[fol. 663] Redirect examination.

By Mr. Hotz:

Q. How many hours a day did the musicians play?
A. Three hours a day, 9:00 to 12:00.
Q. What times of the year?
A. October until the first of June.

Mr. Hotz: That is all.
Mr. Frohlich: That is all.

Witness excused.

[fol. 664] EDNA M. HEDLIN, was called as a witness on behalf of the defendants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Hotz:

Q. State your name.
A. Edna M. Hedlin.
Q. Where is your home?
A. Omaha, Nebraska.
Q. What is your position?
A. Treasurer of the Eppley Hotels Company.
Q. How long have you been treasurer of that company?
A. About six years, I imagine—I don't know offhand.
Q. How long have you been identified with the Eppley Hotels Company?
A. Eighteen years.
Q. In the State of Nebraska what hotels are operated by the Eppley Hotels Company?
A. The Fontenelle Hotel, the Rome Hotel and the Logan Hotel.
Q. How many in Lincoln?
A. The Capitol Hotel and the Lincoln Hotel.
Q. And elsewhere in Nebraska, where?
A. The Norfolk at Norfolk, Nebraska and the Evans at Columbus.
Q. Do you also operate other hotels outside of the State [fol. 665] of Nebraska?
A. Yes, we do.
Q. Altogether, how many?
A. Eighteen in all.
Q. Are the headquarters of that hotel organization located in Omaha, Nebraska?
A. Yes, sir.
Q. Now, Miss Hedlin, how many of the hotels in the State of Nebraska are operated under license with ASCAP?

Mr. Frohlich: I object to that. She doesn't know.
Mr. Hotz: I beg your pardon.

Q. Under whose jurisdiction or whose job is it to deal with ASCAP in your organization?
A. I, myself, have been dealing with them.

Q. Who is the man you had your negotiations with, so far as ASCAP is concerned?

A. Mr. Blazer.

Q. Are you familiar with the records and files and so forth of the Eppley Hotels Company in connection with ASCAP in its hotel business in the State of Nebraska?

A. Yes, sir.

Q. And that is under your jurisdiction and part of your job?

A. Part of my duties, yes, sir.

Q. Now, which of your hotels at the present time are under contract with ASCAP?

[fol. 666] A. The Fontenelle Hotel.

Q. At Omaha?

A. Yes, sir.

Q. Now, how much are they paying at present?

A. The contract?

Q. Yes.

A. Three hundred and sixty dollars a year.

Q. In the employment of musicians, how do the musicians work for the Eppley Hotels Company in the hotels where they happen to be, the Fontenelle or elsewhere; are they paid as employees of the hotel, or otherwise? Are you familiar with those contracts and arrangements?

A. They are not employees of the hotel.

Q. How is that done?

A. There is one head man of the orchestra and we deal direct with him by contract.

Q. You pay a social security tax for those musicians?

A. No, sir.

Q. You do not?

A. No, sir.

Q. Have you had any negotiations with Mr. Blazer in the last year or so with reference to any other hotels besides the Fontenelle?

A. I discussed the Capitol and Rome with him.

Q. What was said by him and said by you in connection with the Capitol Hotel in Lincoln?

[fol. 667] A. Well, he came down later and dealt directly with Mr. Hedges. He inquired of me if they were playing music at the Capitol, and I said I presumed they were having some music and trying to increase their revenue, or get some business there. He dealt directly with Mr. Hedges —you heard what Mr. Hedges said previously.

Q. And it resulted in the discharge of the musicians. You couldn't make arrangements with Mr. Blazer, so you discontinued the music?

A. Had to cut expenses wherever possible.

Q. Have you done that in other hotels of yours in the State of Nebraska and for the same reason?

A. Well, no, we just didn't enter into music, because we figured we would get into the same difficulty and didn't want to take the chance.

Q. Now, Miss Hedlin, is the Fontenelle Hotel interested in building up a library of music of their own?

A. Yes, if they have the opportunity.

Q. What would you like to do in that regard, if you could?

Mr. Frohlich: I object to that.

The Court: Sustained.

Q. When these musicians are employed by the Eppley Hotels Company do you have any control over the selection of music that the orchestra plays?

A. They arrange their own programs—their own dance music.

Q. That is their business, largely?

[fol. 668] A. Yes; that is in charge of the head musician.

Q. Have you ever asked Mr. Blazer for a catalog of the music they claimed in these matters you have had up with him?

A. I have asked him on the phone, in a telephone conversation that I would like to be supplied with a catalog which would be helpful in refraining from using a list of different numbers.

Q. Did he furnish you with such a list?

A. No, I never did receive it.

Q. In your hand do you have a copy of a letter that you wrote to Mr. John C. Wooden, general counsel for the American Society of Composers, Authors and Publishers at Des Moines, and signed by yourself? Is this a form of letter that you have used in connection with your dealings with ASCAP, this form here on defendants' Exhibit Number 51?

A. That is right.

Q. Is this in the form and manner in which you asked for this information of Mr. Blazer?

A. I discussed it with him on the telephone along the same lines.

Q.

Q. The same information contained in that letter?

A. Yes, sir, practically the same; I couldn't say word for word.

Q. Now, do you have in your hand a form that was sent out to you by Mr. Blazer's office? This one also happens to be from Des Moines. Is that the same as the one he has [fol. 669] here in Nebraska, the same thing?

A. It appears to be the same.

Q. Calling your attention to defendants' Exhibit Number 52, is this the form and the letter that has been sent to you in Omaha, that is, the Eppley Hotels Company, in connection with refraining from infringement?

A. We have received application forms, yes.

Q. And signed by ASCAP on this printed form?

A. Yes, sir.

Q. On one part of this it gives——

Mr. Frohlich: I object to reading any more of this instrument, unless it is offered in evidence.

Mr. Hotz: Offer in evidence defendants' Exhibit Number 52 as part of the examination of this witness.

Mr. Frohlich: No objection to that.

Mr. Hotz: Exhibit Number 52, I will read to the Court.

(Defendants' Exhibit Number 52 read).

Q. Now, that came to you, did it not, in the usual course of the mails from the American Society?

A. Yes, sir.

Q. Now, in response to that did you then write a letter or communicate this letter, Exhibit Number 51, to ASCAP?

A. By telephone.

[fol. 670] Q. To Mr. Blazer?

A. Yes.

Q. But this one went where?

A. This went to Mr. Wooden at Des Moines.

Mr. Hotz: I will offer in evidence Exhibit Number 51.

Mr. Frohlich: No objection.

(Exhibit Number 51 read).

Q. Now, Miss Hedlin, has the National Association of Hotels ever been authorized to negotiate for you in any particular with ASCAP?

A. No, sir; they have nothing to say about our music contracts.

Mr. Hotz: That is all.

Cross-examination.

By Mr. Frohlich:

Q. Miss Hedlin, how long has the Eppley Hotels Corporation had a license with the Fontenelle Hotel, how many years?

A. Well, I would say off and on from 1924 to 1935.

Q. In other words, about fifteen years?

A. Off and on.

Q. The Fontenelle is a very large and spacious and beautiful hotel in Omaha, isn't it, insofar as hotels are concerned?

A. Yes, sir.

Q. In all those fifteen years you had no trouble with any-
[fol. 671] body suing you for infringement of music which was played in your hotel, have you?

A. No, sir.

Q. Why were you so anxious to obtain a catalog of all ASCAP members' compositions in May, 1939?

A. In connection with the other hotels in Nebraska, because the smaller hotels were trying to engage orchestras to increase their business, naturally.

Q. You have gotten along pretty well without any catalog at the Fontenelle, haven't you?

A. Well, we didn't request it until we got in this other difficulty.

Q. Nobody bothered you or sued you, and you had no difficulty in fifteen years?

A. There was no other course—we had to pay.

Q. And you paid, and you were let alone, is that right?

A. They demanded pay, and all we could do was pay.

Q. Who paid?

A. We had to pay.

Q. And nobody bothered you after you paid?

A. No.

Q. Did anybody sue you?

A. No, because we had to pay—they demanded it.

Q. Didn't somebody suggest to you in May, 1939 that you write a letter to ASCAP demanding a catalog?

A. Oh, not demanding.

[fol. 672] Q. Or asking for it or requesting it?

A. It was suggested.

Q. Who gave you that suggestion, Miss Hedlin?

A. Our attorney.
Q. What is his name?
A. We have several attorneys.
Q. Which particular attorney gave you that suggestion?
A. I discussed it with Mr. Hotz.
Q. And Mr. Hotz is one of your attorneys?
A. Yes, sir.
Q. Was he the gentleman who suggested to you that you write that letter in May?
A. He suggested I do it in connection with some of the Nebraska and Iowa hotels, and we had to get some relief for the eighteen hotels, and it is too expensive to have this burdensome additional expense.
Q. Your company operates the Rome Hotel in Omaha?
A. Yes, sir.
Q. Have you been employing an orchestra in that hotel?
A. When we could afford it—off and on.
Q. Have you been doing that for the past year?
A. Off and on, yes, sir.
Q. For a period of how long at a time?
A. Probably two or three months, and then the business got so bad we would discontinue them.
Q. During those two or three months did you have a [fol. 673] license from the owners of the copyrights or ASCAP or anybody else in the world to perform musical compositions performed at the Rome Hotel?
A. I talked with Mr. Blazer about it.
Q. Didn't Mr. Blazer tell you you ought to have a license for that hotel?
A. He said it would be included with the Fontenelle.
Q. He asked you to include it in the Fontenelle and pay specifically for the Rome as well as the Fontenelle?
A. He said one would take care of both hotels.
Q. As a matter of fact did you make any agreement or any contract with Mr. Blazer or ASCAP for any license to perform the music in the Rome Hotel?
A. I never made a contract on the Rome.
Q. Are you using music at the present time?
A. I guess they are right now.
Q. You have an orchestra of how many people?
A. Two people.
Q. It is not a very large orchestra?
A. Just an organ.
Q. Are two people playing?

A. An organ and a singer.

Q. And they perform in what room of the hotel?

A. In the bar grill.

Q. And they perform there now every night, don't they?

A. Yes, sir, every night.

[fol. 674] Q. Two or three hours?

A. 6:00 until midnight—6:00 to 7:00 and then 9:00 to 12:00.

Q. They perform a great many of the popular compositions of the day, don't they?

A. Well, I presume they do—I haven't heard them.

Q. Have you made any attempt to inform yourself with respect to music which is performed at the Rome Hotel?

A. We leave that up to the leader who made the contract.

Q. Who is the leader; is he the organist?

A. I couldn't tell you.

Q. Well, have you talked to him about the music you are playing there?

A. No, I never discussed it with him.

Q. Don't you know you are playing music, the performing rights of which belcng to somebody else? You know that, don't you?

A. Well, I know, but we have been requested——

Q. Well, didn't Mr. Blazer request you to take out a license for this music, or stop playing it?

A. No.

Q. Didn't you testify he suggested you pay something for that?

A. You misunderstood me. He said the Fontenelle fee would cover the Rome. He didn't want to reduce the Fontenelle fee. We thought it was too high.

Q. He suggested that instead of reducing it that you leave it stand as it is and include the Rome Hotel?

[fol. 675] A. Right.

Q. Did you draw any contract on that basis?

A. No, we have no contract.

Q. Well, now, I show you a copy of a letter which is addressed to the Eppley Hotels at 1804 Dodge Street, Omaha, Nebraska, under date of January 25, 1938, and ask you, Miss Hedlin, whether you received the original of that letter?

A. It is so far back I would have to look in the files. It is not addressed to any particular person.

Q. Wouldn't you in the ordinary course of business look at the mail that came in?

A. The secretaries open the mail.

Q. Did you receive a letter on or about May 12th or May 13, 1939, addressed to the Eppley Hotels Company, 1804 Dodge Street, Omaha, Nebraska?

A. This is in connection with the Capitol Hotel.

Q. Is that one of the hotels owned by you?

A. Mr. Hedges has testified about the Capitol—it has nothing to do with the Rome.

Q. Let me direct your attention to the second paragraph of this document: "The Hotel Room at Omaha"—obviously means the "Hotel Rome"——

A. I just testified a minute ago that we said the rate was too high and it ought to include the Rome Hotel.

Q. Did you ever get the original of this letter?

A. I presume I did, because I talked to Mr. Blazer since [fol. 676] then.

Q. After you received this letter?

A. That is evidently where I got the idea the rate was too high, and wanted the rate reduced to include the Rome.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 53.

Mr. Hotz: If the other one went in, there is no objection to this one.

Q. Do you recall this particular paragraph in the letter: "The Hotel Room (Rome) at Omaha also does not have a license from this Society to perform the copyrighted works of its members publicly for profit. We have taken up the matter a number of times with your office and have been unable to elicit a response.

"Miss Hedlin told the writer a few days ago she thought the rate on the Fontenelle Hotel was too high, or that it ought to include the Rome Hotel. We advised Miss Hedlin, as we have advised your company a number of times, that every contract we write is on a particular establishment; that if your company thinks that any rate is too high, you may take up directly with the Society the matter of the negotiation of a lower rate. The writer does not attempt to write contracts with hotels, but the matter of contracts with hotels is dealt directly with by the Society. He has even sent in forms to be used, and suggested the taking

up of the matter directly with the Society." Do you recall [fol. 677] that statement in the letter?

A. I talked to Mr. Blazer.

Q. After you read this letter you talked to Mr. Blazer?

A. We had a verbal understanding the two would be included as one.

Q. That was a verbal understanding between you and Mr. Blazer about including the two?

A. That is my understanding. Nothing was done since May, 1939.

Q. Is it your understanding there is some verbal arrangement about it?

A. I think shortly after that the orchestra was discontinued because in the summer months, July and August, there was no music at the Rome any more, and shortly after that music was discontinued and it has not been brought up since.

Q. Is it now your claim there exists a contract between your company and ASCAP under which you are licensed to perform music at the Rome Hotel, is that your claim?

A. According to verbal conversation is all.

Q. Is it your claim under a verbal contract?

A. Yes, sir.

Q. Can you fix the time and place where that arrangement was made?

The Court: I don't see the materiality.

A. I think my office can.

Mr. Frohlich: That is all.

Witness excused.

[fol. 678] (Short recess.)

Don Searle was called as a witness on behalf of the defendants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Hotz:

Q. State your name.

A. Don Searle.

Q. Mr. Searle, where do you reside?

A. Omaha, Nebraska.

Q. What is your business?

A. I run KFAB, KOIL and KFOR.

Q. In what capacity?

A. As general manager.

Q. How long have you been general manager of those stations?

A. Since a year ago January 1, 1938.

Q. Where is KOIL located?

A. At Omaha.

Q. Where is KFOR located?

A. Lincoln.

Q. KFAB?

A. Lincoln.

Q. Those stations are owned by one company, are they?

A. Three separate corporations, KFAB Broadcasting [fol. 679] Company, the Corn Belt Broadcasting Company, and the Central States Broadcasting Company, the Central States being KOIL, and the Corn Belt being KFOR.

Q. Were you in the radio business prior to the time you became manager of these three stations?

A. Been in it since 1925.

Q. What was your prior experience?

A. We owned KOIL, the family owned it, and sold it out in about 1932, and I went with Senator Capper who ran the radio station at Topeka, Kansas from January 1, 1933 to January 1, 1938, at which time I came up here.

Q. Do any of the three stations have an affiliation and contract with the Columbia Broadcasting Station?

A. Two of the stations have definite contracts with Columbia, KFAB and KOIL—both basic Columbia stations.

Q. Columbia is a network, is it not?

A. It is.

Q. What is it popularly known as, what network is that?

A. The Columbia network.

Q. In connection with KFOR located in Lincoln, where is the mechanism of that station located?

A. In Lincoln, Nebraska.

Q. Does the Columbia come in over a wire?

A. Are you speaking of KFOR or KFAB? KFAB comes in over a wire from New York and delivered to our studios in the Lincoln Hotel.

[fol. 680] Q. What do you do with it there?

A. Send it over our line and transmitter at the State

Fairground and put it through our transmitter and broadcast it.

Q. Would the programs come over the State of Nebraska, for example, if it were not for your station that is located out at the Fairgrounds, Lancaster County?

A. If it were not broadcast by KFAB it would not be heard over the State of Nebraska.

Q. Just generally you may state what machinery and equipment you have at the station out at the Fairgrounds, just generally.

A. Well, we have a ten thousand watt transmitter and proper ground and antenna system, all of which constitutes what we consider a transmitting plant. The program is sent over the wire to the transmitter and there put into radio energy and later picked up by the radio receiving sets in the homes, and then brought into sound waves.

Q. Now, do you have a contract with the ASCAP people?

A. We do.

Q. For each one of the three stations?

A. Right.

Q. Can you tell us about what you pay ASCAP to the three stations separately or together?

A. You want to know in dollars what we pay?

Q. I think so.

[fol. 681] A. In 1938 for KFAB we paid $11,563.75; KFOR, $2,347.10; KOIL, $7,868.12; total $21,778.97.

Q. What went to make up those figures?

A. First, they charge a sustaining fee.

Q. Of how much?

A. I don't have our monthly figures here. As a matter of fact, we don't separate it on our regular statement, but on KFAB it is $250.00 a month sustaining fee. I can't give it to you. Over and above that we pay five per cent on everything in the way of net revenue received for the station, in the operation of the station, whether it is baseball games which go on from 3:00 to 5:15 at night, two hours and fifteen minutes in the afternoon, or dramatic shows.

Mr. Frohlich: I object to that. The contract speaks for itself.

The Court: It has been gone over anyway. I assume the contracts are all the same, substantially.

Q. Are there any of your stations that are exempted from the five per cent?

A. Political broadcasts only, and, of course, talent—things other than actual sale of time.

Q. Did you hear Mr. Gillin's testimony in connection with the method of arriving at the amount paid ASCAP by WOW?

A. I believe I heard all his testimony.

[fol. 682] Q. Yours is on the same basis?

A. Do you mean we pay on the same basis as they do?

Q. Yes.

A. We do.

Q. Now, Mr. Searle, do you have a contract with the Columbia Broadcasting Station network?

A. I do.

Q. Do you have that with you?

A. Yes, sir; here is probably what you want—Section 5, Paragraph 5.

Q. This paper here, this Affiliation Agreement between Columbia Broadcasting System of New York and the Central States Broadcasting Company, station KOIL at Omaha, Nebraska, their date of April 25, 1938, and it is signed by your company, is it not, by the vice-president?

A. Yes; Mr. C. L. Carfer.

Mr. Hotz: We would like to offer in evidence this contract, being defendants' Exhibit Number 54, but this is the original and I would like to have permission to substitute a copy therefor.

Mr. Frohlich: No objection.

The Witness: Do you want to submit that one page?

Mr. Hotz: We will see. That is all I am interested in, is that one section, Section 5.

[fol. 683] Mr. Frohlich: I have no objection to the entire contract going in.

Mr. Hotz: We will furnish the entire contract.

Q. Now, calling your attention, Mr. Searle, to Section 5.

A. It is Paragraph 5.

Q. On Page 2.

A. Yes, sir, that is right.

Mr. Hotz: I particularly call the Court's attention to this section: "The station will maintain and operate its facilities in accordance with the best prectice in the broadcasting art and conduct of the industry and in accordance with good engineering practice, and will maintain such

licenses under copyrights as are necessary to enable the station to broadcast the programs to be furnished by Columbia."

Q. On this contract with Columbia are there any of the services that you use that are cleared at the source, that emanate in New York from Columbia?

A. It is my understanding that all musical selections are cleared at the source with the Columbia Broadcasting System, with the exception of those with ASCAP.

Mr. Frohlich: Just a moment. I move to strike that out because he said it is his understanding. I object to any understanding.

[fol. 684] The Court: I think he is qualified, probably.

Q. In connection with this contract that is in evidence here with ASCAP, is that a satisfactory contract with your station?

Mr. Frohlich: I object to that on the ground that it is incompetent, irrelevant and immaterial, whether or not it is satisfactory.

The Court: Objection sustained.

Q. How does it come this contract with ASCAP was entered into with your stations?

Mr. Frohlich: I object to that for the same reasons. The contract is in evidence.

The Court: Objection sustained. We went broadly into these matters with another witness.

Q. You heard the testimony of Mr. Gillin in connection with the developments leading up to the contracts, and his statements in connection with the objectionable features, did you?

A. I did.

Q. Do you agree with Mr. Gillin in regard to the objectionable features as claimed by him in connection with the contract with ASCAP, or not?

Mr. Frohlich: I object to that, your Honors.

The Court: Overruled.

A. I agree with him, absolutely.

Q. Would you be able to operate your station or any one of your stations without the ASCAP music and comply with

[fol. 685] the demands on your station for musical entertainment?

Mr. Frohlich: Objected to as speculative, and incompetent and irrelevant.

The Court: I think it is. We have gone into that so fully. The views of the claims and so forth are covered, and it is also an opinion and argument.

Q. Would your experiences in that regard be along the same lines as testified by Mr. Gillin whom you heard in the court room this morning?

Mr. Frohlich: I object to that as cumulative.

The Court: You may answer.

A. Yes. Your question was, would our experience coincide with the testimony by Mr. Gillin in that respect?

Q. Yes.

A. That is right.

Q. Of course, there is no connection between his station or yours, either by ownership of stock or otherwise?

A. There is no connection.

Q. You are in open competition with him?

A. Yes, sir.

Mr. Hotz: I think that is all.

Cross-examination.

By Mr. Frohlich:

Q. Mr. Searle, when did you get a SESAC license for your station?

[fol. 686] A. When?

Q. Yes.

A. I cannot answer that. It was before I came here.

Q. How many years ago would that be?

A. I have been here since January 1, 1938.

Q. Have you ever looked at the SESAC contract?

A. To be perfectly frank, I have not. We have had a SESAC contract before, and I know the general provisions of it.

Q. You know the general provisions of that contract?

A. Yes, only the general provisions, not detailed.

Q. Let me direct your attention to this provision, Paragraph 7.

The Court: In what exhibit?

Mr. Frohlich: I am reading from Exhibit Number 1 of defendants' Exhibit Number 46.

Q. "The right to broadcast any musical compositions granted under this license extends only to licensee broadcasting from the station (s) licensed under this agreement or from any other place (s) of origin duly licensed by licensor, and licensee may not relay and/or transmit in any manner whatsoever for re-transmission and/or re-broadcasting or otherwise, performances of said musical compositions, to any stations in a hook-up or network or otherwise, unless such stations have duly secured licenses from licensor." Do you know about that provision?

A. I am not acquainted with that thoroughly, but I can imagine that.

[fol. 687] Q. You think there is a similar provision in your contract?

A. I can't say.

Q. Don't you know that every contract is uniform?

A. I don't know.

Q. And particularly the Columbia chain has the identical contract which I have read to you and which appears in this exhibit?

A. I don't know they do.

Q. You still maintain the broadcasting from the Columbia station of SESAC was cleared at the source?

A. It is my understanding it was all cleared at the source, with the exception of ASCAP.

Q. Where did you get that?

A. In talking with the boys at the broadcasting meeting.

Q. What meeting?

A. In general.

Q. Did you ever talk to anybody connected with Columbia?

A. No.

Q. Did you ever talk to Mr. Klauber?

A. No.

Q. You never mentioned the subject to him?

A. No.

Q. How many years have you been operating broadcasting stations?

A. Since 1925.

Q. Suppose there were no ASCAP, how would you go

about protecting yourselves against infringement by peo-
[fol. 688] ple who now own copyrights and musical compositions which are in the ASCAP repertoire?

A. Along the same procedure as so far in my testimony—follow much along the same lines as John Gillin.

Q. Would you make any attempt to contact any particular owner of a particular song if you wanted that song for your program?

A. I suppose if we wanted that song for our program we would probably make an attempt to contact the owner of that particular song.

Q. Would you negotiate for a license with him?

A. It would probably amount to as much.

Q. How many pieces of music do you play a day in your stations?

A. Do you mean over the station we originate ourselves?

Q. Yes.

A. I suppose one hundred.

Q. And that is played about every day, on the average?

A. Something like that.

Q. Now, at the present time you don't concern yourselves with the ownership of any copyrights of the numbers broadcast from stations?

A. Not particularly, because we sign up with everybody that comes along with a threat against us.

Q. Did you ever sign up a contract with any individual composer or writer for the broadcast of his composition over your stations?

[fol. 689] A. Not to my knowledge.

Q. Did you ever pay any author or composer in this country or in the State of Nebraska any money for the right to broadcast his composition?

A. Not that I recall, but we have played selections the composers have asked us to play.

Q. Have you played many selections of that kind?

A. No, not many as numbers go—we haven't been approached very much.

Q. But in many instances you have played such numbers, haven't you?

A. Yes, sir.

Q. Did you ever pay anything for them?

A. No. They asked us to play them in order to popularize the number.

Q. You have no control over the numbers that come in over the chain network, have you?

A. In effect, that is right.

Q. You don't ever know in advance what numbers that are going to come in?

A. That is generally true.

Q. Do you ever ask the network for a list of compositions that are going to be played on your station?

A. No; we think we are pretty well covered with every license we can get.

Q. And you think you are pretty well covered because [fol. 690] of the ASCAP license?

A. And every other one.

Q. What others have you got besides ASCAP?

A. ANPA and several recordings as well.

Q. The recording catalog?

A. Yes, sir.

Q. What do you pay them?

A. I don't have the exact figure here, but it is very small.

Q. What did you pay SESAC in 1938?

A. Less than ten per cent of what we pay you.

Q. How much would that be?

A. We paid them a total of $1570.04 for our three stations. I can't answer that definitely as being such. We have in our form here a place for ASCAP and a place for SESAC, and I know that ASCAP is under ASCAP, but I am not sure but what miscellaneous licenses are under our accounting form for SESAC, and that may be a total of all.

Q. You heard Mr. Gillin testify this morning he thought the public domain was very extensive, didn't you?

A. Yes, sir.

Q. Do you agree with him?

A. I understand there are quite a number of pieces in the public domain if you want to go to the trouble of finding out what is in the public domain and getting your instrumentation figured out so that you can use it.

Q. Did you ever take from ASCAP the index they offered [fol. 691] to give you?

A. I didn't know they ever offered an index.

Q. Did you ever receive a letter from them?

A. Not to my knowledge.

Q. You employ arrangers in your establishment?

A. One acts as an arranger.

Q. You employ him permanently there?

A. In the orchestra we employ.

Q. There is always an arranger on your premises, isn't there?

A. I suppose there is someone in the orchestra who can make certain arrangements.

Q. Now, could you take any compositions of the public domain and have them arranged for use over the radio?

A. I suppose we could.

Q. It would involve the expenditure of some money, wouldn't it?

A. It certainly would involve the expenditure of some money.

Q. You play transcription records over your radio?

A. We do.

Q. How many hours a day would you say?

A. Which radio station are you talking about?

Q. Let's take KFAB.

A. Well, I would say on KFAB we probably play a half to three-quarters of an hour a day.

Q. As against how many other hours?

A. Well, it varies on KFAB—I would say it averaged about eighteen or eighteen and a half hours a day.

[fol. 692] Q. About the same time on KFOR?

A. A little more than that.

Q. KOIL?

A. We would probably play a little more than on KFAB.

Q. Do you obtain those transcription records outside of the State of Nebraska?

A. Yes.

Q. They are sent in to you by mail or express?

A. That is right.

Mr. Frohlich: That is all.

Redirect examination.

By Mr. Hotz:

Q. Mr. Searle, was the National Broadcasting Company authorized to negotiate for and on behalf of your companies with reference to ASCAP at all?

A. You don't mean the National Broadcasting Company?

Q. I mean the association.

A. The National Association of Broadcasters had a committee appointed to find out what sort of an arrangement

they could get from ASCAP. The general understanding was, of course, they would report to the members anything that they might be able to recommend or anything they might be able to get, and put it up to each individual station to accept or reject according to their own desires.

Mr. Hotz: That is all.
Witness excused.

[fol. 693] OFFERS IN EVIDENCE

Mr. Hotz: Offer in evidence defendants' Exhibit Number 55 as part of our direct examination of Mr. Gillin, being telegrams passing between WOW and the American Society of Composers, Authors and Publishers, and which were referred to a number of times by Mr. Mills and Mr. Gillin.

Mr. Frohlich: Give the dates of those telegrams.

Mr. Hotz: December 30, 1935, signed by the American Society, addressed to WOW (reading); another one dated Jannuary 10, 1936 (reading); answered by radio station WOW (reading).

We offer in evidence a certificate signed by Mr. Hoyt, Clerk of the United States District Court, showing the number of cases and the disposition of them by the complainant American Society on the dockets of the Grand Island Division, and a similar one from the Lincoln Division, and a similar one from the Norfolk Division, and similar ones from the Omaha Division, duly certified as of the 6th day of August, 1937, by Mr. R. C. Hoyt, by his deputy, with the seal of the Court attached.

Mr. Frohlich: I have prepared here, your Honors, a document which is more complete than this one, because [fol. 694] I have gone back to 1925, and I have every single suit brought in the State of Nebraska by ASCAP. It includes the information in Mr. Hotz' document, but has additional information about what happened in each instance.

The Court: Is it certified?

Mr. Frohlich: It is my own document and we prepared it. I don't question his exhibit, but I am willing to consent to it if we can have all the facts before the Court.

The Court: You want to object?

Mr. Frohlich: I will have to make a technical objection unless we can put in my document.

Mr. Hotz: The only objection would be I don't want to further encumber the record.

Mr. Frohlich: I don't want to put Mr. Blazer on the stand.

Mr. Hotz: This document which I have is certified by the Court and shows the title of the case and the case number, the date filed and the disposition, and the case dismissed by order of the Court, and whatever other final entry was made in those cases, duly certified by the Clerk, and that is all I am interested in.

Mr. Frohlich: It doesn't tell the whole story.

The Court: He states his record shows what happened [fol. 695] in each of the cases.

Mr. Frohlich: Up to the point it left this court room. Mine shows what happened after it left this Court. Just to put in a list of suits that show judgments running in substantial amounts would make it appear as if the Society were bringing suits for the purpose of securing substantial damages, and which is not a fact, and I can prove it here by Mr. Blazer or by this list, which shows, in spite of the judgments, we settled for the actual costs of the suit, and we didn't go out and collect three or four hundred dollars from these poor devils, and we never did it. I think this will save time, but mine is an accurate list.

Mr. Hotz: I don't know anything about what happened after the case left the Court.

I will offer in evidence defendants' Exhibit Number 56.

Mr. Frohlich: May I object to it, your Honor?

The Court: Overruled.

Mr. Hotz: I believe that there was a counter showing made and filed with the Clerk by the defendants in this case under date of August 14, 1937, and that was a counter [fol. 696] showing made at the time of the application for the temporary injunction, and I am not so sure from the standpoint of procedure of two things: One, whether or not already being on file whether it would be a part of the record in the main case or not, or whether it has to be re-introduced or whether I am entitled to have it. My opinion is that it is part of the record in this case, and it is proper, and that I have a right to use it for whatever use we may desire to make of it, of re-introducing at this time the counter showing made on the temporary injunction.

The Court: Unless you stipulate to try the case on the merits by affidavit that it is a part of the record for the trial of this case on the merits. That was addressed to the temporary injunction.

Mr. Frohlich: I object, your Honors, to the introduction of any such affidavits on the ground that they are hearsay statements of people who were not subject to cross-examination, and not properly a trial on the merits.

The Court: Objection sustained.

Mr. Hotz: I will offer in evidence defendants' Exhibit number 57 which is the counter showing of the defendants [fol. 697] filed in this Court on August 14, 1937 in the hearing on the temporary injunction, offered by the defendants as part of their defense in this case.

Mr. Frohlich: I object to the introduction of the document on the ground of hearsay statements, the statements of people who are not brought into court and subjected to cross examination, and as self-serving, and they are not part of the hearing upon the merits.

The Court: Objection sustained.

Mr. Frohlich: Would you be willing to state into the record that the American Society of Composers, Authors and Publishers have never filed their articles of association, that is, the articles of association that are here before this Court, with the Secretary of State or any other officer in the State of Nebraska at any time.

Mr. Hotz: I object to that as it is wholly irrelevant, immaterial and incompetent, and has no bearing on the issues here.

Mr. Frohlich: He stated he would be willing to waive proof through the Secretary of State's office, and so forth, but I think it is material, and that they never filed anything with the Secretary of the State or any other official.

Mr. Hotz: It is incompetent, irrelevant and immaterial. [fol. 698] The Court: It is not a question whether it is pertinent or not, but it is a question whether you require them to produce primary proof of that fact, or whether you want to waive that and state you haven't it.

Mr. Hotz: I will state for the record I haven't, but I also urge that the question whether I have or haven't is not competent or relevant to this record.

The Court: It is in the record.

Mr. Hotz: Defendants offer in evidence defendants' Ex-

hibit Number 58, which is the interrogatories and the answers and objections to the answers, and the exhibits, of Walter S. Fischer, president of Carl Fischer, Inc.

Mr. Frohlich: There is no objection to that, with the understanding your Honors will make a ruling.

The Court: It will be received subject to the objection.

Mr. Hotz: Defendants offer in evidence defendants' Exhibit Number 59, which is the interrogatories and answers, and objections and exhibits of Saul Bornstein, treasurer.

Mr. Frohlich: There is no objection.

[fol. 699] Mr. Hotz: Offer in evidence defendants' Exhibit Number 60, which is the interrogatories and answers, and objections and exhibits, of Gene Buck.

Mr. Frohlich: There is no objection.

The Court: It may be received.

Mr. Hotz: Offer in evidence defendants' Exhibit Number 61, which is the interrogatories, answers, objections and exhibits of Gustave Schirmer, secretary of Schirmer, Inc.

Mr. Frohlich: There is no objection.

The Court: It may be received.

Mr. Hotz: The defendants rest.

[fol. 700] Eugene N. Blazer, was called as a witness in rebuttal on behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. What is your full name?

A. Eugene N. Blazer.

Q. Where do you reside?

A. Omaha.

Q. Are you a member of the bar of the State of Nebraska?

A. I am.

Q. And have been for many years?

A. Twenty-five.

Q. And admitted to all the Courts in this state?

A. Yes, sir.

Q. And for upwards of twenty-five years have you represented the American Society in the seeking out of infringe-

ment and making contracts for the public performance for rights in the State of Nebraska?

A. I believe since 1920.

Q. And in that capacity have you brought suits for infringement against those persons in the State of Nebraska who publicly perform for profit the works of the members of the Society?

A. Yes, sir.

[fol. 701] Q. Now, I show you this schedule and ask you whether you at my request prepared this schedule of the suits brought in this state since 1925?

A. Yes, sir.

Q. Does that schedule truly and accurately represent, so far as you have been able to ascertain, the title of each suit brought by you in this state?

A. Yes, sir.

Q. In the Federal Courts, of course?

A. Yes, sir.

Q. Does it also truly and accurately represent the final disposition that was made in every instance of every suit brought in this state?

A. I believe so, according to my records; this was taken from my records.

Q. And in the usual course of business in your office?

A. Yes, sir.

Mr. Frohlich: I offer in evidence plaintiffs' Exhibit Number 62.

Mr. Hotz: May I ask the witness if it takes note of the disposition that was made between yourself and the defendants in those respective cases?

The Witness: Yes, Mr. Hotz, you will note at the end under the heading of "Remarks" it shows it.

[fol. 702] Mr. Hotz: Well, I have no objection to that. I might use that some place along the line.

Mr. Frohlich: That is all.

Cross-examination.

By Mr. Hotz:

Q. You work for ASCAP aside from handling infringement cases, you represent the Society in the collection of the license fees for the public performance rights of the Society in the State of Nebraska, is that right?

A. That is true, with the exception of radio broadcasting.

Q. And they go directly into New York for that?

A. Yes, sir, they go directly into New York.

Q. And do you maintain an office in the City of Omaha?

A. As a lawyer, I do.

Q. But you don't have any office that is designated ASCAP?

A. I don't think there is any designation on my door.

Q. But there is on the letters you send out; when you write letters, you write them out on stationery of the American Society of Composers, Authors and Publishers, signed by yourself as Eugene Blazer? How do you usually sign?

A. Counsel.

Q. You do have such stationery and that is the stationery you use ordinarily?

A. That is right.

Q. Throughout the state?

[fol. 703] A. That is right.

Q. Do you maintain an office force, that is, some people as your assistants to aid and help you in this work in the State of Nebraska?

A. One.

Q. Who is that?

A. Mr. Gibbs.

Q. And part of your duty is, if you have a controversy, for example, with a dance hall or user of music out in the state, either you or Mr. Gibbs go out and discuss the matter of their license fee, and make an arrangement, if you can, and enter into a contract and collect that fee, is that right?

A. Well, we attempt to contact him. If we think he is not using our copyrighted music, we don't want him; assuming that he is using our music, or expects to, yes.

Q. You go out in the state and talk with him about it?

A. I don't go out very often. Mr. Gibbs usually goes.

Q. You used to when you were young, is that right?

A. True.

Q. And you carry on your negotiations in the establishment of that individual wherever it happens to be, and make a deal if you can, and he signs the contract, and that is all there is to it, except fulfillment of the contract, except payment?

A. It is too broad and general a question, but I will answer it. We attempt to negotiate the license if we have

[fol. 704] reason to believe that the gentleman to whom we are addressing ourselves is using or expects to use copyrighted works of our members, and according generally to a schedule of rates of the Society, and we negotiate in those cases, except some rare instances such as leading hotels.

Q. The group of exhibits here, Exhibit Number 16, contain 391 copies, and all, or substantially all, contain your signature, do they not?

A. Without examination, I would say the vast majority do—"American Society of Composers, Authors and Publishers, by Eugene N. Blazer."

Q. As agent and attorney in fact?

A. That is right.

Q. And you are authorized, I presume, by the Society to so sign?

A. I don't remember exactly when the authority was given, but I have been doing it.

Q. They have been recognizing it?

A. They have been recognizing it.

Q. Is the American Society contributing in any way to your office expense?

The Court: That doesn't seem to be cross examination. He has been asked very few questions with reference to these particular cases.

Mr. Hotz: That is all.

Mr. Frohlich: That is all.

Witness excused.

[fol. 705] Mr. Frohlich: The complainants rest.

Mr. Hotz: The defendants rest.

The Court: There is certain data you were calling for from the witness Gillin.

Mr. Hotz: There is to be read into the record the number of radios shown by the records of WOW, that is, privately used sets in the State of Nebraska.

Mr. Frohlich: And also the SESAC contract.

Mr. Hotz: And we ask leave to substitute the photostatic copy of the SESAC contract.

Mr. Frohlich: No objection.

(Whereupon an adjournment was taken until 9:30 o'clock A. M., Thursday, September 21, 1939.)

[fol. 706] (At 9:30 o'clock A. M., Thursday, September 21, 1939, Court convened pursuant to adjournment, all parties present as heretofore, and the following proceedings were had, done and entered of record, to-wit:)

Mr. Frohlich: Your Honors, before proceeding with the argument, Mr. Gillin, one of the witnesses on the stand yesterday, sent me a photostatic copy of the SESAC contract, which I would like to offer in evidence as plaintiffs' Exhibit Number 64.

Mr. Hotz: Also WOW has furnished the number of radios in the State of Nebraska in the homes, exclusive of radios in automobiles.

The Court: By consent of the parties, both exhibits will be received.

[fol. 707] IN UNITED DISTRICT COURT, DISTRICT OF NEBRASKA, LINCOLN DIVISION

[Title omitted]

DEPOSITIONS FOR PLAINTIFFS

[fol. 708] Testimony of Witnesses, pursuant to a notice dated December 13, 1937, and all subsequent stipulations thereto, held at the offices of Messrs. Schwartz & Frohlich, No. 1450 Broadway, Borough of Manhattan, City of New York, New York, beginning on May 23, 1938, at 11 o'clock a. m.

APPEARANCES:

For the Plaintiffs: Messrs. Schwartz & Frohlich, by Louis D. Frohlich, Esq., Herman Finkelstein, Esq., and Jack M. Nitzburg, Esq., of counsel.

[fol. 709] For the Defendants: Barley C. Nye, Esq., Attorney General of the State of Nebraska; William J. Hotz, Esq., and Andrew C. Bennett, Esq., of counsel.

STIPULATION RE DEPOSITIONS

It Is Stipulated that the witnesses whose depositions will be taken herein need not return to sign any oath affirming the truth or falsity of the statements contains in said depositions;

It Is Further Stipulated that the defendants do severally object to the materiality of each and all of the questions asked any witnesses in these depositions by the plaintiffs and as to the materiality of each and all of the exhibits offered by the plaintiffs; and it is further stipulated that the plaintiffs object to the materiality of each and every question asked by the defendants on cross-examination of each and all of the witnesses whose testimony is taken in these depositions;

It Is Further Stipulated that the objections made by the defendants to each and all of the depositions shall be deemed to be an objection made for and on behalf of each of the [fol. 710] defendants separately, the same as though separately stated by counsel for each of them; and it is further stipulated that the objections made by the plaintiffs to each and all of the depositions shall be deemed to be an objection made for and on behalf of each of the plaintiffs separately, the same as though separately stated by counsel for each of them;

It is further stipulated that the plaintiffs will produce Mr. John G. Paine, Mr. E. Claude Mills and Mr. Gene Buck upon the trial of this case in Nebraska, who will bring with them and have available all of the relevant and appropriate records of the American Society of Composers, Authors and Publishers for use on the trial.

It is further stipulated that the taking of the depositions in Los Angeles, California, fixed by previous notice and stipulations for June 6, 1938, be continued until June 15, 1938, at the same place at the hour of ten o'clock a. m., and that the date of filing of said depositions be extended ten days accordingly.

[fol. 711] DEPOSITION OF SIGMUND SPAETH

[fol. 712] SIGMUND SPAETH, called as a witness on behalf of the plaintiffs, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. Doctor Spaeth, what is your full name and address?

A. Sigmund Spaeth; business address, 220 West 42nd Street, New York; home address, Westport, Connecticut.

Q. What is your occupation?

A. I have the title of "tune detective" on the radio. In a way, that describes my activities. I have used the researches, studies and analyses of music that I have made all my life for entertainment through broadcasts, through lectures, through other forms of educational entertainment, through motion pictures. I have written over a dozen books popularizing music. I have written a number of magazine articles. I have taught music, especially in the University of Hawaii, Honolulu. In fact, my activities all having to do with music, the analysis of music, the popularization of music, and to a certain extent I have composed music and written words for music.

Q. Can you give us the names of the books you have written?

A. Well, the best known book is perhaps "The Art of [fol. 713] Enjoying Music." That is used as a text book in over fifty schools and colleges. My book, "Behind the World's Best Music," that is used by commentators on the radio. I have written, "Great Symphonies, How to Remember and Recognize Them," in which I set words to the best symphonies. I also wrote a book called "The Common Sense of Music," which was the first attempt to make music intelligible to the layman.

Q. When was that written?

A. 1924.

Q. Are you a member of the American Society of Composers, Authors and Publishers?

A. Yes.

Q. When did you become a member of that Society, about?

A. So far as I remember the date, it was about 1922; it was before 1930. I haven't my contract; they would have a record of the exact date. I would say 1922 or earlier.

Q. Had you prior to your joining the Society written musical compositions or words of musical compositions?

A. Yes, I had done that sort of thing during almost my entire life, certainly since I am in New York, which is 1912, and before that in college, and while teaching at Princeton University; I have always been fairly active in the creation, arrangement and adaptation of music of all sorts.

[fol. 714] Q. Can you give us the names of some of the pieces you have written?

A. Yes. My membership in ASCAP is based chiefly on my lyrics. As a writer of words I have written words of the song, "Down South", which has been very popular and had, I believe, a number of performances on the air. It was recorded in 1906. I wrote the words for a song by Franz Lehar called "My Little Nest;" the full name is "My Little Nest of Heavenly Blue." That was performed on the air.

I wrote the words for a song called "Chansonette," with music by Rudolf Friml. That song had considerable popularity and appeared recently as "The Donkey's Serenade," although my lyrics do not appear there.

There was a song called "The Madrigal of May," a song used by John Barrymore in his production of "The Jest", for which I wrote the words.

I have written various other lyrics, and among my compositions is a setting of humorous poems, "Jabberwocky," a nonsense poem, which I set to music, published by Shirmer. I have published several other choral numbers, chiefly for male voices.

Q. Had you written any of those pieces you have just mentioner, prior to 1914, or prior to 1922 when you joined the Society?

[fol. 715] A. None of those which I have just mentioned, no, but I had written—yes, some of them had been published before I joined the Society. I had written the lyrics which I spoke of, they had been written before the time. I had written various college songs, some of which have since been published. One song appears now in the Haverford College Song Book, called "Haverford Harmony." I used a similar tune in a "Song of Kiwanis". I was National Chairman of Music for two years. That is an organization similar to Rotary. I was editor of the Kiwanis Song Book.

Q. Are you a citizen of the United States?

A. Yes, by birth.

Q. By birth?

A. Yes, born in Philadelphia, Pennsylvania.

Q. Prior to the time that you became a member of the Society, had you ever received any compensation for the performance rights in any of the works that you had written or composed?

A. No, none whatever.

Q. When for the first time did you receive any compensation for your performance rights?

A. At the end of the first year, or at the end of the first quarter I got the membership in ASCAP.

Q. So far as you remember that was about 1922?

[fol. 716] A. Yes. It might have been a year earlier. It was shortly after I joined the staff of the American Piano Company, which was in 1920, because I know that one of the songs which made my membership possible was "Chansonette".

Q. Prior to the time you joined the Society had you ever made any effort to ascertain whether any of the works written by you had been publicly performed for profit?

A. I had no way of checking up. I simply assumed that it would be a hopeless task, and I never made any definite effort to get any return from those works. Of course, the works that were published finally—when I say finally, I mean works of the more commercial type than the ones I had written at college—when those were published, I received royalties on sheet music; but I received no returns until I joined ASCAP.

Q. Did you receive royalties on mechanical reproductions of your compositions?

A. Yes.

Q. From whom did you receive those?

A. Mostly from the firm of E. B. Marks Music Company. They published most of my works. Some came from Shirmer and some from Boston Music Company.

Q. Have the copyrights on any of your works been renewed?

[fol. 717] A. No; they were most of them written within twenty years.

Q. When these works come up for renewal will they be renewed by you in your name, if you are alive?

A. I presume so.

Q. Have these works a value for renewal purposes?

A. Yes.

Q. Are you in a position to demand advance royalties for the renewal of your works at that time?

A. That depends on the value of those works in the eyes of their publishers. I would be inclined to try to get an advance royalty if I could.

Q. Taking all the works you have written and composed over the years; assuming they are to be renewed some day after the 28 years original copyright had expired, would

you say that these renewals have a substantial value to you?

A. Yes.

Q. Can you state for the record what you think they are worth?

A. That is hard to say. Two or three of the songs for which I wrote the words have had a very heavy sale. They have become standard. Take "Down South", it was the theme song of the "Show Boat". It is constantly on the air. It is very popular. I think that song will be very [fol. 718] popular because the tune goes back to 1890. I was asked to write a modern lyric around 1920 to bring it back to popularity; and that occurred, because that song was very popular; therefore I have drawn sheet music royalties on that lyric and I expect that copyright to be renewed and to continue to draw on it.

Similarly, the song of Franz Lehar, a great composer; that song has great value. It was played as a violin solo by Kreisler. Those two numbers have a great value. In addition to which I have several collections of old songs, the best one of which is "Read 'Em and Weep," "The Songs You Forgot to Remember." Those collections are used as text books, and they have been used as material on the radio. Many of those songs are available only in my books.

I expect to keep those copyrights under my control permanently.

Q. What would you say was the value of a song like "Chansonette", to you?

A. That is not a good example, because "Chansonette" as a song has practically ended its life through being turned into "Donkey's Serenade". I only wrote the words. I have no interest in the present words, although the motion picture company paid me something for the right to use the [fol. 719] song. Therefore, eliminate that lyric. But "Down South" had a very definite value.

Q. What value would you say it had for renewal?

A. If I were asking for an advance of royalty on that I would ask for perhaps $500. It is pretty hard to judge those things.

Q. What would you expect to take in by way of royalty during the additional twenty-eight year period of that renewal?

A. That would be very difficult to say. The actual sheet

music royalties, records and mechanical reproductions on a song don't approach the real value of the performing rights. The performing rights of a song like that are very much more valuable to me.

Q. What would you say would be the value to you for the renewal period?

A. It would be very difficult for me to say.

Q. Can you give me some estimate?

A. I would say perhaps two thousand dollars, maybe more.

Q. What would be the value of the Franz Lehar work?

A. I would say the same.

Q. "The Madrigal of May," what would be the value of that for the renewal period, for performing rights and everything else?

[fol. 720] A. That would be perhaps somewhat less, because it has never been performed.

Q. What would be the value of the "Jabberwocky"?

A. That would be impossible to estimate. It is a setting for male chorus. Its performing rights and other rights would be perhaps as much as the other. I am not inclined to be overoptimistic of these things. I am judging from the returns I have had in the past. I am not, of course, a song writer in the sense that Irving Berlin is, but I have had my returns. My returns through ASCAP have always been in excess of my returns from publishing.

Q. When you wrote your songs as a rule you entered into a contract with publishers?

A. Yes.

Q. Under that contract does the publisher agree to pay you royalties?

A. Yes.

Q. On the sale of the sheet music?

A. Yes.

Q. And on mechanical reproductions?

A. Yes.

Q. There are provisions in your contract for performing rights, are there?

A. None whatever.

[fol. 721] Q. Now, did ever any user of that music, any hotel or restaurant or any night club or motion picture company or any motion picture exhibitor or any radio station, apply to you for the right to have a license to publicly per-

form for profit any of the musical compositions that you published prior to your joining up with the Society?

A. No. I think that my works were used fairly often without any permission; but radio was in its very early days then so radio wouldn't have been interested.

Q. Have you a wide knowledge of the music profession?

A. Yes.

Q. Are you familiar with the people in it?

A. Yes.

Q. You know something of the customs and usages of the business?

A. Yes.

Mr. Nye: What are we going to do about objections? I want the record to show that the parties stipulate that either side may make such objections to the testimony as they wish at the time it is read in evidence.

(Discussion off the record.)

Mr. Nye: I want to object as to the materiality of all of the questions and also object to all questions and answers [fol. 722] pertaining to the value of renewal of copyrights as highly speculative, for the reason there is no foundation for the opinion of the witness on this point.

Q. Now, Dr. Spaeth, can you tell us what you received by way of royalties from the American Society of Composers, Authors and Publishers for each year that you were a member of that Society since 1922?

A. My first classification, which I assume was a rather low one, paid me annually royalties of $80, and I paid $10 a year out of that, so that my net return for a good many years, for more years than I want to think back on, but it was several years before I got out of that $80 class. That has gradually been raised, and then I received the princely sum of $400 a year.

Q. What did you get by way of royalties per year from "Chansonette," from the sale of sheet music?

A. Those royalties were never very large; I can't tell the exact amount, but comparatively small amounts.

Q. What would you call a comparatively small amount?

A. Perhaps from twenty to forty dollars a year.

Q. What did you get from "The Madrigal of May"?

A. Even less.

Q. "Jabberwocky"?

[fol. 723] A. Less than fifteen dollars a year from both those.

Q. What did you get from your collection of choral works?

A. Those chorals, they have all run about the same thing. My sheet music royalties, the aggregate has never been very large. The entire total would represent perhaps a few hundred dollars a year, say; certainly not enough to live on. My best return was from "Down South".

Q. What did you get from that?

A. Pretty close to a hundred dollars a year.

Q. For how many years?

A. Ever since about 1920.

Q. What would be the total of your royalties from sheet music each year?

A. I don't think that any year I have drawn sheet music royalties of over $300, or perhaps $400 a year.

Q. Would that be an average?

A. The average would be no more than $300, perhaps $250.

Q. What would you say would be an average? Strike an average if you can.

A. $250 a year.

Q. Do you get anything for mechanical rights on any of your compositions?

A. I included my mechanical rights in that. My royal-
[fol. 724] ties statements from my publishers since 1920 have not averaged more than $250 a year, including mechanicals. My share of the mechanicals is 33 and one-third per cent.

Q. Did you get as much as $250 each year for the period that you have been publishing music?

A. No. My most recent royalty statement, which is the one which is freshest in my memory, was a little more than $50; that was from Marks; Marks has most of my publications; I have very little from anybody except Marks; so that by this last statement of fifty some odd dollars I feel that $250 average during the year is fairly liberal. There have been years where it ran more than that, $300 to $400.

Q. Has there been any diminution of the returns to the writers from the sales of sheet music, if you know?

Mr. Nye: I object to that; no foundation for the witness's knowledge.

A. I would speak from my own experience, so far as I am concerned.

Q. That is not an answer. Are you acquainted with song writers?

A. Yes, with a good many of them.

Q. Do you also know publishers?

A. Yes.

[fol. 725] Q. Do you know Irving Berlin, Inc.?

A. Yes.

Q. Do you know the members of Carl Fischer, Inc.?

A. Yes.

Q. And G. Schirmer, Inc.?

A. Yes.

Q. E. B. Marks?

A. Yes.

Q. Harms?

A. Yes.

Q. Do you know any other publishers?

A. Yes, I know J. Fischer & Brother; the Boston Music Company; Shapiro, Bernstein & Co.; Feist; Robbins; I know executives and others in all of those firms.

Q. Do you know of your own knowledge whether there has been a diminution of royalties received by these publishers from the sale of sheet music since 1922?

Mr. Nye: I object to that as calling for a conclusion.

A. Yes, I do know. I do know that there has been a steady and very definite diminution.

Mr. Nye: I object to the answer, except the word "Yes," as not responsive.

Q. Do you know what that has been due to?

[fol. 726] Mr. Nye: I object to it for the reason it is immaterial, and also no foundation.

A. Yes.

Q. What has it been due to?

Mr. Nye: I object to it as speculative, no foundation.

A. It has been due to the gradual encroachment, first the phonograph and later the radio, which interfere very strongly with the sale of sheet music, by taking the place of sheet music in the home.

Q. Has that di*nim*ution been very substantial?

Mr. Nye: That is objected to as calling for a conclusion, speculative, no foundation.

A. Yes.

Q. Have you seen any diminution in the royalties that you received from your own compositions in the past sixteen years?

A. Yes.

Q. Has that diminution been marked, substantial?

A. Yes.

Mr. Nye: Give me an objection as to the materiality on all of that.

Q. Which of your songs in the last two or three years has been played on the radio to any extent?

[fol. 727] A. "Down South."

Q. When was that played on the radio?

A. I couldn't give the last time, but I was told I received——

Mr. Nye: I object to that as not responsive.

Q. Finish your answer.

A. When I say I was told, I received a written record from my publisher of the figures for 1936, which is the last year on which complete figures are available, and the complete figures——

Mr. Nye: I object to that as not responsive and not the best evidence.

Mr. Frohlich: Let him finish his answer.

Mr. Nye: I withdraw that.

A. (continued) The figures given me by my publisher on "Down South" show it has been played on the air over five thousand times during 1936.

Q. How many copies of the sheet music were sold during 1936 of that song?

Mr. Nye: I object to that as immaterial.

A. I couldn't give you the exact figures; certainly not more than two thousand.

Mr. Nye: You mean two thousand pieces?

The Witness: Two thousand copies of sheet music, cer-

[fol. 728] tainly not more, and probably less.

Mr. Nye: The one piece, "Down South," you are talking about?

The Witness: Yes.

Q. Did you find that the figures of performing over the radio had any effect at all upon the sale of sheet music of your composition?

Mr. Nye: Objected to as speculative, no foundation having been laid.

A. Yes; the figures prove it quite definitely.

Mr. Nye: I move to strike out the answer as a conclusion and not a statement of fact.

Q. Is the sale of sheet music stimulated or retarded by the broadcasting of the composition?

Mr. Nye: Same objection.

A. Definitely retarded.

Q. You said the figures have proved that. Have you some figures?

Mr. Nye: Objected to as immaterial.

A. My royalty statements have consistently shown a smaller sale of sheet music as compared with a larger distribution through radio. The biggest year in radio, 1936, was my smallest in sheet music royalties up to that time. It has been still smaller since that time.

[fol. 729] Q. Now suppose, Doctor, that you were acting alone and independently of a substantial number of other composers or writers, would you be able to determine and fix the price to be charged for the use or rendition of your copyrighted musical compositions within the State of Nebraska?

Mr. Nye: I object to that as calling for the conclusion of the witness, no proper foundation laid, and speculative.

A. I would have no way of judging or fixing such price.

Q. If you were to fix the price of a composition for the public performance for profit, what would you have to take into consideration, in the State of Nebraska?

Mr. Nye: Objected to as calling for the conclusion of the witness, not the proper form of hypothetical question; no foundation.

A. I would be guided by the possible interference with my local sales of sheet music and mechanicals.

Q. What would you have to take into consideration, to fix the price for public performance for profit?

Mr. Nye: Same objection.

A. If I had to fix such a price I would be inclined to price it in accordance with the profit that I thought the user was making and I would try to charge him just as [fol. 730] much as I could reasonably in accordance with his business.

Q. Would you have to take into consideration the nature of the use?

Mr. Nye: Same objection to all these questions.

A. Yes.

Q. Would you have to take into consideration the establishment at which the composition would be performed?

A. Yes.

Q. Would you have to take into consideration the size of the orchestra or the nature of the artist or singer who performed the composition?

A. Yes.

Q. Would you have to take into consideration the size of the establishment and the business that it does?

A. Yes.

Mr. Nye: I also object to all these questions as extremely leading.

Q. Tell me all of the factors that you would take into consideration if you were to fix and determine the price to be charged for the public performance for profit of one of your compositions?

A. I would take into consideration the profit likely to be made by the user, the size and importance of the estab- [fol. 731] lishment concerned, the elaborateness or complicity of the production, the size of the potential audience, and lastly, the possible effect upon my own returns in other ways from that same territory.

Q. Would you have to do that, Doctor, with respect to each and every place in the State of Nebraska, which would use your composition for public performance for profit?

A. Yes.

Q. Are you in a position financially to make investigations in the State of Nebraska with respect to the establishments of the various users of music in that State?

A. No.

Q. Are you able to employ investigators within the State of Nebraska for the purpose of eliciting that information?

Mr. Nye: Objected to as immaterial and calling for the conclusion of the witness.

A. No.

Q. Are you in a position financially or otherwise to employ investigators for the purpose of detecting infringements of your compositions within the State of Nebraska?

Mr. Nye: Same objection.

A. No.

[fol. 732] Q. Are you in a position financially or otherwise to engage lawyers to bring suits to protect you against infringements in the State of Nebraska?

Mr. Nye: Same objection.

A. No.

Q. Have you ever been in the State of Nebraska?

A. Yes.

Q. Have you ever heard any of your compositions played in the State of Nebraska?

A. I have played them myself.

Q. Have you heard others play them?

A. No, I can't say that I have, but I have numerous times played my compositions at the Ad-Sell Club in Omaha. I appeared at a night club there where they were doing one of my songs.

Q. Would you be able to fix a price to be charged for the public performance for profit, at the time your compositions are published?

Mr. Nye: Objected to as immaterial and speculative.

A. It would be impossible to fix it in general; it would have to be specially fixed for each performance.

Q. So that if you publish a composition, at the time the composition is published and sold in the State of Nebraska, [fol. 733] would you have any way at that time to put on that composition the price to be charged for the public per-

formance for profit of that composition in the State of Nebraska?

A. No, I couldn't put such price on it.

Q. When you publish a piece, who does the publishing and selling, you or the publisher?

A. The publisher.

Q. Have you given any of your publishers at any time on any of the compositions that you have published, the right to fix a price for the public performance for profit of your compositions within the State of Nebraska?

Mr. Nye: I object to that as not the best evidence.

A. The answer is no.

Mr. Nye: Add to that an objection as to materiality.

Q. Have you ever received any royalties from any of your publishers on any of your compositions, for the public performance for profit of any of your compositions?

Mr. Nye: I object to that as immaterial.

A. I don't remember receiving any. The only royalties which would come under the head of mechanical. That is off the record.

[fol. 734] Q. Do you wish to retain to yourself the right of public performance for profit in any of your musical compositions at the time that they will be renewed, when the original term of copyright expires?

Mr. Nye: That is objected to as immaterial, calling for a conclusion of the witness, and speculation.

A. I always expect to control the performing rights to my compositions either personally or through such an organization as ASCAP.

Q. Would you allow your publisher to fix the price for public performance for profit on any of your renewal copyrights?

Mr. Nye: Objected to as calling for a conclusion and speculative.

A. I would not allow that.

Q. Would it be to your advantage to control the price for the public performance for profit of any of your musical compositions at a future date?

Mr. Nye: I object to that as calling for a conclusion, speculation, and immaterial.

Q. Apart from the sale of sheet music?

Mr. Nye: Same objection.

A. Would it be to my advantage to control the price for [fol. 735] public performance for profit?

Q. Yes.

A. It would be, but I can't conceive such a possibility.

Q. Supposing such a possibility and there were no Society and you were acting as an individual, would it be to your advantage to control in the future, apart from the sale of sheet music, the public performance for profit of your respective compositions?

Mr. Nye: Same objection, and also it is in improper form for a hypothetical question.

A. My answer would be, it would be profitable if possible, but I can't conceive of the possibility.

Mr. Nye: I move to strike out the answer, except the words, "It would be profitable," as not responsive.

Q. Assuming that there were no Society, assuming that you were acting as an individual author, would it be to your advantage if you published your compositions to retain to yourself the right to public performance for profit and to fix a price for that right at a future date?

Mr. Nye: Same objection as to the last question.

A. I would be compelled to fix such a price if I had no other means of protection.

[fol. 736] Mr. Nye: I move to strike out the answer as not responsive.

Q. Will you explain your answer, "It would be profitable if it were possible"?

Mr. Nye: Same objection to that question as to the other two.

A. I mean by that that I cannot conceive of the possibility of carrying out the necessary details and machinery for protecting all or even a substantial part of the public performances of my copyrighted works anywhere.

Mr. Nye: I move to strike out the answer as not responsive, speculative.

Q. Why would it not be possible?

A. Because it has been my experience that no one will ever pay for such a thing as a copyrighted piece of creative art unless the person is forced to do so.

Mr. Nye: Note my objection to the last question as calling for a conclusion and immaterial. I move to strike out the answer for the reason that it is argumentative and not a statement of fact.

Q. Is this your last contract with the Society, Doctor, dated June 28, 1935 (handing paper to the witness)?

A. That is right.

[fol. 737] Q. Is that your signature and the signature of Joe Young, Secretary?

A. That is right.

Mr. Frohlich: I offer it in evidence.

Mr. Nye: I object to it as immaterial.

(The document just offered was received in evidence and marked Plaintiffs' Exhibit No. 1, of this date.)

Q. Assuming that there are 367 users of copyrighted musical compositions in the State of Nebraska, what would you have to do to protect your performing rights in that State, if you were acting alone?

Mr. Nye: I object to that as calling for speculation; no foundation.

A. I would have to check every possible performance of my work by keeping track of all the activities of all of those users, by engaging clerical assistants in the State of Nebraska, or in some such way keeping check.

Q. Would that involve the outlay of money?

A. It would involve the outlay of so much money that I couldn't start to do it.

Mr. Nye: Objected to as immaterial.

Q. How much money do you estimate that would require?

Mr. Nye: Objected to, no proper foundation laid, specu-

[fol. 738] lative.

A. To be done properly it would require the engagement of a clerical assistant at a salary of from two to five thousand dollars a year, plus incidental expenses.

Q. How about a lawyer?

Mr. Nye: Same objection to that question.

A. The necessity of legal services would greatly add to the expense.

Q. How much would you say it would cost?

A. If I retained a lawyer to protect me in the State of Nebraska in addition to retaining a clerical representative in the State, I imagine my total bill per year would run certainly well over $5,000, somewhere between five and ten thousand dollars a year.

Mr. Nye: I move to strike out the answer to both the last questions, as speculative, and not statements of fact.

Q. Are you financially able to make that expenditure?

A. By no means.

Q. Would you be required, if you were acting alone, to have investigators go round from place to place in Nebraska to look out for the performance of your compositions?

Mr. Nye: Objected to as calling for a conclusion.

[fol. 739] A. Yes.

Q. Would these investigators have to go round to practically all the 367 users in Nebraska?

Mr. Nye: Same objection.

A. Yes.

Q. Would they have to go round there frequently?

Mr. Nye: Same objection.

A. Yes.

Q. Have you taken that into consideration in estimating the cost?

A. Probably not.

Q. How much do you think it would cost to make a proper investigation to detect infringement of your compositions in the State of Nebraska and to protect them by infringement suit?

Mr. Nye: Same objection.

A. It would be difficult to estimate the cost of any such action, and such action could hardly be initiated unless I had some representative, some prior representation there. The action would undoubtedly increase the expense and undoubtedly make for a larger return. I would consider that expense in addition to a lawyer to protect my interest, I would consider that in this State an expense which could not now be estimated, depending on the amount of time [fol. 740] spent in the matter and the amount of work required by the report of my local counsel.

Mr. Nye: I move to strike out all the answers as to the speculation of this witness as to the cost of doing business in the State of Nebraska, for the reason that they are not within any knowledge that the witness has.

Q. Are you familiar with the problems of an infringement suit, Doctor Spaeth?

A. Yes.

Q. Have you frequently testified as an expert in infringement suits?

A. Yes.

Q. Have you testified for me?

A. Yes.

Q. Do you know something of the defenses that are put in in those suits?

A. Yes.

Q. Are you familiar with the requisite amount of skill and experience required to try an infringement suit for copyright?

A. Yes.

Q. Do you think you could engage a lawyer in the State of Nebraska to protect your interests, for less than $5,000 [fol. 741] a year?

Mr. Nye: Objected to as calling for a conclusion; matter not within the knowledge of this witness.

A. I have no way of telling that; I was judging by the possible figure for a retainer which would imply no special work; but I am quite aware that any lawyer engaged in actual litigation must charge fees that must average $5,000 or more a year.

Q. Are you in a position to pay that fee?

A. No.

Q. From time to time when your compositions were pub-

lished were rights granted to producers or manufacturers of mechanical records and piano rolls to use your compositions?

Mr. Nye: Objected to as immaterial.

A. So far as I know, no such records were ever made of any of my compositions.

Q. Didn't I understand you to say that some one made some records of one of your compositions?

A. Yes; "Francita's Serenade"; the piece is known by two titles; "Francita" from the title of the operetta by Franz Lehar, in which appeared a serenade whose title as a song—it was originally from the German—was "Blaues [fol. 742] Himmelbett," literally "Heavenly Bed of Blue". The necessities of general, shall *be* say, purity of American publications forced me to change the "Heavenly Bed" to "A Little Nest," and the song came out in this country as "Heavenly Nest of Blue".

Q. Who published that?

A. E. B. Marks.

Q. Did E. B. Marks grant mechanical rights to it?

A. Yes.

Q. Did you receive royalties for the mechanical rights?

A. Yes.

Q. Do you know whether this particular record was by Kreisler?

A. He made that violin record. I am not sure that I shared in that record, because Fischer also made a record by Jeritza; I also shared in that record. My recollection is that of the mechanicals I received no royalty. I know Kreisler did make a record on the music of that piece.

Q. Did you receive royalties from the record made by Jeritza?

A. That song came later, because it was sung by Richard Tauber at several concerts. That was one of the popular songs in his repertoire and he performed it publicly several times.

[fol. 743] Q. Did the manufacturer of the record made by Jeritza have the right to license anyone to publicly perform for profit that composition?

A. No, not so far as I know.

Q. Did you ever give any publisher that right?

Mr. Nye: Objected to as immaterial.

A. No.

Q. Did E. B. Marks ever give that right, so far as you know?

Mr. Nye: Same objection.

A. No.

Q. Have you any control over the manufacture of that record, that Jeritza record, with respect to the public performance for profit?

Mr. Nye: Same objection.

A. Personally I have no control.

Q. Have you any control over the sale of those records?

A. Only through my publishers.

Q. Has your publisher any control over the sale of those records?

A. Presumably the publisher can restrain the manufacturer of the records from using them in any way except as a phonograph record.

Mr. Nye: I want to make an objection to that last ques-
[fol. 744] tion—the subject matter is not within the knowledge of the witness; the matter is fixed by law, as I understand it.

Q. Has the publisher the right to interfere with the sale of the record as a mechanical record?

Mr. Nye: Objected to as calling for a conclusion; matter not within the knowledge of the witness.

A. The publisher could probably interfere with it if he found that the sale was intended for public performance not included in the contract between the record company and the publisher.

Mr. Nye: I move to strike out the answer as not responsive.

Mr. Frohlich: I consent to it.

Q. Forgetting the public performance, has the publisher or have you any control over the sale or disposition of these mechanical records once they are made by the manufacturer of the records?

Mr. Nye: I object to that as calling for a conclusion as to a matter controlled by law.

A. So far as I know, I have no control.

Q. Do you wish to continue your present contract, Exhibit 1, with the Society?

[fol. 745] Mr. Nye: Objected to as immaterial.

A. Yes.

Q. Is the contract now being carried out by the Society and by you?

Mr. Nye: Same objection.

A. Yes.

Q. Have you been receiving royalties from the Society since June 28, 1935, under this contract?

Mr. Nye: I object to that; same objection.

A. Yes.

Q. Do you consider this contract of value to you?

A. I do.

Q. What value do you place on it in dollars and cents?

Mr. Nye: Objected to as calling for speculation of the witness, not a statement of fact.

A. The value at the moment is $400 a year to me.

Q. Is there reasonable likelihood that this contract will be continued upon its expiration?

Mr. Nye: I object to the question as calling for speculation.

A. Yes, there is.

Q. As a matter of fact, since you have joined this Society you have executed a similar contract each five-year period with them?

[fol. 746] A. Yes.

Q. Have you reason to believe that you will continue to execute similar contracts each five years with the Society so long as you live?

A. Yes.

Mr. Nye: Same objection.

Q. Have you reason to believe that your royalties under this contract and the renewals of the contract will continue at the same rate of royalties or possibly a greater rate of royalties?

Mr. Nye: Objected to as calling for speculation by the witness.

A. Yes.

Q. What do you base that hope on?

Mr. Nye: I object to the question as calling for speculation, not a statement of fact.

A. I base that hope on the fact that since the records show that my compositions, my work, has become more and more widely used on the radio and in other ways for entertainment, that the Society will more and more recognize that fact and reward me accordingly so far as reasonably possible.

Mr. Nye: I move to strike out the answer as clearly not responsive, and hypothetical, speculative, not stating any facts.

[fol. 747] Q. Now, if this existing contract between you and the Society, Plaintiffs' Exhibit 1, were cancelled, would you receive any compensation from the Society?

Mr. Nye: I object to that as calling for a conclusion, speculation, and immaterial.

A. I see no reason to think so.

Mr. Nye: I move to strike out the answer as not responsive.

Q. If this contract, Plaintiffs' Exhibit 1, were cancelled, would you receive any compensation from the users in the State of Nebraska for the public performance for profit of any of your compositions?

Mr. Nye: I object to the question as calling for speculation, calling for a conclusion.

A. I would definitely receive no return, unless I found ways of forcing a return. No, I would not.

Mr. Nye: I move to strike out the answer except the word "No".

Q. If this contract, Plaintiffs' Exhibit 1, were cancelled, would you receive any compensation from any other source anywhere for the public performance for profit of your compositions?

Mr. Nye: That is objected to as immaterial; speculative.

[fol. 748] A. No, unless I found ways of turning up each use and spending the necessary funds to secure a return.

Mr. Nye: I move to strike out the answer, all except the word "No", on the ground that it is not responsive.

Q. Have you the funds with which to enforce your rights and to obtain royalties for the use of your compositions for public performance for profit, if this contract, Plaintiffs' Exhibit 1, is cancelled?

Mr. Nye: I object to that as immaterial; having been asked and answered and gone over in detail.

A. No.
Q. Have you some knowledge of the radio business?
A. Yes.
Q. You yourself are a commentator and broadcaster?
A. Yes.
Q. And have been for some years?
A. Almost since the very start of radio.
Q. Do you know whether or not radio stations in the State of Nebraska frequently perform compositions that emanate outside of the State of Nebraska?

Mr. Nye: I object to that; no proper foundation laid.

[fol. 749] A. I do know that.
Q. Will you tell us on what you base that information?

Mr. Nye: Objected to as immaterial.

A. I base that information on my knowledge of net work broadcasting in which I have frequently taken part and in which I know that various stations in the State of Nebraska are active.

Mr. Nye: I move to strike out the answer as stating a conclusion only.

Q. Please define "net work broadcasting", Doctor.

Mr. Nye: I object to that as no foundation having been laid.

A. Net work broadcasting is one which originates at one central station such as in New York and is carried over a number of local stations connected with that station.

Mr. Nye: I move to strike out the answer as a statement of a fact which is clearly not within the knowledge of the witness.

Q. How are these stations connected up?

Mr. Nye: Objected to; no foundation laid; immaterial.

A. I am not a scientific expert, but my feeling is that the local stations——

Mr. Nye: I object to any statement of what his feeling is.

[fol. 750] A. (Continued) My knowledge of broadcasting is that local stations are connected by direct wires with the central station.

Mr. Nye: I move to strike out the answer on the ground that it is a statement of fact not within the knowledge of the witness.

Q. Have you ever yourself broadcast over net work stations?

A. Yes.

Q. What stations?

A. I have been on the NBC on both Red and Blue net works, the National Broadcasting Company; and also Columbia net works, many times.

Q. When you say "NBC", what do you mean by that; what does that stand for?

A. NBC means National Broadcasting Company, which controls two net works, that is to say, two groups of local stations, one of which is known as the Red net works and the other as the Blue. One of these net works originates in the New York station WEAF, and the other in the New York station WJZ.

Mr. Nye: I move to strike out the entire answer, and object to the question on the ground it is wholly immaterial.

[fol. 751] Q. To what parts of the country are these broadcasts which originate in New York City carried by the broadcasting company?

Mr. Nye: Objected to as immaterial; no proper foundation.

A. All over the country.

Q. Are they carried into the State of Nebraska?

Mr. Nye: Same objection.

A. I am certain there are stations in the State of Nebraska that are connected with those stations.

Q. Do you know KOIL in Omaha and Council Bluffs?

Mr. Nye: Objected to as immaterial.

A. Yes.

Q. Do you know WOW in Missouri?

Mr. Nye: Same objection.

A. Yes.

Q. Do you know what net work those two stations are affiliated with?

Mr. Nye: I object to the question as immaterial; no foundation laid.

A. No, I do not.

Q. If these two stations just named were on the National Broadcasting Company net work, would the broadcast performances that emanate from the New York stations of the [fol. 752] National Broadcasting Company be carried over these local stations?

Mr. Nye: I object to that as clearly not within the knowledge of the witness.

A. The answer is Yes, and it is my impression they are quite large stations.

Mr. Nye: I move to strike out the latter part of the answer, from the words, "It is my impression".

Q. Assuming you were acting alone and no longer a member of the Society, and you broadcast one of your compositions outside of the State of Nebraska or you licensed the broadcast of one of your compositions outside of the State of Nebraska at some station, say in New York, would you be willing to have a radio broadcasting station in the State of Nebraska rebroadcast that performance without any payment to you?

Mr. Nye: I object to the question as immaterial, calling for speculation, not a proper hypothetical question.

A. My attitude would be the same as toward the fee for my actual performance, which is always larger if it is given on a net work broadcast than if it is given on a local station alone.

[fol. 753] Mr. Nye: I move to strike out the answer as clearly not responsive.

Q. Are you willing to have a radio broadcast in the State of Nebraska perform one of your compositions without paying you anything therefor, providing such performance comes in from a broadcasting station located outside of the State of Nebraska?

Mr. Nye: I object to that as wholly immaterial; calling for a conclusion.

A. I am not willing to have such broadcast made unless the payment at the source includes payment for local broadcast.

Mr. Nye: I withdraw the objection; let the answer stand.

Q. Were any of your works ever broadcast in foreign countries?

Mr. Nye: Objected to as wholly immaterial.

A. Yes.

Q. Did any of those foreign countries broadcasting your works send the performances into the United States on short wave?

Mr. Nye: I object to that as wholly immaterial; not within the knowledge of the witness.

A. I beg your pardon; I misunderstood your former question. My works have been broadcast to foreign coun-[fol. 754] tries. I have not initiated any broadcast in foreign countries.

Mr. Nye: I move to strike out the voluntary statement of the witness; not responsive to any question.

A. The question was, whether my works had been broadcast in Europe. I misunderstood the question.

Mr. Nye: I move to strike that out also.

Q. Do you transact any business in Nebraska?

Mr. Nye: I object to that as immaterial.

A. Not at the moment.

Q. Have you any agent in Nebraska?

Mr. Nye: Objected to as immaterial.

A. No.

Q. Are you willing to have Nebraska courts take jurisdiction over your property at this time?

Mr. Nye: Objected to as immaterial.

A. No.

Mr. Frohlich: You may examine.

Cross-examination.

By Mr. Hotz:

Q. Doctor, how old are you?

A. I am fifty-three.

Q. You say that the ASCAP is a necessary organization [fol. 755] for you and others similarly situated, do you not?

A. Yes.

Q. Largely in the protection and detection of violations of the copyright act, isn't that true?

A. I would say more than that; for the general protection of the performing rights of my creative works.

Q. The public performance rights. But the Society does fix the public performance licenses, does it not, the organization does fix prices?

Mr. Frohlich: I object to that as incompetent, irrelevant and immaterial.

A. Prices, so far as my individual works, are by no means fixed, since I draw my royalties simply on the classification, the amount of public performances that my works are getting. But I have never had any indication from the Society that an individual price was stipulated for any work of mine nor have I ever been told that the blanket license that is paid by the year by users was in any sense fixed.

Q. Who determines the price of the public performance rights that ASCAP charges the users; who determines it?

A. The executives of ASCAP determine that.

Q. What amount of the copyrighted music of the United States would you say was controlled in that manner by ASCAP?

Mr. Frohlich: I object to that on the ground that this [fol. 756] witness is not qualified; no foundation for that question.

Q. If you know.

A. I have no knowledge of it.

Q. Is it a substantial figure?

A. Yes.

Q. Very substantial?

A. ASCAP includes the majority of the popular composers of standing.

Q. When you receive money from ASCAP you don't receive it on the basis of your compositions that have been used; you receive from them a sum of money which is determined by the classification to which they assign you; isn't that right?

A. That is true, but the classification is assigned on the basis of the frequency of the public performance of my works.

Q. According to whose determination?

A. The determination of a classification committee working with all the statistics available, gathered in multitudinous ways.

Q. Have you attended meetings of the board of directors of ASCAP at any time?

A. I have attended some meetings of the Society and I [fol. 757] have attended a meeting of the classification committee.

Q. Are you on it?

A. I am not a member of the board of directors and therefore never attended them.

Q. Were you, ever?

A. No.

Q. As a member you have nothing to do with the electing of that board of directors?

A. I have my vote.

Q. Did you ever vote?

A. There have been votes every year; there are ballots sent out, so far as I know.

Q. Do you of your own personal recollection remember, of ever having cast a vote for director of the Society?

A. Well, whether for the board of directors or not, I don't know. I know I am a voting member of the Society and have a right to express my opinions and have expressed them before the classification committee and have also expressed them to Mr. Buck, the President.

Q. What sort of things do you remember voting on, as a member of that Society?

A. There have been votes at our annual business meeting, on general questions of policy, and there are frequent votes as to members of committees, and then the classifica-
[fol. 758] tion committee would be appointed, which of course is a very important committee, and committees which would hear any complaints that might come up, or anything of that sort. In other words, if a member of ASCAP ever has any complaint or anything he wishes to bring before the executives it is always easy to do so.

Q. Of course you have a grievance committee of some sort. Did you ever read the articles of association of ASCAP?

A. Yes, I have read them.

Q. What particular thing did you ever vote on as a member of that organization, that you recall; just tell me one thing?

A. I have already answered that question. I said my recollection is I voted at various times on members of committees, like the grievance committee and classification committee.

Q. You mean you elected them?

A. Yes, I think there have been votes on them.

Q. When?

A. I am not familiar enough to say that; I know there are a number of ballots sent out.

Q. You know that the articles of association of ASCAP provide that the directors are elected by themselves; they
[fol. 759] are the ones who elected the directors, the directors themselves; isn't that true?

A. I know that a great deal of machinery of ASCAP has been handled by—I won't say a little group, but a group that could be called the directors, a group in whose hands the Society as a whole has been very glad to leave these important problems. They are able men.

Q. Who are those men; who are the chief men in charge of the ASCAP situation?

Mr. Frohlich: I object to that as characterizing, incompetent, immaterial.

A. I frankly couldn't answer that because I don't know well enough. The men I know personally in ASCAP are men for whom I have the greatest respect and in whom I have the greatest confidence—Gene Buck, Mr. Paine, the general manager, and Mr. Mills; they are my chief con-

tacts; they are the men to whom I write or talk if I have any ideas or suggestions.

Q. Those three men stay here in the City of New York, do they not?

A. Yes; not all the time.

Q. They are the moving spirit largely of the Society, are they not?

Mr. Frohlich: I object to that question on the ground [fol. 760] that it is characterizing, incompetent and immaterial.

A. I would by no means limit myself to those men as being the guiding force of ASCAP. They are the men who I happen to have my contacts with.

Q. Who are the guiding lights of ASCAP, in your mind? I want to get your view on that subject; as a member of that Society I want your views who they are.

A. They are officers and general manager. Mr. Mills was former general manager. They are the three men who are the most important men in ASCAP. There are important men and writers; I know Mr. Deems Taylor; he is a director; Mr. Bernstein, and others.

Q. Mr. Berlin?

A. I know other men but I don't come in contact with them officially.

Q. These men, that is, Buck, Mills and Mr. Paine, those three gentlemen, they devote their sole and exclusive time to the business of ASCAP, do they not?

A. Yes, so far as I know.

Q. Can you give me an idea, based upon the experience that you have had, of about the percentage of the copyrighted music that ASCAP controls, in the manner in which it does its business?

[fol. 761] Mr. Frohlich: I object to the question on the ground it is incompetent, irrelevant and immaterial; no foundation laid for it; the man is not qualified; nothing to do with the case.

A. I don't know the exact percentage.

Q. I didn't ask you the exact percentage; about what percentage?

Mr. Frohlich: Same objection.

A. I would be guessing, and I would rather not guess. I know a rather large percentage of copyrighted music is controlled by ASCAP.

Q. It is more than half of it, wouldn't you say?

Mr. Frohlich: Same objection.

A. I couldn't say.

Q. Do you know where that information could be obtained?

A. Yes.

Q. Where?

A. In the copyright office in Washington.

Q. In the copyright office in Washington, compared with the records of ASCAP; isn't that true?

A. Very true, that is to say, the catalogue of ASCAP, which I imagine is available, could be compared with the full copyright list in Washington, and my guess is that [fol. 762] it would be found that a tremendous number of compositions are copyrighted every year in Washington by non-members of ASCAP.

Q. There is no objection to anyone copyrighting any music they want to mail down to Washington, with two dollars?

A. It is a very small matter to send in an application. There is a great deal of that music available and the composers are very anxious to have their music played on the radio and made available.

Q. As a matter of fact, ASCAP controls, does it not, all the music, substantially all the music that has merit?

Mr. Frohlich: That is objected to on the ground it is improper, incompetent, irrelevant and immaterial, no foundation for it; nothing to show that this witness is qualified to speak on the subject.

A. My answer to that question, from my wide knowledge of music in general, is that ASCAP controls an infinitesimal amount of the music of merit in the world.

Q. I mean the copyrighted music.

A. All music was copyrighted at one time. You have raised the question, by your question, of the available music which is in the public domain; it outnumbers tre- [fol. 763] mendously the amount of material which is controlled by ASCAP,—that I know.

Q. You are speaking now of copyrighted music?

A. All that music was copyrighted originally, but so much of it is now in the public domain that it is available to any radio station or artist,—music in the public domain which includes all the folk music of the world and all the music of Bach, Beethoven, Wagner, Schubert and hundreds of other composers, all of which is available at any time if a user wishes to make use of it.

Q. Those men were all great artists?

A. Those were the greatest, all of greater importance in the history of music than any particular member of ASCAP. If you say the great music of the world you must include the great masters of music in the public domain.

Q. They were undoubtedly happy in the thought that they had contributed greatly to the art of music?

Mr. Frohlich: I object to that; you are arguing with the witness.

A. Most of those composers received very little for the composition of their music. But since most of them are dead for many years, the law says their works are in the public domain and open to the use of anyone who wishes.

Q. In connection with the falling off of sales of sheet [fol. 764] music, did I understand you to say that your particular compositions with your publisher show about two thousand copies a year that they were selling now?

A. Not now; that was at the top.

Q. At the top two thousand copies a year?

A. Yes.

Q. Now it has gone down to what figure?

A. My last royalty statement, as I said under direct examination, was a little over fifty dollars, representing the six months' period.

Q. Translated into number of copies, that is how much?

A. It can be figured out in this way: my share as a writer of the words is one-half, a cent and a half per copy; there is a royalty of three cents per copy divided between the music and the words. On the lyric "Down South", which is my best composition, I have drawn one and a half cents and 33 and one-third from mechanicals; add all that together and also take into consideration that that check of slightly over fifty dollars represents not only "Down South" but several other works, it couldn't possibly have sold more than a few hundred at the outside.

Q. A few hundred?

A. In the last year. My mathematics may not be very good.

[fol. 765] Q. There is no objection to increasing the price of sheet music if the author or composer and publisher wish to do it?

A. No objection except the good old rule of supply and demand. That law still works.

Q. If you get the price up too high it just won't sell?

A. Sheet music has always been priced as high as could reasonably be expected to be collected. The prices of sheet music couldn't be put higher than they have been. The tendency is to lower prices.

Q. If you are receiving $400 a year now from ASCAP for public performance rights and if the public performance rights are included in the price that you and your publisher fix at the time that the music is sold and collected when the music is sold so that you had a public performance price added right in there, you would have no complaint to make whatever about infringement of public performance rights?

Mr. Frohlich: I object to that on the ground that it is speculative; incompetent.

A. My only answer to such a question is, the possibility has never been suggested, and it seems to me entirely inconceivable that a publisher should be able to control public [fol. 766] performance rights or to put a price on it. If you compare the $400 return that I have received in the past year from ASCAP with this 4,000 performances of only one song on the air, and compare that with what I got from sheet music, you will see why I smile.

Q. Have you ever read the Nebraska statute that is in question?

A. I am not sure that I have. I only know in a general way what it is.

Q. What price does your publisher charge for your sheet music when he sells it?

A. Of course, he figures on the basis of a wholesale price.

Q. What is it?

A. Usually about twelve or twelve and a half cents.

Q. Per copy?

A. Yes. It varies, depending on type of music, the sort of piece, whether a production number—that will be sold

at a higher price; a piece of movie music will be sold for more.

Q. If the public performance rights will be included in the sales price and the sales price were arranged by yourself and your publisher high enough to cover a substantial and reasonable income for yourself, then you would have no necessity of an organization such as ASCAP?

[fol. 767] Mr. Frohlich: I object to that question as speculative and assuming a state of facts not in evidence.

A. I think I can answer that by saying that my total returns from sheet music would be zero; it would be nothing. If the price were put up to include anything at all for public performance rights the sale of sheet music would cease automatically.

Q. Where do you assume that the money is coming from that you get from ASCAP?

A. I know very well where.

Q. Where?

A. From the users, of which a very considerable percentage is paid into the treasury, which is divided among those whose works are entitled to recognition.

Q. You don't suppose those people would cease to use music simply because the public performance price was put on the music?

Mr. Frohlich: That is objected to as speculative and calls for the operation of the witness's mind; it is something he does not know about,—asking what users might or might not do; it is incompetent and immaterial.

A. I can answer that question in this way: I believe that [fol. 768] they would automatically cease to use it because they couldn't afford to pay the price which the publisher would want; and the case was very clearly proved when the Warner Brothers with their publishers ceased; rather than pay the prices that Warner expected them to pay, they said, "We would rather not use your music," and no Warner music was used during that entire period; the entire time that Warner was outside of ASCAP the music of Warner was boycotted by the radio stations and all the others using music.

Mr. Hotz: I move to strike out the entire answer as not responsive.

Q. Warner Brothers were assuming a similar position to music that ASCAP did?

A. Yes.

Q. And it became necessary for users of music to have two licenses if they wished to be free from infringement?

A. They didn't have to have two licenses, if they wanted to substitute the Warner license for the ASCAP license. I have heard of no cases where anyone chose the Warner license in place of the ASCAP license. In most cases I found that the user simply refused to deal with Warner. The only exceptions were certain small stations. Warner licenses were so much higher than the comparatively small [fol. 769] charge by ASCAP. Users of music in general refused to do business with any such concern like that which controlled large publishers and several motion picture houses and controlled one of the large motion picture companies.

Q. Do you know of any publishing houses that publish vocal and instrumental music, of any size or consequence, that are not members of ASCAP?

A. Any large publishing houses?

Q. Or are they all in the Society, largely?

A. I am not sure, because there are large publishing houses abroad.

Q. I mean, in the United States.

A. In the United States? I don't know of any, but I might be wrong. My impression is——

Q. All or substantially all are in it?

A. Yes, I think they are all members of ASCAP.

Q. When a man copyrights a piece of music or goes to his publisher and makes a deal with his publisher, does he negotiate? Tell us how this is done.

A. The publisher gets a contract and the composer gets a contract as the creator of the work, which is a written contract. There is a contract known as the regular song writers' contract, which always calls for the payment of royalty on the basis of three cents per copy of sheet music, [fol. 770] to be divided between the writers of the music and the words. Each man gets the same. Recently, with some exceptions, the usual share of the mechanical reproductions is thirty-three and one-third.

Mr. Frolich: Have you completed the answer?

A. (continued) The main thing is, the publisher assumes the expenses of publication and he agrees to bring out the composition and to exploit it and to pay the creator this royalty.

Q. In other words, the creator of music is helpless without a publisher, so far as getting his composition on the market is concerned; is that right?

A. No; I would hardly admit that.

Q. They would have to do their own publishing?

A. Yes. Sometimes——

Q. Irving Berlin——

Mr. Frohlich: Let him answer.

Q. You have answered the question. It is sometimes done. Irving Berlin is a good example of it? Irving Berlin publishes his own compositions?

A. Irving Berlin was first handled by various publishers before he organized his own publishing house. A man is always free to publish his own compositions.

Q. The publisher gets one-half of the money that ASCAP [fol. 771] collects from music users throughout the country, including Nebraska?

A. I don't know the figures, but my impression is that the total receipts for distribution are divided equally between the publisher members and the writer and composer members.

Q. And the bill of complaint says there are about 123 publisher members and they publish a list of them. Those 123 publisher members, then, receive one-half of the net proceeds that come into ASCAP from the State of Nebraska and elsewhere, according to your version; isn't that right?

A. I don't know the details of that; I imagine that is correct, but I am not an officer of ASCAP, and I don't know.

Q. Do you know how many composer members there are in the Society?

A. No, I don't know the exact number.

Q. I want to find out what you know about this Society. What is your best judgment as to the number of members?

A. I know that the Society has its European affiliations.

Q. I am not talking about its European affiliations; I am talking about ASCAP composer members.

A. I haven't checked the total members. I imagine it runs between seven and eight hundred.

[fol. 772] Q. Now, the money, then, that ASCAP takes in is divided between those persons that compose this half or the other, whatever they are; the composer members; and the other half, the 123 publishers?

A. I am not sure that is so. You are asking now questions that I am not in a position to answer at all. I haven't that type of mind. My mind doesn't work about those matters. I know my own problems and what ASCAP means to me. As to the publishers, I can't say.

Q. When Warners pulled out of ASCAP or settled its differences with them, do you know anything about ASCAP's refusal to reduce its fees to compensate the users for the withdrawal by Warner?

A. I don't know the financial details of the situation at all.

Q. Have you ever tried to figure out a plan of collecting your public performance rights at the time that copyrighted music was sold; have you ever put in any time or thought on that subject?

A. I have to be convinced that I could work out any plan.

Q. You never tried it?

A. Yes, I have tried to keep track, for my own personal satisfaction, of the performances that were made, and I frequently get letters from people asking if something of [fol. 773] mine can be performed at a certain place, and if it is a charity where they are not making a profit out of it I have given a permission without bothering ASCAP at all. Another place where they want something where they are making a profit, I said I had no right to do so.

Q. There is no separation of the funds that you derive from the users of copyrighted music, by ASCAP; is that true?

A. Any separation?

Q. No separation of the funds? They don't go out and collect royalties on your music and turn it over to you?

A. No. The beauty——

Q. I am not asking you about the beauty; I am asking what ASCAP does.

A. ASCAP deals with lump sums, which it distributes equitably.

Q. Give us the dates of your copyrighted music.

A. I can't do that off hand.

Q. You can't do that off hand?

A. No. The records are with my publishers, mostly E. B.

Marks. They run roughly from 1920 or a little earlier; some are earlier than that; they run over the last 18 or 20 years.

Q. When is your nearest expiration of copyright that you can give us?

[fol. 774] A. I imagine "Chansonette" would probably be the nearest one for renewal, and that has rather lost its value by being superseded by "The Donkey's Serenade." "Chansonette" you know was something I worked out with Friml in my early days with the American Piano Company. I am not thinking seriously about renewals; they are at least ten years ahead of me.

Q. When you estimated for Mr. Frohlich the value of your copyright, you were merely speculating, were you not, on those figures?

A. I was judging by the average return during the years I have been drawing royalties and the possibility of royalties for the future, and I was naturally somewhat influenced by the confidence that I have in the compositions.

Q. How long have you been getting $400 a year from ASCAP?

A. Only during, I think, the past year, at the outside. I think this is the second year I am on that classification.

Q. It was increased up to $400; it was never cut down?

A. It was never cut down? Yes, I think once my classification was reduced.

Q. What did you say it was before you got $400?

A. I think it was $80 a year.

Q. How long was it $80 a year?

[fol. 775] A. Five or six years, is my impression. I am talking simply from a general recollection. It finally raised, and this final jump to $400 was from 200; from 200 to 400; it was doubled.

Q. Was it increased due to the popularity of your music?

A. It was due particularly to the fact that I was getting more use of my music than ever before.

Q. How do you know?

A. Because I had the figures. I was given the figures by ASCAP—my publishers, I mean, who had gotten them from ASCAP investigators.

Q. How does ASCAP judge that?

A. There are paid people who do that work, paid, I imagine, by ASCAP.

Q. It is largely over the radio, isn't it?

A. Radio is by far the largest user.

Q. Then the present value of your public performing rights is fixed at $400, is that right?

A. That is the way it is estimated by ASCAP at present.

Q. Suppose they decide to pay to you $200 instead of $400, what would you do about it?

A. I would probably object and would have to be shown good and sufficient reason for the change. In fact, once [fol. 776] when I was reduced I objected.

Q. What did you do?

A. I came to the classification committee and stated my grievance.

Q. Suppose it had not complied with your request, what would you have done?

Mr. Frohlich: I object to that as highly speculative.

A. I think I would be free to resign from the Society.

Q. Then you wouldn't have gotten anything.

A. I don't see how I could. I have to trust ASCAP to give me a square deal, and I try to do my part. I trust my publisher the same way. He gives me a split of the royalties; I have no way of checking the figures; he told me he sold 100 copies of "Down South" and I have to accept that.

Q. You have no way of knowing the value of your public performance rights, for instance, next year; there is no way of estimating that?

A. No.

Q. You have no way of estimating nor of figuring in two or three years from now on the balance of the period of your copyright?

A. I have never had any value set upon my public per- [fol. 777] formance rights until I became a member of ASCAP. There was no public performance value in any of my work. Whatever value there is in the future is due to my membership in ASCAP; otherwise it would cost more than it would bring me.

Q. It would depend on the deal that you and your publisher might work out, is that right?

A. My publisher would do nothing about that. My publisher is too concerned with selling sheet music. My publisher has never shown any interest in trying to protect my public performance rights. My publisher knows I am well taken care of by the Society.

Q. In the radio broadcasting from the emanating station here in New York, it comes out to Nebraska, does it not, by wire?

Mr. Frohlich: Objected to; if you state that as a fact we will concede it.

A. That is my impression.

Q. After it goes to Nebraska by wire it is re-broadcast in the local station; isn't that true?

A. Essentially I imagine that is what happens. I am not a scientist; I don't know the exact process. I know a program emanating in a New York station is distributed through various local stations, which I assume is through wires and which could be called re-broadcasting. I am not [fol. 778] familiar with technical terms.

Q. A copyrighted program originating here in New York and picked up in Nebraska must have, in order to grow into being or use, a local broadcasting station out there in Nebraska where it is picked up and re-broadcast; is that true?

A. No; there are stations in New York powerful enough to be heard directly in Nebraska. I am quite sure of that.

Q. What ones, for example?

A. I think WOR, among others. I was on WOR here in New York on a purely local broadcast,——

Q. Not as a practical matter?

A. I might say as a matter of fact I received letters from Oklahoma and Texas, where I was heard at that time.

Q. That is an exceptional case, isn't it, Doctor; not a practical proposition?

A. You asked me whether it was necessary to have a local station in Nebraska in order to hear a New York broadcast. I have had the experience of getting letters from Texas, after a local New York broadcast. There is also station WLW in Cincinnati, a tremendously powerful station, which does not require a net work at all. I think WLW has proved that it has gone into all the States of the United States, I think.

Q. You have testified, have you not, in infringement [fol. 779] suits?

A. Yes.

Q. About what kind of copyright infringement suits were those; between individuals that were quarreling about prior rights?

A. Usually a case of that sort is between an individual and a publisher, and sometimes a motion picture company where a copy of music has been used on the screen. An individual, as a rule, is trying to collect money from a publisher or from a motion picture company and says that his melody or his song has been stolen. In most of those cases I have appeared for the defendant because I always appear on the side which I feel is right in the case, and in the majority of the cases the plaintiff is merely imagining the fact that his music was taken, and that is the first thing for me to show. That is usually in a suit in which the individual is suing a publisher or a motion picture company.

Q. Have you ever testified in a case where the public performance rights were involved?

A. No, I don't think so. I would like to correct that last answer. There were a couple of cases in which public performance rights were definitely involved. There was a case in Syracuse in which a certain road house or some such [fol. 780] place of entertainment was trying to prove that every song, every popular song published, was in the public domain, because all these songs were based on the seven notes of the diatonic scale and the twelve tones of the chromatic scale, and therefore Irving Berlin or any other composer couldn't legally copyright any of his compositions. They actually tried to retain me as a witness on their side. I, of course, told them that their case was ridiculous. I then appeared for ASCAP to clear up a situation which was obvious, that since the United States had given a copyright for these numbers they are, therefore, entitled to legal protection; and even if one could find material that appeared many times, that its creator has put it together in this particular way, for which the United States Government had given him a copyright, and they were entitled to protection. That was a case where performance rights were included.

Q. Your publisher has the right from you, does he not, to give copies to users occasionally, particularly broadcasting companies and leading artists?

A. He has a right to give away such copies as he considers helpful for promotion of the number.

Q. As advertising?

A. Yes.

Q. What is one of the methods of popularizing a piece of [fol. 781] music that you know now?

A. The only way of popularizing music is by having it heard.

Q. And that, I presume, is the job of your publisher largely?

A. The publisher is principally interested in that; the creator is also.

Q. It is usually the publisher's job?

A. It should be, but if a publisher is not as largely interested in a composition as I am, I am trying to help it along, and I have done it.

Q. You advise with your publisher and fix the price that your sheet music is to sell, do you not?

A. No, the publisher does that.

Q. He decides that entirely?

A. Yes, he decides on the price that he thinks can get the best market.

Q. The composer, then, has nothing to do with the price that he gets for his sheet music? You want to go on record as saying that?

A. I wouldn't say that he has nothing to do with it. Of course he is consulted. I happen to be a writer of books also, and I am consulted by my publishers; but if they think that it will bring two dollars, that is the price, although [fol. 782] I think the proper price should be one dollar and I know I will not get as much by pricing it at two.

Q. So you do sit down and work it out with your publisher?

A. That is stating it a little too broadly. My publisher says, "I think we can sell this for such and such a price," and I agree.

Q. What way do you have of checking with your publisher the number of copies he has sold?

A. I have no way at all.

Q. Except his records?

A. I have to take my publishers word for it. If I thought a clerical error had occurred I should think that was justification for examining his records. I have no reason for thinking that a music publisher has falsified his records. He is doing the clerical work that I haven't the time to do or the facilities for doing.

Q. ASCAP doesn't do that for you?

A. With regard to performing rights.

Q. As to your publisher?

A. ASCAP is not interested in sheet music returns; that is my problem.

Q. You and your publisher?

[fol. 783] A. Yes.

Q. About what is the division that you have on sheet music with the publisher, between yourselves; what is the relative division of the price?

A. A song that will sell at wholesale for perhaps twelve or fifteen or perhaps twenty cents—I don't know if it goes as high as that—my share is three cents if I have done the words and music, or half of three cents if I have done the words alone, the publisher carrying the expense of printing, exploitation, cover design, and promotion in general.

Q. What is the biggest source of income of ASCAP? What is its biggest source of income? I want to know what you know about that as a member.

A. I have never inquired into that, but it is my assumption that radio contributes the largest sum to the income of ASCAP.

Q. Do you know how much it is annually?

A. No, I do not. I had some figures on that a year or so ago. I referred to them in some lecture, but I haven't them now.

Q Do you know what the total income of ASCAP is annually?

A. I know it has risen gradually. I know it passed the [fol. 784] three million mark, and it may have risen to four.

Q. Where are the publishers of music located, largely; in what part of the United States?

A. New York is the chief center.

Q. Do you know of any large publishing house that is not a member of ASCAP?

Mr. Finkelstein: I object to that; it has already been asked and answered.

A. I will be glad to answer the question again, because I happen to know of a great many so-called publishers. In the music industry they are known as "song sharks." They publish a great many compositions. I know of one that has 80,000 clients, for each of whom they have published one piece, which has been entered by the United States Government at Washington. These so-called sharks are constantly offering to radio stations; they are trying to do

what a regular composer finds it impossible to do; they make claims which are absurd.

Q. Claims of what?

A. Claiming to be publishers and distributors. I think it has been proven that they collected a million dollars from amateurs, obtaining money from gullible amateurs. I have been fighting against these song sharks, but I know from my contacts with that business, if you can call it a business, [fol. 785] that there are thousands of compositions published and copyrighted every year outside of ASCAP, and if one such concern actually has 80,000 clients, which I believe is true, that concern might be called a larger publisher than anyone in ASCAP at the moment.

Q. Is there any merit to the publications of an organization such as you have mentioned, that makes fools out of people?

A. There is occasionally.

Q. By accident somebody will have something meritorious?

A. In fact, many songs do not arrive at publication which undoubtedly are worthy.

Q. The thing that I am trying to bring out, Doctor, is that the substantial number of all of the publishing music houses, that is, publishing houses that put out vocal and instrumental music, are members of the ASCAP organization.

A. I would say that a substantial amount of this popular music of commercial value is controlled by ASCAP.

Q. That is all for that. How do you pay this ten dollars to ASCAP, this membership fee? Do they bill you for it and you send them a check for $10, or do they just take it, deduct it?

A. I get a bill and I send a check.

Q. And you send a check in?

[fol. 786] A. That is the way it has always been done. I have never known of any deduction, so far as I know, and I always paid my dues regularly.

Q. Buck, Mills and Paine are paid salaries, are they not?

A. My impression is that they are. I can't imagine anyone doing that amount of work——

Q. —for nothing. Do you know what Mr. Buck's salary is?

A. No, I do not.

Q. Do you know what Mr. Mills' salary is?

A. I do not know what any of those salaries are.

Q. Nor Mr. Paine?

A. No.

Q. Is Mr. Mills a composer, writer or author?

A. I don't know him in that way.

Q. Is that true of Mr. Paine, that he is not an author, composer or writer?

A. They have both been connected with publishing members, I am sure.

Q. I am getting at whether they are publisher members?

A. No.

Q. Nor composer members?

A. No.

[fol. 787] Q. I think Mr. Buck claims to have written compositions?

A. Buck is definitely a composer and writer. He did a great deal of work.

Q. How many years has it been since he did anything?

A. Buck's most recent writings have been largely for the Dutch Treat Club. He may have done things for professional shows. He was always one of the leading writers for Ziegfeld Follies. I know that Buck worked for the Society for several years without a cent of salary; I remember an annual meeting at which it was talked about.

Q. Do you know whether Buck draws from the Society any income from public performance rights?

A. My feeling would be that if he has any compositions still protected by copyright he would have a perfect right to that. I don't know the circumstances.

Q. What was your answer?

A. My answer was that if he still has any productive work still protected by copyright, he draws royalties, and they were perfectly justified. Mr. Buck is in the double position of being a creative writer and also a salaried official.

Q. As I understand it now, as a member of that Society, who fixes the price, we will say, that the broadcasting stations, for example in the State of Nebraska, pay to ASCAP?

[fol. 788] A. As I understand it, it is fixed by our board of directors or some committee working for that special purpose.

Q. Is that true of all other users?

A. I think that is true. I don't think any one individual decides upon those rates. The rates are fixed after very

careful examination. I know that in the case of motion picture theatres——

Q. That is all; you have answered the question. The point that I wanted to bring out further, Mr. Witness, is that they fix whatever charges or licenses that are collected for your music in the State of Nebraska.

A. It doesn't apply to me alone; the license is always a blanket license. Our committee, whatever it is, arrives at these rates through a careful examination of the profits made by the users in that locality; and it is definitely fixed in the case of a motion picture theatre by the number of seats in that theatre, something like one cent a seat.

Q. It happens to be ten cents.

Mr. Bennett: Ten or fifteen cents a year.

A. Per year? A ridiculously small sum; it is a very small sum, since they are so dependent on music. I thought it was a month.

Q. Doctor, do you know a definition, as applied, let us [fol. 789] say, to modern dance music, for such compositions as would be termed "popular" as distinguished from "standard"?

A. The distinction usually applied is that a popular work is transient or ephemeral, and a standard work is a lasting one. A popular work depends for its return upon a short and very happy life. A standard number depends on a long life, not necessarily so happy.

Q. Do you know of any popular music, now that you have given the definition, now in the public domain?

A. Yes.

Q. Give us some.

A. For example, all the songs of Stephen Foster; every song of Stephen Foster was written as a popular song.

Q. Under your definition would it not become standard now, under your definition?

A. It is still a popular song, however. Every popular song writer hopes that some of his popular songs will become standard in time.

Q. We are talking about today, Mr. Witness; we are talking about today. What I want you to answer, if you can, in the light of the definitions you have given, is, do you know of any popular, modern popular music that is in the public domain?

[fol. 790] A. Yes; a very good example is the tune of

"Loch Lomond" which is very popular at the moment, a tune in the public domain. The sheet music of it has been tremendously popular.

Q. Was that ever copyrighted?

A. It was a folk song. The sheet music was copyrighted only so far as the arrangement was concerned. Now, take the music of "Loch Lomond"——

Q. You have given that one. Any others?

A. Yes. I have mentioned Foster. I want to point out a specific song; the song "Oh, Susanna" was a campaign song for the Republicans. Mr. Landon used that song. It achieved a new popularity and certainly arrived at a sale of sheet music as the result of that. It was a popular song.

Q. Then you say that all of Stephen Foster's songs are in the public domain?

A. Yes, they are all in the public domain.

Q. Have you ever taken it up with Mr. Buck? Do you think he would agree with you on that?

A. Yes. It is available to anybody, as Foster wrote it. The original publications, which are in the library at Pittsburgh at the Foster Memorial, are in there. Anybody can use it.

Q. Is that true of "Loch Lomond"?

A. Yes. There is a copy of "Loch Lomond" in prac-
[fol. 791] tically every song book in the world. When a man makes an arrangement of it, that is copyrighted.

Q. When the public becomes acquainted with it, do they want the original melody or do they want the modern arrangement?

A. The public must have the combination of both. The original melody is a necessity as a basis for the variations that modern swing puts into that basis. The reason the old tunes are being dragged out is because not enough modern melodies are being brought out by our men, so they bring out the old tunes and arrange them effectively.

Q. So that those new arrangements are kept copyrighted?

A. Yes; and any arranger in a studio or motion picture house or restaurant could take those tunes and make his own; and many of them do.

Q. ASCAP has a great amount of those copyrights under its control and supervision?

A. A very small percentage as compared with the original compositions which it controls.

Q. Give us some three or four outstanding musical com-

positions where the modern arrangement has been copyrighted and which otherwise were free but for that?

A. "Loch Lomond" is a very good example.

[fol. 792] Q. That is copyrighted; that is, the modern arrangement is copyrighted?

A. "Loch Lomond", I don't know how many arrangements there are; "Loch Lomond" is open to unlimited arrangements. I used a negro spiritual, "Oh, Yes;" I arranged that myself; I get royalties on the arrangement. A tune recently declared in the public domain is "Home on The Range".

Q. That is what I want to get at. Why do you say it was declared in the public domain?

A. Because there was some argument as to its origin. It was proved to have been written in Colorado. There was some litigation which determined it was not an infringement.

Q. It was free?

A. It was an old cowboy song. It appears in the Rotary Song Book; they get credit for the arrangement.

Q. Their arrangement?

A. Yes. I think the first man who arranged "Home On The Range" was David Guion; I think he was the first man to arrange it. He also arranged "Turkey In The Straw;" that was another old arrangement; and "The Arkansaw Traveler."

Q. You have used as an illustration, "Home On The Range." Can you give us, of your own knowledge, any useful arrangement of that song that is not copyrighted; do you have anything in mind?

[fol. 793] A. Yes.

Q. What, for example? I mean useful for commercial practical use.

A. You will find "Home On The Range" printed, I think, in a number—at least a dozen—of song books of the general type which contain most of the public domain material—in the Kiwanis and Rotary Song Books, and there is a book called "Everybody Sing".

Q. What I want you to exclude from your answer are those pieces of music that are in use for limited purposes. I want you to tell if you can those where there is a public performance right that is being collected upon. Can you tell any arrangement of "Home On The Range" where public performance rights are collectible, that is dedicated

to the public domain, ordinarily would be collectible, I mean?

A. I believe there must be some such arrangements. The arrangement that occurs in a general song book. Of course, where there is a new arrangement, such arrangement is the property of the arrangers. It remains the property of the orchestra leaders. They are jealous of those properties.

Q. They are of some value to an orchestra leader in building up his music library?

A. Yes; they are very jealous of them. I can refer you to two articles which I wrote for Cosmopolitan. The article [fol. 794] on "Jazz" sets forth that case very clearly. The leaders don't want it published. They hold onto it. It is their own manuscript.

Q. How are public performance rights handled in regard to such pieces?

A. There is no way to get them; they are carefully guarded. If anyone picked them up from a radio performance they would be sued immediately.

Q. Those orchestras and those people control their own public performance rights?

A. Yes, for their own pieces, for a limited number of pieces.

Q. Are there a large number of authors and composers that you know that are not members of ASCAP?

A. There are many. All these so-called would-be composers; of course, the country is full of those. The very fact that a composer must have five songs published before he can become a member holds the number down considerably.

Q. Before a person can get into ASCAP he has to have the approval of the Society's directors?

A. Any person who has had published five pieces of music by a recognized publisher, not privately, is eligible to ASCAP. The record is then examined, and if the pieces are either of a type that represents a popular commercial or [fol. 795] of a type that represents a musical value—and we have many such composers in ASCAP—then that person is elected to ASCAP.

Q. What do you mean by "recognized publisher"?

A. By "recognized publisher" I mean a publisher who does a legitimate business at a definite address and who brings out songs regularly, in fact, who maintains an office force and does business in a way that any reputable con-

cern would. In other words, I can make myself a publisher by bringing out only one piece of music, but I wouldn't be a recognized publisher.

Q. Are there any recognized publishers that you know about that are not members of ASCAP?

A. There may be; I am not prepared to say.

Q. It would be the exception if there were?

Mr. Finkelstein: Objected to. There is no foundation for that.

Mr. Hotz: You qualified the witness as an expert.

A. I would have to go through the list; I would have to check it up.

Q. Have you a list of publisher members of ASCAP here? Otherwise I would be glad to furnish one.

A. Actually I think I have seen such a list.

[fol. 796] Mr. Hotz: That is all.

Redirect examination.

By Mr. Frohlich:

Q. Do you know, Doctor, of any associations of users of music?

A. The National Broadcasters Association.

Q. Do you know of any other association?

A. Well, there are all kinds of associations of theatrical managers and so on.

Mr. Nye: We object to that as immaterial.

Q. Do you know of any association of motion picture exhibitors?

Mr. Nye: That is objected to as immaterial.

A. Yes.

Q. Any dance hall association?

A. Yes.

Q. Do you know whether any of those associations ever negotiated with the Society with respect to rates?

Mr. Nye: Objected to as not within the knowledge of the witness.

A. I imagine that there was.

Q. Have you heard of the Hotelmen's Association?

A. I know there is such an association.

(Recess until 3:45 p. m.)

[fol. 797] DEPOSITION OF ABRAHAM SCHWARTZ

[fol. 798] (After recess) 3:45 p. m.

ABRAHAM SCHWARTZ, called as a witness on behalf of the plaintiffs, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. Mr. Schwartz, what is your residence?
A. 91-09 Baldwin Avenue, Forest Hills, New York.
Q. What is your occupation?
A. Business manager.
Q. Of what company?
A. Irving Berlin, Inc.
Q. How long have you been connected with that company?
A. Eighteen years.
Q. Is Irving Berlin, Inc. a corporation?
A. Yes.
Q. Under the laws of what State?
A. New York State.

Mr. Frohlich: Do you concede that they are a New York corporation?

Mr. Nye: We concede that they are a New York corporation and that this man is the manager.

Q. What is the business of that company, Mr. Schwartz?
[fol. 799] A. Music publishers.
Q. How many years has it been in existence?
A. Since 1919.
Q. How many years have you been connected with that company?
A. Eighteen years.
Q. Where is the office of Irving Berlin, Inc. located?
A. 799 Seventh Avenue, New York City.
Q. Is that office occupied under a written lease?
A. Yes.
Q. What is the yearly rental under that lease?

Mr. Nye: I object to that as immaterial.

A. $4800 a year.
Q. How many years has your lease to run?
A. To September 30, 1940.

Mr. Nye: We object to that as immaterial.

Q. What is the business done by that corporation; what does it consist of?
A. Publishing of music.
Q. Has that been the business of the company since its inception?
A. Yes.
Q. What has been the gross business of the corporation for the past eighteen years; do you know?

[fol. 800] Mr. Nye: Objected to as immaterial.

A. I don't know.
Q. What was the gross business done by the corporation in 1936?
A. I don't know; I would have to look it up.
Q. Is this corporation a member of the American Society of Composers, Authors and Publishers?
A. Yes.
Q. I show you this document dated December 19, 1935, and ask you whether you recognize the handwriting and the signatures (handing paper to the witness).
A. Yes, I do.
Q. Whose handwriting is it?
A. S. H. Bornstein, Treasurer of our company.
Q. What is the other signature?
A. Joe Young.
Q. Is he Secretary of this Association?
A. He is Secretary.
Q. Is this contract now in force?
A. Yes.

Mr. Frohlich: I offer it in evidence. That is the same as the other contract.

(The document just offered was received in evidence and [fol. 801] marked Plaintiff's Exhibit No. 2, of this date.)

Mr. Frohlich: If you will stipulate that we can substitute a photostatic copy in place of the original, you can take my statement that it is a true and correct copy, subject to correction at all times.

Mr. Nye: That is agreeable.

Q. When did Irving Berlin, Inc. first join the American Society of Composers, Authors and Publishers, if you know?

A. I don't know.

Q. Who is the President of your company?

A. Irving Berlin.

Q. Who is Mr. Saul H. Bornstein?

A. He is Secretary and Treasurer.

Q. Is he in New York at the present time?

A. No.

Q. Where is he?

A. In Europe.

Q. How do you acquire your rights from the writers and composers of musical compositions?

A. By contract.

Q. Have you brought with you typical contracts made with an author or composer?

[fol. 802] A. I have.

Q. Will you produce it, please? (Paper produced by the witness.) You have produced this document from your files, dated September 27, 1934, purporting to be an agreement between Irving Berlin, Inc. and Truman Tomlin, Coy Poe and Jimmy Grier. Do you recognize the signatures to the contract (handing paper to the witness)?

A. Yes, I do.

Q. Are those the signatures of the gentlemen whose names I have just read?

A. Yes.

Q. Do you also recognize the signature of Mr. Bornstein at the foot of the contract?

A. Yes, I do.

Mr. Frohlich: I offer the paper in evidence.

Mr. Nye: Objected to as immaterial.

The Witness: Can we substitute a photostat copy of that?

Mr. Nye: There is no objection to the substitution of the copy, but it will be subject to the same objections as the original.

(The paper just offered in evidence was marked Plaintiffs' Exhibit No. 3, of this date.)

[fol. 803] Q. Mr. Schwartz, does Irving Berlin, Inc. enter into many contracts with authors and composers similar

or identical with the form that you have produced, which is now in evidence as Plaintiffs' Exhibit 3?

A. Yes.

Q. After you enter into a contract similar to Plaintiffs' Exhibit 3, do you arrange to publish the composition?

A. Yes.

Q. As a rule, when a contract of that kind is made and the composition placed with you, does the author or composer hand you a manuscript?

A. Yes.

Q. What do you do with that manuscript?

A. I have plates made of it and then have it printed, placed on sale and registered in Washington.

Q. At the time you register in Washington, you make a claim for the copyright of the composition?

A. Yes.

Q. And you receive from the Register of Copyrights a card saying that the composition has been registered for copyright?

A. Yes.

Q. And you thereafter sell the composition throughout the United States and elsewhere?

[fol. 804] A. Yes.

Q. When I say "this composition", I mean compositions that are published by you under these same conditions.

A. Yes, I know what you mean.

Q. Do you register musical compositions published by Irving Berlin, Inc. as unpublished works?

A. Yes, we do.

Q. Is that your invariable practice?

A. Yes.

Q. And when you register as an unpublished work, what do you send to Washington?

A. What we call a lead sheet.

Q. That is sent to Washington before publication?

A. Before publication, yes.

Q. After the composition is published, do you register again for copyright protection?

A. Yes.

Q. And this time you register as a published work?

A. Yes.

Q. Is that the practice adopted by your firm?

A. Yes, that is.

Q. Has that practice been followed by your firm for many years?

A. Yes.

[fol. 805] Q. Does your firm also publish musical compositions the copyright of which is owned by other publishers?

Mr. Nye: Objected to as immaterial.

A. We only publish after we have taken over from other publishers the copyright.

Q. Suppose some publisher wanted to transfer the right of publication to you, what is the practice in that respect?

Mr. Nye: I object to that; no foundation; hypothetical; immaterial.

A. He gives us a contract turning over the copyright to us and then we publish.

Q. Do you publish compositions in countries other than the United States?

Mr. Nye: I object to that as immaterial.

A. Not directly.

Q. How do you do it?

A. Through an agent.

Q. How do you publish compositions in England?

A. Through our agent.

Mr. Nye: Please note the same objection to all those questions.

Q. How do you publish compositions in France?

Mr. Nye: Same objection.

[fol. 806] A. Through an agent.

Q. Have you published many compositions since this firm has been in existence?

A. Yes.

Q. Can you tell us approximately about how many you published?

A. I think I have it here; about 125 to 150 a year average.

Q. Going back to 1919, is that right?

A. Yes.

Q. Are all of those compositions published by your firm since 1919 active compositions?

A. Most of them are.

Q. They are?

A. Yes, most of them are.

Q. And they are still being used and played, performed?
A. Yes.
Q. Does your firm publish compositions that are created and composed by Irving Berlin?
A. Yes.
Q. Who is Irving Berlin?

Mr. Nye: I object to that as immaterial.

A. A song writer, and President of our company.
Q. Has he written many compositions?
A. Yes, he has.
[fol. 807] Q. Have his compositions acquired popularity?
A. Great popularity.
Q. Has he written compositions that have appeared as production numbers in plays on the stage?
A. Yes, he has.
Q. Has he written compositions that have appeared in motion pictures?
A. Yes.
Q. Has your firm published the compositions so written and composed by him?
A. Yes.
Q. When an Irving Berlin number is written for a play or a motion picture, what is the practice of your firm with regard to registering the same for copyright as a published work?

Mr. Nye: I object to that as wholly immaterial.

A. The registration itself is the same as all other numbers.
Q. You mean that you register it as an unpublished work?
A. Yes.
Q. But do you withhold the publication of the composition for any considerable period while this number is being produced in a picture or stage play?
[fol. 808] A. Yes.
Q. Will you state the reason for withholding the publication of a composition under those conditions?

Mr. Nye: I object to that as immaterial.

A. Because in most cases the stage producer or motion picture producer asks that we hold it up and not exploit it until a certain time, until the release of the picture.

Q. What is the practical reason for withholding the release, if you know?

Mr. Nye: I object to the question as speculative, calling for a conclusion.

A. Until the release of the play or the picture.

Q. In other words, if you publish the composition while the play or picture were current, that might hurt the receipts of the exhibition of the picture or play?

Mr. Nye: I object to that as having been asked and answered.

A. No, not exactly; I mean that if we published a song prior to the time they tell us to that then we might hurt their play or picture.

Q. Do you license the mechanical reproduction of your musical compositions from time to time?

A. Yes, we do.

Q. What is the practice with regard to licensing these [fol. 809] compositions for mechanical recording purposes?

Mr. Nye: That is objected to as immaterial.

A. We license them by contract, and in some cases under the compulsory license law.

Q. What do you mean by the "compulsory license law"?

Mr. Nye: I object to that as incompetent.

A. That is in the copyright law of 1909; where we give one company the right to record a record, other companies may do the same thing by paying us the stipulated two cents royalty and notify Washington and ourselves that they are recording it; that is what we call the compulsory license law.

Q. Until you license your composition with one company, has any other company a right to make a recording of that number?

A. No.

Q. Do you have any definite practice with regard to the time when you issue licenses for the recording of your compositions?

A. Yes, on production numbers we do.

Q. When do you license the recording for mechanical reproduction of your production numbers?

Mr. Nye: I object to that as immaterial.

A. A certain time after the release of the play or picture, [fol. 810] and not before.

Q. Who collects the royalties from the mechanical recordation of these compositions?

A. We do.

Q. Who pays you the money?

Mr. Nye: I object to that on the ground that is immaterial.

A. The various mechanical companies.

Q. Out of the moneys collected by you from these mechanical companies, do you pay the author and composer?

A. Yes.

Mr. Nye: Just give me an objection to all those questions as to materiality.

Q. Is that money paid to the author and composer pursuant to your contract with him?

A. Yes.

Q. Do you in any of your contracts with authors or composers provide for public performance for profit of the composition?

Mr. Nye: I object to that as not the best evidence; Exhibit 3 being in evidence is probably the best evidence.

A. What is the question? (The pending question was read by the stenographer.) Yes.

[fol. 811] Q. Do you enter into any other contracts, other than Exhibit 3 in evidence, with any other writer or composer, under which you undertake to pay him for public performance for profit of any of his compositions?

A. No, we do not; we don't agree to pay for that.

Q. After a composition is produced as a mechanical record, do you in any way control or have any voice in the sale or disposition of that record?

Mr. Nye: I object to that as immaterial.

A. No.

Q. Did you ever license any producer or manufacturer of mechanical records or music rolls to publicly perform for profit any of the records of your compositions?

Mr. Nye: Objected to as immaterial.

A. No.

Q. Is there any contract between you and any producer or manufacturer of music rolls in existence under which you have the right to control the public performance for profit or the use for public performance for profit of any of your compositions or publications?

Mr. Nye: I object to that as immaterial.

A. No.

Q. So that if a manufacturer of a piano roll or disk record sold a record or roll in the State of Nebraska, is there [fol. 812] any way under which you could compel him to fix the price for public performance for profit of that composition?

Mr. Nye: I object to that on the ground that it is speculative, calling for a conclusion and immaterial, and calling for an interpretation of law.

A. No, because he has no rights to public performance.

Q. Is there any contract between your firm and any manufacturer of records or music rolls under which you have the right, on such record or music roll, to fix the price for public performance for profit of that record or roll?

Mr. Nye: I object to that on the ground that it calls for a conclusion, not the best evidence.

A. No.

Q. Your firm has published many popular pieces over the years, hasn't it?

A. Yes.

Q. Were Irving Berlin's musical compositions very popular?

A. Yes.

Q. Can you name some of the older compositions written ten or fifteen years ago, that were very popular?

Mr. Nye: Objected to as immaterial.

[fol. 813] A. Yes, I can.

Q. Will you name a few?

A. "Always"; "All Alone"; "Remember"; "Blue Skies"; those are all popular songs.

Q. Can you tell us how many copies of sheet music you

sold of these four or five compositions of Berlin that you have just named?

Mr. Nye: Objected to as immaterial.

A. Over a million of each.
Q. A million of each?
A. Yes.
Q. Has your firm published within recent years any popular compositions of Irving Berlin?
A. Yes, we have.
Q. Will you please name some?
A. One called "Me"; "How Deep Is The Ocean, How High Is the Sky"—that is all one song; "Butter Fingers".
Q. Did you publish "Top Hat"?
A. That is not a popular song. I am giving you popular songs, not productions.

Mr. Nye: Let me make an objection to that last question as immaterial.

Q. How many copies of the compositions you have just mentioned, did you sell?

[fol. 814] Mr. Nye: I object to that as immaterial.

A. From about thirty or forty thousand to a hundred and fifty thousand.
Q. Did you publish a composition named "Top Hat"?
A. "Top Hat, White Tie and Tails".
Q. Did you publish another composition in the picture, named "Picolino"?
A. We did.
Q. Do you classify those compositions as production numbers?
A. Yes.
Q. Were those numbers popular?
A. Yes.
Q. Did those pictures have a wide distribution?

Mr. Nye: Objected to as immaterial.

A. Yes.
Q. How many copies of sheet music did you sell of these last three?

Mr. Nye: That is objected to on the ground that it is immaterial.

A. There were a few other compositions in that same picture. I know about how much the whole score sold; I can't give you the individual compositions.

Q. Were these compositions published individually?

[fol. 815] A. Yes.

Q. Can you tell us how many copies of these individual compositions were sold?

A. No. I could get it.

Q. Does your firm publish compositions from other sources?

A. Yes.

Q. Besides Irving Berlin?

Mr. Nye: Objected to as immaterial.

A. Yes.

Q. Many others?

A. Yes.

Q. Have you published the compositions of these other writers and composers during these years?

A. Yes.

Q. And were many of those compositions what you would call "hit numbers"?

A. Yes.

Q. By a hit number, what do you mean?

A. In demand.

Q. Is a hit number a number that is played by the users of music throughout the country?

A. Yes, a great deal.

Q. Played over the radio?

[fol. 816] A. Yes.

Q. Played at dance halls?

A. Yes.

Q. Hotels?

A. At hotels.

Q. In the old days—I am going back twelve or fifteen years—was it the usual thing to sell a million copies of music of a hit number?

Mr. Nye: Objected to as immaterial.

A. Yes.

Q. Do you recall when radio became a popular means of entertainment?

A. About 1929 I think it was, or 1930, it first started.

Q. Did you notice any falling off in the sale of sheet music after 1929?

Mr. Nye: Objected to as immaterial.

A. Yes, at least eighty per cent.

Q. Did you notice any falling off in the manufacture and sale of piano rolls and mechanical records since 1929?

A. Yes, about ninety-seven per cent.

Mr. Nye: Why can't it be agreed that we make an objection as to the materiality of all this stuff right through, except as to the individual exceptions as to which it stands; [fol. 817] in other words, I want to get away from the word "immaterial" for each question.

Mr. Finkelstein: You can note on the record that the counsel for the defendants has a standing objection as to the materiality of each of the questions asked.

Mr. Frohlich: That is all right.

Mr. Nye: In addition to any more specific objection that is made to any individual question.

Q. Are you acquainted with other publishers?

A. Yes.

Q. Do you know many writers of music and composers?

A. Yes.

Q. Do you know something about the publishing business generally?

A. Yes, I do.

Q. And you know some of the problems that they have?

A. Yes.

Q. Some of the troubles that they have had?

A. Yes.

Q. Do you know whether other publishers have had a marked falling off in the sale of sheet music and mechanical records and piano rolls since 1929?

Mr. Nye: Same objection; not the best evidence.

[fol. 818] A. Yes, every publisher.

Q. In the old days when you published a song, prior to 1929, how long was the life of a song, generally speaking?

A. Between six and eight months.

Q. Was that the life of a hit song?

A. Yes.

Q. When you publish a hit song now, what is the average life of it?

A. Four to six weeks.

Q. When you publish a hit song now is it played extensively on the radio?

A. Yes.

Q. Is it played every night and every day?

A. Yes.

Q. And has this constant repetition of playing the song over the radio anything to do with the life of the song, in your opinion?

A. Yes, it has.

Q. What is the result of this constant repetition?

Mr. Nye: Objected to as calling for a conclusion; no foundation.

Mr. Frohlich: I think he has qualified as an expert.

Mr. Nye: We will let the Court say.

[fol. 819] Q. What is the result?

A. It shortens the life of a song and kills it very quickly.

Q. Now, you have a catalogue compiled of the compositions published by your firm, have you not?

A. Yes.

Q. Does that catalogue involve an investment of money?

A. Yes.

Q. Can you give us an approximate idea of how much money your firm has invested in the publication of songs since 1919?

Mr. Nye: Objected to as immaterial.

A. I can't even give it to you approximately, because it involves a great deal of money and I would have to look it up.

Q. Has Irving Berlin, Inc. spent any moneys for advertising?

A. Yes.

Q. What did you spend for advertising in 1936?

A. If you mean by advertising just advertising in trade papers, that is a different matter, because I consider advertising the overhead, what we spend to have the songs done on the air and in other places.

Q. Do you include in that word "advertising" the many expenses of popularizing and plugging the songs?

[fol. 820] A. Yes.

Q. Can you give us approximately what you spent on your compositions in 1936?

A. About an average of thirty or forty thousand dollars every month.

Q. How much in 1937?

A. About the same.

Q. Would you say $30,000 was an average price?

A. An average price?

Q. Or an average amount expended?

A. Average amount expended.

Q. Now, with respect to works that were published prior to 1909, has Irving Berlin, Inc. published any such works?

A. We started in business in 1919.

Q. Have you in the catalogue any works that were published prior to the time you started in business?

A. No.

Q. Do you own any copyrights that were obtained prior to 1909?

A. No, we do not.

Q. Would you be able, acting alone and not in combination with any other publisher, composer or author, to determine and fix the price to be charged for the use or ren- [fol. 821] dition of any of your copyrighted musical compositions within the State of Nebraska?

Mr. Nye: That is objected to on the ground that it calls for a conclusion, no foundation laid, and also speculative.

A. No.

Q. If you were to determine and fix the price to be charged for the use or rendition of any of your copyrighted musical compositions within the State of Nebraska, tell us, please, what factors or elements you would have to take into consideration in fixing such a price.

Mr. Nye: Same objection as to the last question.

A. There would be quite a few factors to be taken into consideration. First, the song itself; second, what part of the song is being played; whether it is played instrumentally or sung; whether the whole song is played and sung or only part of it; where it is being done; whether on the radio; what sort of a station; is it a big station or a small station; where the dance hall is; what is the size of that dance hall, how many people they could accommodate; each dance hall would have to be figured separately; every movie house would have to be figured separately, how many seats they have and the size of the town and where they are and what

[fol. 822] their income is. There are a great many other factors I can't remember off hand that would have to be taken into consideration.

Q. Assuming that there are 367 users of copyrighted music in the State of Nebraska, would you, in order to determine and fix the price to be charged for the use or rendition of any of your musical compositions within that State, have to make inquiry as to each one of the 367 establishments?

Mr. Nye: Please note the same objection, and also that it is leading; and also assuming that the Nebraska statute or law requires a publisher or composer to do that; it is just the opposite; it seeks to avoid all those difficulties.

A. Yes, I would.

Q. In order to make inquiry into the extent and nature of the use and of the price to be fixed for such use within the State of Nebraska, would you have to have some representative in that State?

Mr. Nye: I object to it on the ground that it calls for a conclusion and speculation; no foundation.

A. Yes.

[fol. 823] Q. Would that involve you in any expense?

Mr. Nye: Same objection.

A. Yes, a very large expense.

Q. Would you be compelled to employ somebody in the State of Nebraska to keep an eye on these establishments for the purpose of detecting infringements of your compositions?

Mr. Nye: Same objection.

A. Yes.

Q. Would you be compelled to employ a lawyer in the State of Nebraska for the purpose of bringing suits against these users for infringement?

Mr. Nye: Same objection.

A. Yes.

Q. Can you tell us what is a fair estimate of the expense you would be put to in ascertaining these establishments, their nature and extent, in hiring somebody to detect in-

fringements, and in bringing suits to protect you from infringements?

Mr. Nye: Same objection.

A. I can't give you a stated amount, not having experience, but I imagine it would be at least, for a firm like ours, $25,000 or more a year.

Mr. Nye: I move to strike out all of the words after the [fol. 824] words, "but I imagine"; not a statement of fact nor the expression of an opinion.

Q. Perhaps I can narrow this down to something that we won't have to guess on. If you hired somebody in the State of Nebraska to ascertain the nature and extent of the establishments and the use of your copyrighted musical compositions, what would that necessitate?

Mr. Nye: Objected to, as having been asked and answered, and also calling for a conclusion.

A. It would necessitate hiring an attorney, and a man to go around on that investigation.

Q. Would you have to pay their expenses?

Mr. Nye: Same objection.

A. Their expenses, their railroad fare and salaries.

Q. You would have to pay their salaries?

A. Yes.

Q. Would these men have to be skilled in music?

Mr. Nye: Same objection.

A. They would have to be, in order to recognize the songs that were being played.

Q. What salary would you have to pay to such an investigator?

Mr. Nye: Objected to as calling for speculation and con- [fol. 825] clusion.

A. About $75 a week, plus expenses.

Q. What would you have to pay a lawyer down there to bring suits for you?

Mr. Nye: That is objected to as calling for speculation; and no foundation.

A. I don't know what lawyers charge in Nebraska.

Q. In other words, you would have to establish an agency of your own in Nebraska to protect your compositions against infringement?

A. Yes, we would. I would like to qualify that by not saying an agency; an agency in every city in the State.

Q. In every city in the State?

A. Large, and small ones too.

Q. What is your estimate of the expense involved in maintaining such an agency?

Mr. Nye: Same objection.

A. At least $25,000 a year.

Q. Now, taking all the compositions that you have heretofore published, if you determined and fixed the price to be charged for the public performance for profit of these compositions and stamped that price upon each composition sold by you in the State of Nebraska, would you be under any obligation to pay any of your writers any part of the [fol. 826] sum collected for such public performance for profit?

Mr. Nye: Same objection; calling for a conclusion.

A. Do you mean, if we did it and not the American Society of Composers, Authors and Publishers?

Q. If there were no American Society and you were acting alone and independently, would you be required to pay your writers anything that you received by way of public performance for profit within the State of Nebraska?

A. Yes, we would.

Q. Would you be required to make that payment under any contract with them?

A. Yes.

Q. Is there any contract in existence between you and the writers for public performance for profit of these compositions?

Mr. Nye: I object to that question as calling for a conclusion and tending to vary the terms of Exhibit 3.

A. No.

Q. Would the writers' compensation on these compositions published by you over the years be determined by the contracts between the writers or composers and your firm?

Mr. Nye: Objected to as calling for a conclusion.

[fol. 827] A. Yes, they would.

Q. Can you fix the price to be received by you on your compositions published in the State of Nebraska for the mechanical recordation of your compositions?

Mr. Nye: Objected to as calling for a conclusion.

A. That is a hard question to answer, because according to the law if one company makes it in New York State another company can make it in Nebraska if that company complied with the copyright law.

Q. Do you recognize that under the statute of Nebraska you would be required, immediately upon publication of your composition within the State of Nebraska, to fix the price for all uses and purposes within the State of Nebraska?

A. Yes.

Q. Assuming that when you sell a composition within the State of Nebraska you can for all uses and purposes determine and fix the price for all that that composition would be used for, assuming that state of facts, could you or would you want to fix and determine the price for the mechanical recordation of your composition at the time you sell your composition in Nebraska?

Mr. Nye: I object to that as calling for speculation, call-
[fol. 828] ing for a conclusion, and for the reason that it is a double question, and argumentative.

A. No.

Q. Is it to your business advantage to withhold giving the license for mechanical recordation of your composition until after the publication of a composition?

A. No, it is not.

Q. Do any of the manufacturers of records or piano rolls ever receive from you a license to publicly perform for profit the composition?

A. No.

Q. Are these records made from your composition manufactured in various parts of the United States?

A. Yes.

Q. Have you any control over the place where they are sent or sold or delivered?

A. No.

Q. Is that entirely within the province of the manufacturer of the record?

A. Yes.

Q. Are they sent from outside of the State of Nebraska into the State of Nebraska?

A. Yes.

[fol. 829] Q. Have your compositions been played within the State of Nebraska?

A. Yes.

Q. Have you any measure of control over the sale of these records in the State of Nebraska?

A. No.

Q. Have you any contract with any of these manufacturers of records under which you can compel them to fix a price on each of those records for the public performance for profit of those records?

A. No.

Q. Are you willing to allow the manufacturers of records and piano rolls to have that right?

Mr. Nye: Objected to as calling for a conclusion; speculation.

A. No.

Q. Are you willing to allow any of these manufacturers of records or rolls to act as your agents for the purpose of collecting fees for public performance for profit of these positions in the State of Nebraska?

A. No, we are not.

Q. Have any of your compositions ever been played on hook-ups on the radio?

Mr. Nye: I object to that; no foundation laid.

[fol. 830] A. Yes.

Q. Have you any familiarity with radio?

A. A little.

Q. Do you know whether there is such a thing as a national hook-up?

Mr. Nye: Objected to as calling for a conclusion.

A. Yes.

Q. Do you know that the National Broadcasting Company has a system of national hook-up?

Mr. Nye: Objected to as calling for a conclusion; no foundation.

A. Yes.

Q. Do you know whether the National Broadcasting Company has such a national hook-up system?

Mr. Nye: Same objection.

A. Yes.

Q. Are your compositions frequently played in the New York stations of the National Broadcasting Company and sent by hook-up to various other stations in the United States including Nebraska?

Mr. Nye: Same objection.

A. Yes, they are.

Q. Have you sold your sheet music over the years to [fol. 831] various dealers of sheet music in the State of Nebraska?

A. Yes.

Q. When these dealers purchase musical compositions from you, when they purchase this sheet music, is it their property?

A. Yes.

Q. Have you any control over the manner in which they sell this sheet music?

A. No.

Q. Can you compel them in any way to put any price on that sheet music, including the price for public performance for profit?

A. Except public performance for profit, they have no right to that.

Q. Have you any right to put on the composition that they sell, a price for the public performance for profit?

Mr. Nye: I object to that as calling for a conclusion of law.

A. No.

Q. Nave you sold a substantial number of your compositions in the last few years to dealers in Nebraska?

A. Yes.

Q. Have you any agent or representative of your own in that State?

[fol. 832] A. No.

Q. Do you transact any business within that State?

A. Yes, we sell sheet music there.

Q. You sell sheet music to jobbers?

A. To dealers.

Q. Where is the music shipped from?

A. New York.

Q. Have you any office of your own out there in Nebraska?

A. No, we have not. I want to qualify that other statement, that besides ours there are plenty of dealers in Nebraska who buy from jobbers.

Q. Are copies of practically all of your copyrighted compositions now owned by dealers in Nebraska?

Mr. Nye: I object to that; no proper foundation laid for knowledge of the witness.

A. Most of them are, yes.

Q. You as general manager of Irving Berlin, Inc. have some knowledge of the business done by your company?

A. Yes, I have.

Q. Do you know of your own knowledge whether or not copies of your compositions are sold to dealers or jobbers in the State of Nebraska?

A. To dealers.

[fol. 833] Q. Could anyone walk into a store in Nebraska and buy one of your compositions?

A. Yes.

Q. I show you this document and ask you whether you recognize the signatures at the foot of it (handing paper to the witness).

A. Yes, I do.

Q. Whose signatures are they?

A. S. H. Bornstein, Treasurer of our company, Ned E. Depinet, President of R. K. O. and Morton E. Young, Assistant Secretary of R. K. O.

Q. Is that contract now in force and effect?

A. Yes.

Mr. Frohlich: I will offer it in evidence.

(The paper just offered in evidence was marked Plaintiffs' Exhibit No. 4, of this date.)

Mr. Frohlich: Will it be all right to put in a photostat copy in place of the original to be used with the same force and effect as the original?

Mr. Nye: That is all right. We object to it as immaterial.

Q. Is this contract, Exhibit 4, still in force and effect?
[fol. 834] A. Yes.
Q. Did it expire by limitation of time?
A. Yes.

Mr. Nye: I move to strike out Exhibit 4.

Q. Under this contract did R. K. O. synchronize the musical compositions of your firm in its pictures?

Mr. Nye: I object to that as immaterial and incompetent.

A. Yes.
Q. Your firm published the musical compositions that were so shown and synchronized in the picture, is that right?
A. Yes.
Q. Can you name some of the pictures that were the subject of this contract?
A. May I refer to the catalogue?
Q. Certainly.
A. (Examining catalogue) The picture called, "Down To Their Last Yacht," "Strictly Dynamite," "Kentucky Colonels", "Stingaree", "Hurray For Love". Do you want any more?
Q. That will be sufficient. Can you recall any musical compositions which were published by you which appear in the pictures just mentioned?
A. I will call them off for you.
[fol. 835] Q. Just pick out a few of those compositions (handing catalogue to the witness).
A. Do you want one of each?
Q. One of each will do.
A. "There's Nothing Else To Do In Malakamokolu," "One Little Kiss," "I Went Hunting And The Big Bad Wolf Was Dead," "Night Is Mine", "You're An Angel".
Q. Under this contract, Plaintiff's Exhibit 4, has R. K. O. the right to use the compositions mentioned by you in their pictures for the balance of the term of copyright of each of the compositions?
A. Yes, they have.
Q. Are these copyrights of the compositions you have just mentioned still subsisting?
A. Yes.
Q. Can you tell us when they were copyrighted, how many years ago approximately?
A. You can see it in there; it gives you the year.

Q. You have produced this document in a red cover, entitled, "Catalogue of Copyrighted Musical Works, Irving Berlin, Inc." Is that a list of the copyrighted publications of Irving Berlin, Inc.?

A. Yes; there is a supplement attached to that.

Q. It is all in one volume?

[fol. 836] A. Yes.

Mr. Frohlich: I will offer it in evidence together with the supplement.

Mr. Nye: We object to it as immaterial.

(The catalogue just offered in evidence was marked Plaintiffs' Exhibit No. 5; the supplement to the catalogue was marked Plaintiffs' Exhibit No. 5-A, of this date.)

Q. What did Irving Berlin, Inc. receive from the American Society of Composers, Authors and Publishers by way of royalties for the year 1936?

A. I don't remember the exact amount.

Q. Give us the approximate amount.

A. It was over $100,000.

Q. What did it receive for 1937?

A. Also over $100,000.

Q. What did it receive for 1935?

A. I don't remember; it was around the same figure, but I don't remember.

Q. What do you consider the value of this contract, exhibit 2; what do you consider the value of that contract to your firm?

Mr. Nye: I object to that as immaterial and speculative.

[fol. 837] A. I consider it is the life of the firm.

Q. What do you consider that value in dollars and cents?

A. That is hard to judge—passing on an income of over $100,000 a year. I know that without that contract we would be out of business.

Mr. Nye: I move to strike out all of the answer except "That is hard to judge", as not responsive.

Q. Can you give us an estimate of the value, based on the amount of money you have received from the Society and the balance of the contract period?

Mr. Nye: I object to that as purely speculative, no foundation laid.

A. I would say over a million dollars.

Q. Assuming that you were not a member of the American Society of Composers, Authors and Publishers, could you, at the time of publication of your compositions, immediately determine and fix the price for the public performance for profit of such composition?

Mr. Nye: I object to that as calling for a conclusion, speculative, having been asked and answered.

[fol. 838] A. No.

Q. Will you tell us what is the practice of your firm in launching a song, with respect to the advertising publicity popularizing it and so forth?

Mr. Nye: I object to that as having been asked and answered.

A. I employ men in various cities throughout the country to get our songs played and sung over the radio, in dance halls and any other place where mus-*t* is played or sung.

Q. Does the time vary in which you are able to popularize a composition?

A. Yes.

Q. Are some songs popularized in a short time?

A. Yes.

Q. Are some songs never popularized?

A. Yes.

Q. And with respect to some songs, does it take a long time to popularize them?

A. Yes.

Q. In determining and fixing the price to be charged for the use or rendition of your copyrighted composition in the State of Nebraska, would you have to take into consideration the length of time which you would have to have to popularize your composition?

[fol. 839] Mr. Nye: Objected to as calling for a conclusion.

A. Yes.

Q. Could that be done immediately upon the publication of the work?

Mr. Nye: Same objection.

A. No.

Q. In popularizing a song, please give us the various steps that you take in making a song popular.

Mr. Nye: Objected to as having been asked and answered.

A. Every branch office that we have, New York and otherwise, have to take the orchestrations, the professional copies, the vocal, and go to each band and singer and keep after him or her until they do the song.

Q. Do you have to pay any advance royalties to the author or composer?

A. Sometimes; not in every case.

Q. Does your firm publish compositions that appear in productions on the stage?

A. Do you mean, do we publish it now, or have we published it?

Q. Have you published them in the past?

A. Yes, we have.

[fol. 840] Q. Can you give us the names of some?

A. "Ziegfeld Follies," "Music Box Revue," "As Thousands Cheer".

Q. With respect to these production numbers, are the rights frequently separated?

A. I don't understand that question.

Q. Well, let us take it piecemeal. These numbers have grand performing rights as well as small performing rights?

A. Yes.

Q. And by the grand rights you mean the rights on the stage?

A. That is right.

Q. And when you have for publication a musical composition which is interpolated or is a part of a stage production, does your firm possess or own such rights?

A. No, we do not.

Q. Are the stage rights usually held by somebody else outside of the firm?

A. Yes.

Q. Do you know anything about the capital investment that is made in producing a stage play in which your compositions appear?

Mr. Nye: I object to that as purely speculative.

[fol. 841] A. No, I don't know.

Q. Where your firm has published musical compositions which appeared on the stage, has your firm any practice with respect to restricting those numbers?

A. Yes; they are always restricted.

Q. That is to say, you restrict the public performance for profit of those numbers throughout the country, is that correct?

A. Yes.

Q. You do that by notifying the Society to that effect?

A. Yes, we do.

Q. What is the object of that?

Mr. Nye: I object to that as calling for speculation.

A. So that we can regulate it so that it doesn't hurt the play.

Q. In other words, you don't want the public performance for profit, the small rights, to interfere with the production of the play during its run; isn't that what you have in mind when you restrict these numbers?

A. Yes.

Q. You don't want to have any competition between these two?

[fol. 842] A. That is right.

Q. Would you be able to restrict the compositions published by you which appear in these stage plays, under the statute which provides that you must immediately upon publication of the work determine and fix the price to be charged for the use or rendition of your copyrighted musical compositions for public performance for profit within the State of Nebraska?

Mr. Nye: I object to that as calling for a conclusion.

A. I don't know the Nebraska law, but I certainly could not fix a price on a composition the minute it is published.

Q. Would any producer put on a play if you were unable to restrict the compositions in that play?

Mr. Nye: Objected to as calling for a conclusion.

A. The producer may put on the play, but he certainly wouldn't give any publisher the right to publish the song.

Q. So that under those circumstances would that interfere with the publication of the musical composition by your firm?

A. Yes, it would.

Q. In what way would it interfere with the publication of the composition?

[fol. 843] A. If we couldn't restrict it we couldn't get the publication.

Q. Is the publication of musical compositions that appear in plays a substantial part of your business?

A. Yes, it was.

Q. Was there a time when Irving Berlin wrote many plays?

A. Yes.

Q. Did your firm have the publication rights of the compositions that appeared in those plays?

A. Yes.

Q. Did your firm also have the publication rights in other compositions in plays written by others, in the past?

A. Yes.

Q. Was the publication of these compositions of great value to your firm?

A. Yes.

Q. You derived substantial moneys from them?

A. Yes.

Q. In all cases where these compositions appeared in stage playes, did you restrict the different compositions?

A. Yes, we did.

Q. At that time you didn't permit any radio company or any hotel or dance hall to perform these compositions?

[fol. 844] A. No.

Mr. Nye: I object to that as leading. Counsel is testifying instead of the witness. I move to strike out the last five questions and answers for the same reason.

Q. Are you willing to have your contract, Exhibit 2, with the American Society of Composers, Authors and Publishers declared void and illegal?

Mr. Nye: I object to that as calling for a conclusion.

A. No, we would not.

Mr. Frohlich: Your witness.

Cross-examination.

By Mr. Hotz:

Q. Mr. Schwartz, calling your attention to Exhibit 3, which is the contract between yourselves and Truman Tomlin, Coy Poe and Jimmy Grier, I note a clause therein under paragraph four which reads as follows: "Any and all receipts of the publisher from any other source or right now

known or which may hereafter come into existence". Now, that clause I presume is operative, is it not?

A. Yes.

Q. In all of your contracts with composers and authors?

A. Yes.

[fol. 845] Q. That calls for a division of an amount equal to thirty-three and one-third per cent of all of the receipts of the publisher with respect to the licenses and then these other things which are covered by the clause that I have read to you; is that right?

A. Yes.

Q. Now, you, of course, are a member of the American Society of Composers, Authors and Publishers?

A. Yes.

Q. And have been for many years?

A. Yes.

Q. And I presume that you are more or less acquainted with all of the publishers of copyrighted musical compositions in this country?

A. Not all of them, no.

Q. Well, you know who the publisher members are of ASCAP, I presume?

A. I don't know the whole list; I know those I come in contact with in New York.

Q. Do the publisher members of ASCAP, would you say that they constitute a very substantial part of the reputable publishing houses in the country?

A. Yes.

Q. Do you know of any large publishing house that [fol. 846] is not a member of ASCAP?

A. I don't know of any.

Q. You know of none?

A. No.

Q. In Exhibit 5, that is a list of the copyrighted musical works of your organization?

A. Yes.

Q. And it contains about how many would you say in number?

A. I don't know; I never counted them.

Q. Five thousand?

A. I don't know.

Q. Does your firm own the copyrights as your own on some music where you do not—that you bought outright and you don't have to deal with the composer?

A. We own the copyrights on everything.

Q. What I am driving at here—are there pieces in your catalogue on which you do not have to pay the author and composer any portion of the money, by way of royalities, that you collect?

A. I don't know whether there are any.

Q. You know of none then that are owned?

A. I don't recall any offhand.

Q. In each instance there is a division made of profits [fol. 847] on copyrighted music and you make that division with somebody in each instance, of the income?

A. We pay a royalty in accordance with that contract, a royalty, of what we receive.

Q. Are all of the persons that you deal with, all of the persons, that is, composers and authors with whom you have contracts similar to Exhibit 3, members of ASCAP?

A. There are times when the author or composer has not become a member of ASCAP at that time and we would take a song from him just the same, and we have taken them.

Q. Who fixes the price that is to be paid for public performance for profit of the musical compositions upon which you own or control the copyrights?

A. American Society of Composers, Authors and Publishers.

Q. Now, as a matter of fact, your organization actually owns the copyrights, do you not?

A. Yes.

Q. Otherwise you wouldn't publish the music. That is one of the conditions and requirements that your house has in dealing with authors and composers?

A. Yes.

Q. Is that generally the arrangement that publishers have?

Mr. Finkelstein: That is objected to; no foundation [fol. 848] laid.

A. I wouldn't know that.

Q. Now, the non-members, that is, persons that are not members of the American Society of Composers, Authors and Publishers, you pay them nothing for public performance rights, do you?

Mr. Finkelstein: The contract speaks for itself.

A. No.

Q. Do you pay any of the persons such as those whose names appear on Exhibit 3, anything for their public performance rights?

A. No, because they get it from the American Society.

Q. Now, the income from the public performance rights is divided equally, I understand, between the publisher members and the composers and authors, is that right?

A. Yes.

Q. That is, the profits are divided equally?

A. I don't know whether they are profits; I don't know that the American Society makes any profits.

Q. That is, the income, the money which they collect is divided equally between the composers on the one side——

A. And the publishers.

Q.—and the publishers on the other? Who made that [fol. 849] arrangement?

A. The American Society.

Q. Do you have anything to do, your Irving Berlin Company, with fixing licenses for public performances, that is, the amount that a hotel shall pay or a radio station shall pay?

A. No.

Q. Who does that work? You say the American Society of Composers, Authors and Publishers, but who in that organization does that work?

A. I don't know.

Q. Would you say Mr. Buck and Mr. Mills and Mr. Paine?

A. Whatever I would say would be a guess. I don't go to their meetings or anything like that.

Q. Have you ever attended any meetings of ASCAP?

A. No.

Q. Has anyone from your firm?

A. Yes.

Q. Who does?

A. S. H. Bornstein, our Treasurer.

Q. He usually goes?

A. Yes.

Q. Is he on the board of directors?

A. Yes.

[fol. 850] Q. Of ASCAP?

A. Yes.

Q. Any other members of your firm on the board of directors of ASCAP?

A. No.

Q. How long has Bornstein been on that board of directors?

A. I don't know, but I know it is over ten years.

Q. A long time?

A. Yes.

Q. Irving Berlin is one of the members of the Authors and Composers, also?

A. Yes.

Q. As well as of Irving Berlin, Inc.?

A. Yes.

Mr. Nye: Make that a member of the board of directors of American Society of Composers, Authors and Publishers.

Mr. Frohlich: No, not Irving Berlin.

Q. Do you know what Mr. Irving Berlin gets from the American Society of Composers, Authors and Publishers?

A. No, I don't know.

Q. That is not handled through the books of your firm?

A. No.

[fol. 851] Q. But he does receive a fixed sum of money from them?

A. Yes.

Q. Because of the ~~fact that~~ he is a composer and writer?

A. Yes.

Q. You have never read the Nebraska law, I don't suppose, on this subject?

A. No.

Q. What does your firm sell by way of its product; just the names of a number of things; sheet music, that is one thing.

A. Orchestrations.

Q. Orchestrations and what else?

A. The right to make phonograph records.

Q That is a right which you give to manufacturers?

A. That is right.

Q. That is, you get up a phonograph or a record of that type and then you are paid a certain sum of money by arrangement that you make with the manufacturer?

A. That is right.

Q. And that is all the interest you have in that matter?

The manufacturer then manufactures and promotes the sale? You don't sell those records?

A. No.

[fol. 852] Q. The only thing you sell, then, is written or printed matter?

A. We give them a license to record the record for sale.

Q. But you don't sell the record, that is the point?

A. No, we don't sell the record.

Q. What arrangement do you have with him, that is, the manufacturer, for paying you for that right; what arrangement do you have with him?

A. We have some people that pay us quarterly; other people pay us monthly.

Q. It is a fixed sum that they pay you?

A. No, they pay us so much per record.

Q. That they sell?

A. That they manufacture.

Q. Whether they sell them or not?

A. Yes, that is right.

Q. Now, of the $100,000 that you got last year from the American Society of Composers, Authors and Publishers, did you pay any of that sum to the three men, or any of the three, that are on Exhibit 3, that is, Truman Tomlin, Coy Poe or Jimmy Grier?

A. No, because they get their share from the American Society of Composers, Authors and Publishers.

Q. That is true in each instance as to all composers and [fol. 853] and authors?

A. Yes, composers and authors.

Q. According to the record here which I have, published by the American Society of Composers, Authors and Publishers, dated August 1, 1937, the first two on the contract, Truman Tomlin and Coy Poe, do not appear as members of the Society. I am calling your attention to that fact because you stated that the three got something from the American Society of Composers, Authors and Publishers. You wouldn't pay them a part of the public performance rights if they were not members, would you?

A. We wouldn't know if they were members or not.

Q. But you make no payments; no part of that $100,000 that you got from ASCAP was distributed to anybody but your own firm?

A. That is correct.

Mr. Frohlich: Do you want to clarify that answer?

The Witness: Even if we wanted to pay them we couldn't, because we wouldn't know whether it was five cents or a dollar or a thousand dollars aggregated for this song.

Q. You know, do you not, that ASCAP, the American Society of Composers, Authors and Publishers, in their [fol. 854] literature, said that they have complete and exclusive authority to license for public performance for profit?

A. Yes.

Q. And that they have the exclusive right to do so for your publications?

A. Yes.

Q. Is that a misstatement of fact on behalf of ASCAP or not?

A. What is?

Q. That they have the exclusive right to license and collect for public performance rights of your compositions?

A. No; they have.

Q. They do have that right?

A. Yes.

Q. And they do have the exclusive right?

A. Yes.

Q. And that is true so far as you know with all other publisher members?

A. So far as I know, yes.

Q. You are familiar, are you not, with the copyright law in connection with the construction of mechanical records?

Mr. Frohlich: I object to that, on the ground that the witness has not shown that he is qualified and he has not [fol. 855] shown that he is a lawyer, and there is no fundation for the question.

A. I am not familiar with the copyright law as I never studied it.

Q. In the State of Nebraska—the reason I am putting these questions to you is because your counsel asked you if you could operate in a certain way in Nebraska as required by the law of Nebraska, and you said "No," and your counsel was directing to you questions largely in connection with mechanical devices, and I merely wanted to call your attention to certain parts of the copyright act which covers that subject, as I view it. But now, out in

Nebraska, all that you have got to sell is copyrighted musical compositions, isn't that right?

Mr. Finkelstein: I object that the term "musical composition" has not been defined by counsel. The question is vague, indefinite, impossible to understand.

Q. These musical compositions——?
A. Directly by us?
Q. Yes.
A. Sheet music and orchestrations.
Q. And they are printed on paper, are they not?
A. Yes.
[fol. 856] Q. And you have certain things printed on that paper?
A. Yes.
Q. Among other things, you probably have on there, "All rights reserved, including the rights of public performance for profit"?
A. I don't remember whether we have that or not.

Mr. Finkelstein: I object to the question. The publications speak for themselves.

Q. You also put in your catalogue here, Exhibit 5, that anybody interested in public performance for profit apply to the American Society of Composers, Authors and Publishers. It would be a simple matter, would it not, at the time you sold music in the State of Nebraska, to determine, if you wished to do so, and the composer, what price you would want to get for your music for all purposes, if you wanted to?
A. Not a simple matter.
Q. You could arrange with the composer and your own firm, the publisher, to determine the rights, if you wished to do so?
A. I stated before that in order to do that we would have to get a lot of information to decide what price it should pay.
Q. That same information has to be obtained in any case [fol. 857] because the public performance rights are being collected by ASCAP?
A. But that same information would have to be obtained for each individual song, because two songs are not alike.
Q. Of course, two songs are not alike, but the point I am trying to get at is, you could do it if you wished?

A. I could do it if I did it that way; if I could go to Nebraska or have somebody else do it, to get the information that I testified to before, and then let me have that information in New York, I would then sit down and put a price on that particular song.

Q. And ASCAP sends out a questionnaire to the various users which gives all or substantially all of the answers to the problems that you have brought out here. You have seen those, have you not?

Mr. Finkelstein: I object to that.

A. No, I have not.

Q. The point that I am getting at is that ASCAP gets that information and it fixes the public performance rights by obtaining information such as you have related here. And if you had that information, if Irving Berlin had that information, by arrangement between the author and composer and yourself you could stamp that piece of music and fix a price that would include public performance for [fol. 858] profit?

A. If we had all the information we need.

Q. And it could be done on just such pieces of music as you sold in the State of Nebraska?

A. No, it could not.

Q. Why not?

A. Because there are plenty of songs that go through the stations in Nebraska that go through from New York and from every big city in the United States, through a general hook-up.

Q. You are speaking now of radio?

A. Yes.

Q. I am speaking now of selling sheet music, musical compositions in the State of Nebraska.

A. Yes, just sheet music.

Q. There are three ways, are there not, in which music is presented to the public; one is through the sheet music, and the other is over the radio, and the other is through mechanical devices?

A. And through sources like dance halls.

Q. I mean instrumentally. It gets into being through those three things; either the music is taken and played by some individual or they hear it over the radio——

Mr. Finkelstein: I object to that line of questioning.

[fol. 859] Q. (Continued) —or by mechanical device?

A. Or through a motion picture.

Q. That would be a mechanical device.

Mr. Finkelstein: Or public performance for profit, then I will withdraw my objection.

Q. In each of these instances, whether by radio or mechanical device, it still has its origin through the sheet music to begin with?

Mr. Finkelstein: I object to the question, improper, incompetent, irrelevant and immaterial; assumes a state of facts that do not exist. There is no evidence in the record of it.

Q. Does it not?

A. Read the question again. (The pending question was read by the stenographer.) If you mean that the sheet music is written by the author first, yes.

Q. Yes, that is right. The author first sits down and makes his score with a pencil or pen and writes it up and then it is made up and printed and published by you?

A. That is right.

Q. And from that everything else arises, your mechanical and radio, singing and playing and everything else?

A. Yes.

Q. And you still could fix on the sheet music whatever [fol. 860] rights and privileges or restrictions you and the composer wished; that would be within your power and the power of your author and composer?

A. I don't quite understand that.

Q. I will put it this way. There would be nothing to prevent the publisher and composer getting together at the time that the music was put out and making whatever restrictions to its use they desired?

Mr. Finkelstein: I object on the ground that the question is hypothetical, assumes a state of facts not in evidence; it is a legal argument.

A. I don't know whether the copyright law would allow it or not.

Q. You could put on your sheet music, could you not, that anyone who came into possession of that piece of music could use it for the purpose, say, of electrical transcription?

A. We could print that on there.

Q. If you wished?

A. Yes.

Q. Now, about this falling off of sheet music sales. You talked about a million pieces of some years ago and that do not come now. What about the present day? Don't you have a larger number of songs; doesn't it require a [fol. 861] larger number of songs than it did before; doesn't that follow?

A. No, the only reason we require a larger number of songs is because the songs are killed so fast that we have to put up more material.

Q. More songs?

A. Yes, in order to exist.

Q. Would you say that your volume of business is off proportionately?

A. Our volume of business, taking all the additional songs into consideration, is the same percentage off from sales as I have testified previously.

Q. In other words, your business is just eighty per cent of what it was some years ago?

A. Yes, that is right.

Q. Has that been made up in any other manner?

A. Yes.

Q. How?

A. We get more from the American Society than we did before.

Q. This $100,000 that you get?

A. Yes; if we didn't we would be out of business.

Q. And that comes from your public performance rights?

A. Yes.

Q. Are you also paid something from the motion picture [fol. 862] people?

A. No.

Q. For recording?

A. No. That is a custom of the business.

Q. Does anyone get anything from that source, the recording of musical compositions used in pictures?

A. Yes, once in a great while when a picture company will want to use one of your songs in a particular picture, we charge them a hundred or two hundred dollars or something like that; but not all songs in pictures are paid for; the majority are not.

I must qualify that. I am talking about original compositions, the first time put in pictures; I don't mean a com-

position four or five years old where the company wants the synchronization rights. That is a different thing altogether. Where the company takes the song in its original form to put in the picture they don't pay you for it.

Q. When you do make a deal it is a fixed amount, and they pay it on the spot, and that gives them the right to play the music and display the picture as much as they want and wherever they want?

Mr. Finkelstein: I object to that; it assumes a state of facts not shown on the record.

A. Yes.

[fol. 863] Q. What was that thirty or forty thousand dollars for advertising that you spoke of; what was that for; how was that spent? Just break that down a little bit; not in any detail, but generally.

A. Mostly overhead; salaries and things of that kind, insurance, rent, telephone, telegrams, royalties.

Q. I am afraid that we don't understand each other.

A. I said overhead.

Q. You made a statement in your testimony, as I get it—if I am wrong you can correct me—that your firm spent thirty or forty thousand dollars per month for advertising.

A. And I qualified the term "advertising" in my testimony at the time.

Q. Let us have that again. What did you mean by that, Mr. Schwartz?

A. I said advertising includes all our men in the branch offices, their salaries and expenses, our expenses here in New York for our contact men, and various other expenses that we have to pay.

Q. In other words, thirty or forty thousand dollars per month is your whole overhead, including the advertising and everything else?

A. That is right.

[fol. 864] Q. What is your gross business; what amount of gross business does your firm do?

A. I have seen months as low as eight or ten thousand dollars, and some months as high as forty to fifty thousand dollars, but very few.

Q. An average of the year would be what, say for 1937, the gross income of your firm?

A. The average of the year would be between fifteen and twenty thousand dollars.

Q. I guess we don't understand each other some place along the line, because you have stated to us here that there was thirty to forty thousand dollars per month spent for your overhead.

A. That is right.

Q. You couldn't have twenty thousand dollars business per month.

A. When you say gross business do you include receipts from the American Society?

Q. Yes.

A. Then add about twenty thousand dollars and that comes up to the $100,000.

Q. $100,000 is what you get from ASCAP. How much do you get from all other sources?

A. I said over $100,000 a year from ASCAP.

[fol. 865] Q. How much over $100,000; considerable? Do you remember?

A. I guess it would be about—it may run to $150,000.

Q. $150,000 a year. Can you give us an estimate of your gross business aside from that $150,000 annually say for 1937?

A. I would have to look it up, because I don't remember what we got from records. I know what we got from sheet music. Sheet music and orchestrations, they average between fifteen and twenty thousand dollars.

Q. Gross income is what I was getting at. Between fifteen and twenty thousand dollars from sheet music and orchestrations.

A. And orchestrations.

Q. Are you one of the biggest publisher members of ASCAP, would you think?

A. One of the biggest.

Q. Who would you say had a bigger right in the Society than yourself?

A. Harms, Inc. would.

Q. Anybody else?

A. I think they are about the biggest.

Q. Do you know what Harms receives from ASCAP?

A. No, I do not.

[fol. 866] Q. Do all of the music publishers have a catalogue similar to yours that they publish?

A. I think quite a number of them have; I don't think all of them have. Some publishers don't go to the trouble of printing them.

Q. How many pieces of sheet music would you say that you sold in a year?

A. I can't answer that.

Q. Can you give us an estimate?

A. No, I would have to determine it by the sale price; some sell for twenty, twenty-two, twenty-four cents, twenty-five; I would have to do some figuring, and it wouldn't be true.

Q. Now, then, could you look up from your records and files in your office and give us the total amount or the total number of sheet music that your firm sold in 1937, and divide it into orchestrations and regular sheet music of all kinds?

Mr. Frohlich: I object to that as incompetent, irrelevant, immaterial to this issue and places an undue burden on the witness and calls for a lot of calculation.

A. How much time have I got?

Q. Is that much of a burden? You could have all the [fol. 867] time that you wanted. Any time that you had it would be all right. Is it a big job or not?

A. Yes, it is a big job. I would have to have some time on it. It is really a big job.

Q. I would like to have the total number in this record of a concern like yours that have these orchestrations and sheet music for sale.

A. It would take a long time. Take orchestrations; you might print up ten thousand orchestrations; you give away a lot of them free. It is a big job. If we had time we could do it.

Q. Now that you have hit on that point of giving music away, tell us just a little bit more of how that works and why you do it.

A. We *go* it to people on the radio to get them to play a song, our songs, because a song on a sheet of paper means nothing until it is popularized, until the public hears it; and you have to have singers that do that for you; you have got to give it to them; they won't buy it.

Q. That is one of your methods of advertising and getting other people to buy; when they hear it on the radio or by a band, they go down to the music store and buy it?

A. Yes.

Q. Do you give them anything else by way of inducement? [fol. 868] A. We give them vocal orchestrations.

Q. Vocal orchestrations are free, gratis?

A. We give them professional copies.

Q. By professional copies you mean, of course, to leading singers and artists?

A. Yes, to all of them. We don't get any part of that.

Q. Why do you do that?

A. For the same reason. If you have a singer on the air and you don't give him a professional copy, what is he going to sing?

Q. In your catalogue that was introduced in evidence and marked Exhibit 5, I want to ask you to explain the list on the righthand side of the page. What does that mean? For example, I have page 110, and it says—there is an "M" before the top line, "Who Wouldn't Say Yes"?

A. That means it is in manuscript form.

Q. What does "B" mean?

A. It is in black and white; we have published it and have it without color on the title page.

Q. Over on the righthand side it says——

A. The name of the author and composer.

Q. Those names there are the authors or composers?

A. That is right.

Q. Aside from Irving Berlin, do you have any men or [fol. 869] women in your employ who write songs for you?

A. Not in our employ. They all work on a royalty basis.

Q. Is your catalogue accurate?

A. Yes.

Q. It is the same, or should be the same, at least, as the records in the Federal Copyright Office?

A. Yes.

Q. Now, in the year 1922, for example, your catalogue here shows about 89 numbers that were copyrighted. And isn't it true that the Copyright Office records show 115?

A. Did you count the popular and the production?

Q. Would you say then that if, referring to the catalogue, it included those compositions from musical productions and the popular songs that it would be the same?

A. Yes.

Q. The price that is fixed here in New York by the American Society of Composers, Authors and Publishers for the public performance rights of music is fixed for the State of Nebraska; it prevails in the State of Nebraska?

Mr. Finkelstein: I object to that on the ground that it assumes a state of facts not shown in the record.

A. I don't know the workings of the Society.

Mr. Hotz: I think that is all.

[fol. 870] Redirect examination.

By Mr. Frohlich:

Q. Mr. Schwartz, if you published a composition today in Nebraska, could you put on that composition a price for the use in television, could you today with any degree of accuracy put on a price that would be adequate and commensurate with the work for the full twenty-eight years of the copyright?

A. No.

Q. As a matter of fact, a composition fluctuates in value over the years?

A. Yes.

Q. Some become of less value and some of very great value?

A. Yes.

Q. Is that true of every item in your catalogue?

A. Yes.

Q. Could you today tell with any degree of accuracy how valuable television might be twenty years from now?

A. No.

Q. You could not, could you?

A. No.

Q. If you had to fix the price on compositions that you had copyrighted or published, in Nebraska, today you [fol. 871] couldn't change that price at any time in twenty-eight years. Could you, having that in mind, fix any price that is fair and reasonable either to the user or to yourself?

A. No, I could not.

Q. To what extent does the value of your compositions fluctuate? Do they fluctuate weekly or monthly or yearly?

A. There is no specific time.

Q. Does the value of your compositions remain constant and fixed?

A. No.

Q. Take an important composition that you have had

in the last two or three years; take Irving Berlin's "Top Hat"; there is such a composition?

A. "Top Hat, White Tie and Tails."

Q. Was that very popular while the composition was on the screen?

A. Yes.

Q. How long did that popularity continue?

A. It is still being played all over the country.

Q. Is it being played as much as it was at that time?

A. No.

Q. Has there been a marked falling off in the sale of the musical composition?

[fol. 872] A. Ninety-nine per cent.

Q. Is there any way of telling whether that composition will have any popularity ten years from now?

A. No.

Q. I call your attention to a composition published by you in 1937 called "Carelessly", by Charles Kenny, Nick Kenny and Kalmar?

A. Yes.

Q. Was that a popular composition?

A. Yes.

Q. How long did its popularity continue?

A. About six weeks.

Q. Is the composition popular at the present time?

A. No.

Q. Would the right to play this composition for public performance for profit be the same today as it was at the time you published it?

A. No.

Q. Would the value or the price for that composition for the public performance for profit be the same a year from now as it was at the time you published it?

A. No.

Q. It might be more?

A. No.

[fol. 873] Q. Less?

A. It might be less.

Q. Could you tell within ten weeks after a composition is published what its value would be for public performance for profit?

A. No, I can't.

Q. At the time you publish a composition and you fix the

value on that composition, would there be a likelihood that the value would be more or less in ten weeks?

A. There would be the likelihood that it would be ten times as great as at the time we put the value on it.

Q. And ten weeks after that?

A. No.

Q. In other words, there is a change, a marked change, almost every week on these compositions?

A. Yes.

Q. That is, some compositions take longer to reach a stage of popularity than others?

A. Yes.

Q. And the degree of popularity of the composition would determine to a great extent its value in public performance for profit?

A. Yes.

Q. And you would have to take that into consideration [fol. 874] in fixing the supply?

A. Yes.

Q. Can you with all your experience tell what composition would be popular?

A. No man has ever been able to do that.

Q. Of the compositions that you publish each year, how many become popular?

A. A very small percentage.

Q. What percentage, roughly?

A. I would say ten per cent.

Mr. Frohlich: I think that is all.

Recross-examination.

By Mr. Hotz:

Q. Mr. Schwartz, you could change the price of your music and increase its price when it became more popular, as the numbers of copies were sold, couldn't you?

A. We might, but it wouldn't be good business.

Q. And by my question I mean to include public performance rights.

A. But we can't fix that.

Q. You could fix them if you wished to do so?

Mr. Frohlich: It is hypothetical and it is not based upon anything in evidence; it is not within the language of your statute.

[fol. 875] Mr. Hotz: That is correct.

Q. Each piece of music that is sold out, we will say, in the State of Nebraska, and that had stamped thereon the price for public performance rights, would be fixed and determined as of the status today, would it not?

A. We couldn't stamp it; we wouldn't know what to stamp.

Q. If you did agree with your composer and the two of you agreed as to what price should be stamped on that piece of music, if you sold more music in six months from now or eight months from now, you could increase it on the number of copies that were sold?

Mr. Frohlich: That is objected to; it assumes a state of facts not in evidence. The law states that once the price is stamped thereon it is for all purposes and any purchaser of the music that pays the price so stamped has the right to use himself or through others for all purposes within the State of Nebraska; it assumes a state of facts not in evidence.

Mr. Hotz: Counsel is in error because the statute specifically provides that nothing in that section or in the Act should be construed to give to any purchaser of copyrighted musical composition the right to resell, copy, print, publish [fol. 876] or vend the same.

Mr. Frohlich: And we are talking about performance rights and television.

Q. You continue to sell copyrighted music; you don't merely sell one piece, do you?

A. We sell music.

Q. You sell more than one?

A. Sure.

Q. And in a piece, take for example in the supplement to your catalogue, let us just take "Red Rhumba," published by you in 1936, about how many copies of that would you say that you would have printed up right at the beginning?

A. Oh, about three thousand.

Q. Those are not all sold at once?

A. No.

Q. You are still selling them?

A. We might sell more.

Q. You might sell more. Those prices remain standard?

A. Yes.

Q. It does?
A. Yes.

Mr. Frohlich: The price for what?
The Witness: A copy.
[fol. 877] Mr. Nye: For sheet music, that is what we are talking about.

Q. Your big business comes from orchestrations, does it not?
A. No.
Q. It comes from what?
A. Sheet music.
Q. Now, on the public performance for profit, that income that ASCAP receives is largely, is it not, for the use of music for orchestras and bands and things of that sort rather than sheet music?

Mr. Frohlich: Objected to; that assumes a state of facts not in evidence.

A. No, it can't be.
Q. You wouldn't say that?
A. No.
Q. Sometimes sheet music and sometimes the other?
A. No, it is just the whole thing.
Q. The whole business?
A. Yes.
Q. You know, do you not, that ASCAP changes the license from time to time and increases it, do they not, for public performance?

Mr. Frohlich: Objected to; assumes a state of facts not [fol. 878] in evidence; no proper foundation laid.

A. I don't know how they do that.
Q. You don't know anything about that?
A. No.

Mr. Hotz: I think that is all.

Q. Is the sheet music that is sold or given away and that is carried in the music stores out in Nebraska, for example, is that available or usable by orchestras and bands and so forth in the form that it is in?
A. Piano players can use it and guitar players can use it.
Q. What about orchestras?
A. They use an orchestration.

Q. They use an orchestration. And do you sell orchestrations?

A. Yes.

Q. Do you give away a good many of the orchestrations?

A. Yes.

Q. Why do you do that?

A. So that the band leader or orchestra leader will play it.

Q. And popularize the music?

A. Yes.

Q. And so that people will come in a- buy the sheet [fol. 879] music?

A. Yes, and also buy phonograph records, and also that people will hear the song in different places of amusement where they go.

Q. So that the sheet music business is not a dead letter completely, is it?

A. I didn't say it was; we still do $20,000.

Q. $20,000 a month in sheet music?

A. And orchestrations.

Q. In the orchestrations of music, the form and manner in which it is gotten up, is there anything that would prevent printing or having affixed thereon the price for public performance in the State of Nebraska?

Mr. Frohlich: I object to the question as indefinite. Do you mean there is nothing to prevent the physical printing of the price on the sheet?

(The pending question was read by the stenographer.)

A. That would apply the same as we talked before; we couldn't affix a price without knowing the price to affix.

Q. Assuming that you and the composer had the necessary information, there would be nothing that would prevent it?

[fol. 880] Mr. Frohlich: The question is objected to as hypothetical and assuming a state of facts not in evidence.

A. If we could get the information that I testified to before we could do anything we wanted.

Mr. Hotz: I think that is all.

(Adjourned to May 24, 1938, at 10:30 o'clock a. m., at the same place.

[fol. 881] DEPOSITION OF WALTER S. FISCHER

[fol. 882] 1450 Broadway, New York, N. Y.,
May 24, 1938, 10:30 a. m.

Met pursuant to adjournment.

Appearances: As before.

WALTER S. FISCHER, called as a witness on behalf of the plaintiffs, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. What is your name and address?
A. Walter S. Fischer, Darien, Connecticut.
Q. Are you connected with the firm of Carl Fischer?
A. I am President of Carl Fischer, Inc.
Q. Is Carl Fischer, Inc. a corporation?
A. It is.
Q. Of what state?
A. New York State.

Mr. Frohlich: Is that conceded? I don't want to put in [fol. 883] this voluminous certified copy of the certification of incorporation.

Mr. Nye: It is a New York State corporation and he is President; we will concede that.

Q. What business is Carl Fischer, Inc. engaged in?
A. Music publisher.
Q. When did it go into business?
A. 1832.
Q. Who founded it?
A. My father founded the firm in 1832.
Q. Did it commence business in the City and State of New York?
A. It commenced business in the City and State of New York.
Q. Has it been continuously in business in the City and State of New York?
A. Either in that form or as a partnership or as at present, a corporation.
Q. What is the nature of the business conducted by Carl Fischer, Inc.?

A. We are music publishers. We also have a retail department. We also do, in connection with that retail department, a retail mail order business.

Q. What do you publish?

A. All kinds and varieties of standard music.

Q. Suppose you give us a definition of "standard".

[fol. 884] A. Standard is a word that is difficult to define, because there are sometimes certain compositions which are first popular music. Standard is music that is not exploited as popular music is exploited; has a lasting value; some of it has artistic value; a lot of it has educational value, the type of music that is used by people not using popular music; popular being defined as music that has a short life and is exploited in a peculiar way by so-called popular publishers.

Q. Is Carl Fischer, Inc. a member of the American Society of Composers, Authors and Publishers?

A. We are.

Q. Since when have they been members of that organization?

A. Have you got it there? I don't know exactly.

Q. Approximately?

A. Twelve years.

Q. I show you this document dated April 12, 1935, and ask you whether you recognize these signatures?

Mr. Nye: We will admit that that is the contract that he has with the plaintiff Society and that his organization is a member of it.

Mr. Frohlich: May I use a photostat in place of the original?

[fol. 885] Mr. Nye: That you may use a photostat in lieu of the original.

Mr. Frohlich: I offer it in evidence.

(The document just offered in evidence was marked Plaintiffs' Exhibit No. 6, of this date.)

Q. Have you brought with you a catalogue of the compositions published by your firm?

A. Yes, I have.

Q. May I have them? (Several pamphlets produced by the witness.) Are these documents you hand me a catalogue of the copyrighted musical compositions of Carl Fischer, Inc.

A. Yes; they constitute a catalogue of the musical compositions of Carl Fischer, Inc.

Mr. Frohlich: I will offer these in evidence.

A. (Continued:) With possible exceptions of recent publications which have not yet been incorporated.

(Thirteen printed pamphlets just offered in evidence were marked respectively Plaintiffs' Exhibits 7-A, 7-B, 7-C, 7-D, 7-E, 7-F, 7-G, 7-H, 7-I, 7-J, 7-K, 7-L and 7-M, of this date.)

Q. Mr. Fischer, these catalogues, Plaintiffs' Exhibits [fol. 886] 7-A and so forth, consisting of thirteen booklets, will you be good enough to explain why you print up your catalogue in these thirteen volumes instead of putting them in one volume?

A. Because the music is segregated: Piano music, violin music, organ music, vocal music, wind instrument and reed music, band music—I don't know what else I might have overlooked—sacred and choral music, secular choral music, violin and harp music, woodwind and reed music, brass instrument, accordion, and of course orchestra music; then there is a catalogue of books on music.

Mr. Hotz: Are they duplicates?

The Witness: There are many of those titles that are duplicated, but the bulk of the catalogue is not duplicated. You mean a duplication as to title?

Mr. Hotz: No; if the music in your catalogue would be listed in more than one catalogue.

The Witness: It would be listed in more than one catalogue. If it was listed for piano it would be listed in the piano catalogue and if it was listed for orchestra it would be listed for orchestra also.

Q. Where is your principal place of business located?
[fol. 887] A. 52-56 Cooper Square.
Q. In New York City?
A. Yes, in New York City.
Q. Does the firm own the building down there?
A. No, we lease the building.
Q. Have you a long term lease?
A. Five-year lease.
Q. What is the annual rental?
A. We lease the building on a basis of paying the taxes;

our rental—we have two buildings down there; one adjoins the other; the one is used as a store room and warehouse and the other for the purpose of doing our business. Our rental in 56-62 Cooper Square is $24,000 plus taxes.

Q. Annually?

A. Annually; and in 52-54 Cooper Square, the adjoining building, $4,000 plus taxes.

Q. About what are the taxes, approximately?

A. The taxes last year amounted to $12,306, that is the real estate taxes; of course we also pay the water bill; 56-62, $12,306, and 52-54 Cooper Square, $1,699.

Q. Prior to the time that Carl Fischer, Inc. became a member of the Society, did your firm ever obtain any compensation for the use for public performance for profit of any of your works?

[fol. 888] A. Yes.

Q. In what way?

A. Well, we had so-called manuscript works which we rented out to symphony orchestras.

Q. Aside from symphonies, speaking of the great bulk of your works, did you receive any compensation for those rights?

A. No.

Q. Did you receive any compensation for these symphony manuscripts unless you rented them?

A. They couldn't obtain the works unless they rented the material from us; it was not available except in rental form.

Q. Do you employ any writers of music, composers of music?

A. Yes.

Q. In addition to the writers and composers in your employ, do you publish compositions for other writers and composers?

A. We certainly do.

Q. What is the practice in regard to publishing compositions of writers in your employ and those not in your employ?

A. The writers in our employ are employed for hire and [fol. 889] *and* we publish their material if we see fit to publish what they produce.

Q. Do you copyright them in your own name?

A. Yes.

Q. And with respect to writers who are not in your employ?

A. The practice is very different, depending on the circumstances. Sometimes we buy manuscripts outright; sometimes under royalty contracts.

Q. Have you with you a typical contract that is issued by your firm to a composer?

A. I have.

Q. May we see them?

A. I brought with me a number of different forms of contracts involving different propositions. I would say that was a typical ocntract (producing paper).

Q. You have produced a contract with Richard Hageman dated November 17, 1936; is that the original contract with the signature of Mr. Hageman?

A. Yes.

Q. And the signature of a member of your firm as well?

A. That is my signature.

Mr. Frohlich: I will offer it in evidence.

(The document just offered in evidence was marked [fol. 890] Plaintiffs' Exhibit No. 8, of this date.)

Mr. Bennett: Do you want to substitute a copy?

Mr. Frohlich: I would like to. I don't like to take these originals away from the witness.

Q. What was the method of procedure under which you secured, copyrighted and published the composition that is mentioned in Exhibit 8?

A. We secured the right to publish under that contract the manuscript, and then we published the manuscript with our copyright notice and registered it at Washington, an unpublished manuscript.

Q. Was that copyrighted as a published or unpublished work?

A. As a published work.

Q. Did you follow the practice of copyrighting your composition as an unpublished work?

A. No, but sometimes unpublished works have been copyrighted before we acquired them, by the composer.

Q. But the practice of your firm is to acquire the work and to publish and to copyright upon publication?

[fol. 891] Q. That is done practically all the time by your firm?

A. Ninety-nine per cent of the cases.

Q. Have you another form of contract with some other composer?

A. Yes.

Q. Will you be good enough to produce it?

A. Here I have an instance where the composer copyrighted his work in manuscript before we acquired it (producing paper). This is a contract made with a man by the name of Green who had copyrighted the works in manuscript before we acquired them, and that is an assignment of the copyright in the unpublished work, and this is the contract made with the composer (producing papers).

Q. These two documents?

A. These two documents, yes.

Mr. Frohlich: I will offer these in evidence, as one document.

(The documents just offered in evidence were marked Plaintiffs' Exhibit No. 9-A and Plaintiffs' Exhibit No. 9-B, of this date.)

Mr. Frohlich: May it be stipulated that we can use photostats in place of these originals?

[fol. 892] Mr. Nye: Yes.

Q. These two contracts, Plaintiffs' Exhibits 9A and B, represent a situation where a composer had already copyrighted his work as an unpublished work and then came to you and you made a deal with him and took over the composition and you proceeded to publish it and copyrighted it in your own name?

A. Right.

Q. Would you say that this represents a small or large portion of the manner in which you acquire your works?

A. Small, I imagine.

Q. The great bulk of your work is acquired as set forth in the previous contract, Exhibit 8?

A. Yes.

Q. Under all of these contracts you are obligated to pay royalties to these authors and composers from time to time?

A. Yes.

Q. Do those contracts 8 and 9 have provisions for the payment of mechanical royalties to these composers and writers?

A. Yes.

Q. Do these contracts have any provisions for the payment of any moneys for public performance for profit?

[fol. 893] A. They do not.

Q. So that unless the writer is a member of the American Society of Composers, Authors and Publishers he receives nothing, so far as you know, for his performing rights?

A. That is correct.

Q. Now, would you say that the great bulk of your writers and composers, those for whom you publish, are members of the American Society of Composers, Authors and Publishers?

A. I wouldn't say all of them are; a great many of them are; whether it is a majority or not I would have to check on that. A great many writers we publish for are not members of ASCAP.

Q. Do you publish compositions in this country that had previously been copyrighted in any of the European countries?

A. Yes.

Q. Will you tell us the mechanics of how that is done?

A. Well, of course, they vary too, depending upon circumstances. I have here a contract made with the Union Musical Espanola covering a transcription of a work by Sevida, made by Heifetz. We published the transcription by Heifetz.

[fol. 894] Q. Was that done under a contract?

A. That was done under a contract with Heifetz and a contract with the original publishers.

Q. Have you the contract with the original publishers?

A. I have (producing paper).

Q. May I see it please?

A. (Paper handed to counsel.) Our rights under this are restricted to the use of this transcription in North and South America; it provides they should have the right to publish the transcription in all other countries.

Mr. Frohlich: I will offer these two contracts as one document, in evidence.

(The documents just offered in evidence were marked Plaintiffs' Exhibit No. 10-A and Plaintiffs' Exhibit No. 10-B, of this date.)

Q. Have you another form of contract made by you under which you publish foreign compositions?

A. Not with me, no.

Q. Have you some form of contract there with reference to foreign works?

A. Some other foreign work. The one I have given you is the one I have here.

Q. Do you publish any of your compositions in European [fol. 895] countries?

A. We have granted other publishers the right to publish.

Q. How is that arranged. How do you do that?

A. There are numerous agreements that we make; sometimes we give them a limited right to publish for a number of years, predicated on a renewal of that contract if they sell so many copies. In other instances we give them the complete right subject to recovery if they do not sell a minimum number of copies in a given period. In other instances we have sold the copyrights.

Q. You have no foreign company affiliated with Carl Fischer, Inc.?

A. No.

Q. Do you trade with other firms or corporations in European countries for these foreign rights?

A. Yes, for individual works.

Q. When you publish in England, you trade with an English concern?

A. Yes.

Q. And on the Continent with some continental firm?

A. Sometimes an English firm will publish on the continent. Sometimes the rights will be divided; for instance, the "Stein Song", we gave the right to publish in England to one firm, and to another firm the right to publish in [fol. 896] Australia, and another one the right to publish in Germany.

Q. Have you some other form of contract with you?

A. I have a form of contract here where we acquired the song called "Shadrac" by Robert McGurnsey, from the Southern Music Publishing Company, publishers.

Q. Before they made any contract with you had they copyrighted the composition?

A. I imagine they must have because they retained—I mean, we had to—our assignment to us was subject to any contract or license they had heretofore made on behalf of the composer. This is the bill of sale, from Southern to us.

Mr. Frohlich: I will offer it in evidence.

Mr. Nye: We are noting an objection as to the materiality of all these exhibits.

(The documents just offered in evidence were marked Plaintiffs' Exhibit No. 11-A and Plaintiffs' Exhibit No. 11-B, respectively, of this date.)

Q. Now, Mr. Fischer, the contracts that we have placed in evidence this morning, are they representative contracts?

A. The only representative contract is the first contract; the others are all special contracts.

Q. This first contract, which is Exhibit 8, is a contract [fol. 897] with Hageman?

A. That is a representative contract.

Q. Would that represent the usual bulk of contracts with your firm?

A. Yes.

Q. You have other special contracts of the type of these other documents that you have produced this morning?

A. Certainly.

Q. Have you purchased any renewals of copyright in the past few years?

A. Do you mean purchased from the composers, previously published by someone else?

Q. Yes.

A. No.

Q. Have you obtained the right to renew the copyright from artists or composers who previously had contractual arrangements with you?

A. Yes, a great many.

Q. In every case where there is a renewal, are you required to negotiate with the owner of the renewal right?

A. Where once it is covered by contract and the composer is still alive, then we don't think we are required to negotiate.

Q. If the composer is dead, you negotiate with his [fol. 898] widow?

A. Whoever may be the legal owner of the renewal right we have to negotiate with.

Q. Is it your custom to have a new contract made for a further period of twenty-eight years?

A. Yes.

Q. Do you some-times on these negotiations pay an advance royalty to the owner of the renewal right?

Mr. Nye: I object to all this as being purely speculative, not the proper way in which to prove the custom of the business; the custom of the business being immaterial.

A. Yes.

Q. Do you publish any compositions, Mr. Fischer, that are interpolated or incorporated in stage productions?

A. Occasionally, yes; in motion picture productions, not in stage productions.

Q. Can you tell us the name of a composition that you published in the last three or four years, of that type?

A. Yes; in the picture "The King Steps Out," in which Fritz Kreisler's music was used.

Q. Did you restrict that number?

A. No.

Q. Do you restrict any of your numbers?

[fol. 899] A. Yes.

Q. What numbers do you restrict?

A. For instance, among these contracts here, that song "Shadrac" was restricted for a time, by the insistence of a composer who wanted to be sure that the song was introduced by a reputable artist.

Q. When you restrict a number do you notify the American Society of Composers, Authors and Publishers to take it off its active list?

A. Yes, we are required to, and they are so notified.

Q. What was the reason for restricting this particular number, "Shadrac"?

Mr. Nye: Objected to as calling for a conclusion, speculation.

Q. If you know, what was the reason for restricting that song; why did you restrict it?

A. I just stated, because the composer was very particular; he wanted the number introduced by a reputable artist and we knew we couldn't get the cooperation of this particular artist if lesser artists were doing it at the same time.

Q. If that particular number were being played over the radio or other places, would it have injured the number?

Mr. Nye: Objected to as speculative.

A. Yes.

[fol. 900] Q. That was the artist's contention, I mean?

A. Yes.

Mr. Nye: I move to strike out the answer as stating a conclusion only.

Q. Does that happen in many instances?

A. Not in many instances; that is exceptional.

Q. Do you also grant to motion picture companies the right to synchronize some of your musical compositions in their pictures, from time to time?

A. Yes, we do.

Q. Can you give us the names of some compositions that you have licensed for that purpose within the last three or four years?

A. I can give you names of some; there are a good many of them; "Washington Post March", by Sousa; "On The Mall" by Goldman; "Lights Out" by McCoy.

Q. Are these licenses given by you under some special contract?

A. They are granted through an agent and trustee.

Q. And you receive a special compensation for that right?

A. Yes, we do.

Q. You don't receive them from the Society?

A. No.

[fol. 901] Q. Do you frequently grant the mechanical reproduction rights of your works to manufacturers of piano rolls and disk records?

A. Yes.

Q. Is that done in many instances?

A. Our contracts are relatively few as compared with the popular publishers.

Q. When you grant such rights to a producer or manufacturer of records and piano rolls, do you grant any rights other than the right to make the records?

A. That is all we grant.

Q. Have you any control over the disposition of his records or piano rolls?

A. No, except that he is limited by that contract to certain music he can make.

Q. Have you a form of such a contract with you?

A. Yes, one with the Victor Company (producing paper); no, that is with the R-C-A Manufacturing Company.

Q. Is this a contract made with reference to a composition entitled "Two Guitars"?

A. Yes.

Mr. Frohlich: I will offer it in evidence.

(The document just offered in evidence was marked [fol. 902] Plaintiffs' Exhibit No. 12, of this date.)

Q. Now, Mr. Fischer, this contract, Plaintiffs' Exhibit 12, with the R-C-A Manufacturing Company, Inc., represents a typical mechanical contract entered into by your firm?

A. Yes, it does.

Q. Under this contract the R-C-A Manufacturing Company, Inc. is merely required to pay you so much per record manufactured, isn't that right?

A. That is correct. Wait a minute; doesn't it say, "records manufactured and sold"? "Manufactured and sold".

Mr. Nye: I object to that; the exhibit is the best evidence.

Q. Is there any way in which you could compel R-C-A to put on its records sold in the State of Nebraska any price for all uses of the composition?

Mr. Nye: Objected to as calling for a conclusion, the contract being the best evidence.

A. No.

Q. Does R-C-A act as your agent in any way?

A. No.

Mr. Nye: I object to that as calling for a conclusion.

Q. Have you any control whatever over the sale of the [fol. 903] records manufactured by the R-C-A Manufacturing Company under this contract?

Mr. Nye: I object to that as calling for a conclusion; not the best evidence.

A. No, we have no control.

Q. Are you willing to allow the R-C-A and other manufacturers of record and rolls of your compositions to act as your agent in the disposition of the public performance rights for profit in the State of Nebraska?

Mr. Nye: That is objected to as speculative.

A. Definitely not.

Q. Do you sell any of your compositions in the State of Nebraska?

A. We do.

Q. When I say "compositions," I mean copies of your sheet music in the State of Nebraska.

A. Yes, we do business in Nebraska.

Q. Have your compositions over the years been performed in the State of Nebraska?

A. I believe so.

Mr. Nye: I move to strike out what the witness believes; no sufficient foundation.

A. I will answer that differently. Obviously they have.

Mr. Nye: Same objection.

[fol. 904] Q. Do you know of your own knowledge whether any of your works have ever been performed in the State of Nebraska?

Mr. Nye: Objected to as calling for a conclusion.

A. I have never definitely checked it, so I have no definite knowledge of it.

Q. Have you from time to time sold many copies of your compositions to dealers or jobbers of music in the State of Nebraska?

A. We do business there regularly; I don't know how much our business amounts to with the dealers in the State of Nebraska; I haven't checked it.

Q. Have you an office there in the State of Nebraska?

A. No.

Q. Any agent or representative there?

A. We have a western representative who covers the State of Nebraska.

Q. Is he located in the State of Nebraska?

A. No; we have a representative in Chicago, and one in Los Angeles. As a matter of fact, I don't know which of them covers Nebraska.

Q. Are you able to print on the face of your musical compositions sold in the State of Nebraska the price to be charged for the use or rendition of your copyrighted mu-
[fol. 905] sical compositions within that State, for all purposes?

Mr. Nye: Objected to as calling for speculation, immaterial and being purely hypothetical.

A. It would be quite impossible for us to do that.

Mr. Nye: I move to strike out the answer on the ground that it states a conclusion, and not a statement of fact.

Q. At the time that you sell one of your compositions in the State of Nebraska, can you determine and fix the price to be charged for the use and rendition of your copyrighted musical compositions within that State for all uses?

Mr. Nye: Same objection.

A. And for all time?

Q. And for the full length of the copyright renewal?

Mr. Nye: Same objection.

A. We could not.

Q. If you were acting alone and not in combination with any of the other members of the Society, could you determine and fix the price to be charged for the use or rendition of your copyrighted musical compositions within the State of Nebraska, at the time you sold them in that State?

Mr. Nye: I object to that as assuming a hypothetical state of facts not in evidence.

[fol. 906] A. Could I determine and fix the price?

Q. Which would cover all uses, including the right to publicly perform for profit, for the full term of the copyright and renewal?

Mr. Nye: Same objection.

A. No, we could not; there are too many factors that may come into being; we couldn't tell what we should charge; it is impossible.

Mr. Nye: I move to strike out the answer, all except the word "no", as not responsive.

Q. In determining such a price to be charged for the use or rendition of your copyrighted musical compositions within the State of Nebraska, what factors would you have to take into consideration?

Mr. Nye: Objected to as calling for speculation.

A. The particular vogue of the composition, that is what we would have to know to determine its value, because you take for instance one man may write a dozen songs and out of those dozen songs one may be the outstanding song and have value; we wouldn't be justified in fixing the same price for the other eleven songs as for that one particular outstanding song. There is no way we could determine in

advance which song will be the successful one or the one [fol. 907] that will be accepted.

Q. Let us take any particular composition, whether successful or not, and you are required to determine and fix the price to be charged for all uses and purposes at the time you sell the composition in the State of Nebraska, what elements would you have to take into consideration in relation to the establishment of the price at which this composition would be sold?

Mr. Nye: I object to that as speculative, assuming a hypothetical state of facts not in evidence.

A. We would have to take a lot of elements, the nature of the performance, the means of its performance, the vogue of the song, its present sale, its possible future sale.

Q. Do those factors vary from day to day or are they constant?

A. And also our contractual relation to the composer.

Mr. Nye: I move to strike out the answer as not responsive.

Q. Do any of those factors vary from day to day?

A. Absolutely, they vary from time to time.

Q. In order for you to ascertain the information required to enable you to consider those factors, would you have to [fol. 908] employ somebody in the State of Nebraska to obtain that information for you?

Mr. Nye: I object to the question as calling for speculation.

A. I do not see how this information could be available to us unless we got it from our agents whom we would have to employ to get the data for us.

Q. What would you have to pay these men to get this information for you?

Mr. Nye: Objected to; no sufficient foundation laid.

A. I think that would be difficult to value; it would take an intelligent high type of man to do that work.

Q. Can you tell us what you would have to pay some intelligent and high type of man to do this work?

Mr. Nye: Same objection.

A. I suppose you would have to pay him fifty dollars a week, plus his traveling expenses.

Q. Assuming that there were 367 places of entertainment or establishments in the State of Nebraska that used music, would you have to employ such men to go around among these 367 establishments constantly?

Mr. Nye: I object to that as being purely speculative, calling for a conclusion.

[fol. 909] A. I don't see how you could get any information unless you contacted the various people who were using the music, and found out what use they were making of it.

Mr. Nye: I move to strike out the answer for the same reason.

Q. Would you have to keep a constant check on the nature of their performances, and how they varied, and how the establishments varied?

Mr. Nye: Same objection.

A. Definitely, because they may be having a large band one time and a small group another time and they may be giving a performance of dinner music and they may be giving it for dance purposes at another. There are a lot of changes.

Q. Would the profits of the establishment have some bearing on your determination?

A. Yes, it would.

Q. Would the size of the dance hall have some bearing?

A. That definitely would.

Q. Would the dignity and manner of the performance have some bearing?

A. I think that in certain instances it might be very important.

Q. Having obtained all that information, would you have to employ somebody to keep a check on these establishments [fol. 910] to see whether or not they infringed upon your compositions?

Mr. Nye: I object to the question; no foundation laid; speculative.

A. I don't see how you could get a record of the works that would be performed from your catalogue without a careful checking; it would be impossible.

Mr. Nye: I move to strike out the answer for the same reason.

Q. Would you have to have someone check up to see whether or not performances were made on copies that were sold within the State of Nebraska or purchased outside of the State of Nebraska?

Mr. Nye: I object to the question as speculative.

A. I don't understand the question fully. (The pending question was read by the stenographer.) I would. We couldn't tell whether the copy being used was purchased within the State of Nebraska or without the State of Nebraska, without seeing the copy and having identified the copy.

Q. Do you make a practice of selling any of your musical compositions and determining and fixing the price for all uses and purposes of such compositions in any State, outside of the State of Nebraska?

[fol. 911] A. We don't do it in any place, not in Nebraska or elsewhere.

Q. Would you have to employ a lawyer to protect you against infringements in the State of Nebraska?

Mr. Nye: Objected to as calling for a conclusion and speculation.

A. We would probably have to employ a staff of attorneys.

Q. What do you think it would cost you; what do you estimate?

A. That would be a speculation.

Q. Going back to the investigator that you said you would have to employ to obtain the information with relation to these various establishments, would such an investigator have to have some musical skill and knowledge?

A. Definitely, yes; he would have to be able to recognize music if played from our catalogue.

Q. Would that be true in relation to the man who would have to go out and detect infringements of your works; would he have to be musically trained?

A. Yes, certainly.

Q. You have employed many persons in your concern from time to time in various capacities, have you not?

A. Yes.

Q. What salary do you have to pay a man who has some musical knowledge or skill?

[fol. 912] Mr. Nye: I object to the question; no proper foundation.

A. Seventy-five or a hundred dollars a week.

Q. Have you employed attorneys from time to time in infringement work?

A. Yes.

Q. Are you familiar with the fees charged by attorneys in representing you in infringement work?

A. I know what our own attorneys are charging us.

Q. I mean your own attorneys. Are you familiar with the fees they charge?

A. Yes.

Q. Your attorneys that represent you in infringement work are skilled in copyright litigation?

Mr. Nye: I object to the question as calling for a conclusion, no proper foundation laid.

A. Yes, of course they would have to be.

Q. Would you hire a lawyer who didn't know anything about copyright work?

Mr. Nye: Same objection.

A. Certainly not.

Q. Taking into consideration the salaries paid to employees with musical skill, taking into consideration the fees you paid attorneys that heretofore represented you [fol. 913] in infringement suits, what would you estimate that it would cost you to obtain information in the State of Nebraska respecting the establishments, the cost of detecting infringements and the cost of bringing suits to protect you on infringements within the State of Nebraska?

Mr. Nye: I object to that on the ground that there is no proper or sufficient foundation laid, and calling for conclusion.

A. My answer would be that it would be almost impossible to give any accurate statement as to that, because there are too many unknown factors. It would be a substantial amount of money.

Q. What do you mean by a substantial amount of money?

Mr. Nye: Same objection.

A. Some people consider $10,000 is substantial. It might be and probably would be in excess of that. I would have to study that before I could give you a more accurate answer. There are too many unknown factors there.

Q. Would you have to establish an office in the State of Nebraska to protect you?

Mr. Nye: Objected to as calling for a conclusion.

A. Yes, I should say we would have to have someone in the State of Nebraska as a responsible representative, prob-
[fol. 914] ably with a staff of one or two to assist him.

Q. Can you tell us from your past experience what it would cost to run such an office staff and employees and attorneys, a minimum figure?

Mr. Nye: Same objection.

A. I should say a staff would cost $100 a week, plus traveling expenses; what they would be I don't know. I don't know what you could rent an office in Nebraska for. I have had no experience out there. I don't know what the attorneys' fees would be. That is a pretty difficult question to give an answer to.

Q. Would it be in excess of $10,000?

Mr. Nye: Same objection; and leading.

A. Yes, it would have to be in excess of $10,000 a year; your staff would cost you $5,200; your traveling expenses would cost, I don't know how much; the rent would cost something, and other incidentals. That is without attorneys' fees, so obviously it would be in excess of $10,000.

Q. Have you, Mr. Fischer, any present data at your command that would enable you to determine and fix a price to be charged for the use and rendition of your copyrighted musical compositions in the State of Nebraska, for the purpose of television?

Mr. Nye: I object to that as immaterial; calling for specu-
[fol. 915] lation.

A. Of course, we have no such data.

Q. Have you any data at your command that would enable you to determine the value and the price for all uses and purposes of your musical compositions sold in the State of Nebraska at this time?

Mr. Nye: Same objection.

A. No, we have not.

Q. If television is perfected and comes into general use ten years from now, would there be some basis ten years from now for determining the value of a particular composition for television purposes?

Mr. Nye: I object to the question as calling for speculation, and for the further reason that the witness is not qualified to answer.

A. I don't think I would know how to answer that question. I don't know what ten years from now will disclose.

Q. If you are required to determine and fix the present price for all uses and purposes of a musical composition of yours, sold within the State of Nebraska at the present time, is it possible for you, with the information and data that you now have and the experience you have in the business, to place a value at all on this composition for the [fol. 916] purpose of television use?

Mr. Nye: I object to the question for the reason that there has been no foundation laid for the knowledge of the witness; calling for speculation.

A. No, it would be impossible.

Q. And television use might change in value for all purposes from time to time even though it became popular?

Mr. Nye: Same objection.

A. I don't know; nobody knows what that is going to mean. Nobody knew what radio would mean in our business until years of experience.

Q. Assuming that television becomes popular years from now, within the life of the copyrights you own, wouldn't you have to take into consideration in determining and fixing the price to be charged for the use or rendition of your copyrighted musical compositions by television, wouldn't you have to take into consideration the same elements that you would have to take into consideration for the price now?

Mr. Nye: Same objection.

A. Yes.

Q. You couldn't tell that until the time arrived, could you?

Mr. Nye: Same objection.

[fol. 917] A. It would be impossible.

Q. Are any of your compositions played on the national hook-ups of the National Broadcasting Company and the Columbia Broadcasting System from time to time?

A. They are.

Q. How do you receive your moneys—when I talk of yours I mean the company's moneys—from the American Society?

A. By means of a quarterly distribution made by the board of directors.

Q. Can you tell us approximately how much you received from the American Society during the year 1936?

A. I can tell you accurately if you want it.

Q. Will you give us the accurate figures, Mr. Fischer?

A. No, I can't give you the accurate figures, because the statement I have here lumps some other figures with it; approximately $100,000.

Q. What did you receive in 1937?

A. Approximately $110,000.

Q. What did you receive in 1935?

A. Approximately $80,000.

Q. Do you consider this contract, Plaintiffs' Exhibit 6, your contract with the American Society, of great value to you?

[fol. 918] A. Definitely.

Q. What do you estimate the value of that contract to be?

Mr. Nye: Objected to on the ground that it calls for speculation; no foundation laid.

A. Well, to arrive at an estimate, I suppose one way of figuring would be on the basis of the return. On the basis of a ten per cent return, $1,000,000.

Q. When this contract expires in 1940, is there a likelihood that it will be renewed?

A. These figures that I have given you are accurate figures.

Q. When this contract expires in 1940, is there a likelihood that it will be renewed?

A. We all hope it will be renewed.

Mr. Nye: I move to strike out the answer as not responsive.

Q. As a matter of fact, since you have joined up with the American Society you have received a contract with them each five years?

A. Yes, we have.

Q. This is the last of a series of contracts, 1935?

A. Yes, sir.

Q. And are you willing to have this contract declared [fol. 919] invalid?

Mr. Nye: Objected to as calling for a conclusion; immaterial.

A. Certainly not.

Q. Do the receipts that you obtain from the Society constitute a substantial portion of the net income of Carl Fischer, Inc.?

A. They do.

Q. If these receipts were lost to you would it affect the business of Carl Fischer, Inc.?

A. It would, very seriously.

Q. To what extent would it affect it?

Mr. Nye: I object to the question as calling for speculation.

A. We would be operating at a loss if we were deprived of that revenue.

Q. Since the advent of radio in 1922, have you noticed any falling off in the sale of sheet music by your firm?

A. Yes, there has been a falling off in the sales of certain types of music.

Q. What types were affected; what types fell off?

A. Songs particularly, violin and piano concert music, orchestra and band music.

Q. Were those compositions that were played on the [fol. 920] radio to a large extent?

A. Yes.

Q. Did you find any ratio between the increase of performances of compositions over the radio and the decrease of your musical compositions?

A. We have not established any figures on that.

Q. Are you prepared to testify that where there has been an increase in the performance of your compositions on the radio there has been a decrease in the sale of your sheet music?

A. No.

Q. Have any of the compositions published by your company become very popular over the radio in recent years?

A. Yes.

Q. Has their popularity continued or has it been short-lived?

A. Well, take the use of the "Stein Song"; that was a popular number, not a standard number; that of course is now practically obsolete, that particular number.

Q. On all the compositions published by your company do you print at the foot of the first page of the music the copyright notice required by law?

A. We do.

Q. Mr. Fischer, if you had to determine and fix the *the* [fol. 921] price to be charged for the use or rendition of your copyrighted musical compositions in each and every State of the United States, could you carry on your business?

Mr. Nye: I object to the question for the reason that it calls for speculation; no foundation.

A. In order to do it we would have to make very serious readjustments.

Q. Can you financially afford to have a man in every State of the Union to detect infringements for you?

Mr. Nye: Objected to as speculative.

A. No.

Q. Can you financially afford to retain a lawyer in every State of the Union?

Mr. Nye: Same objection.

A. The financing would be difficult unless we would have somebody to pay them.

Q. If you acting alone were required to take the various steps we have mentioned in order to protect your performing rights, could you financially carry that situation?

Mr. Nye: I object to that question as assuming a state of facts not in evidence, and calling for speculation.

A. It would be impossible to maintain any such staff [fol. 922] without in some way getting a return from somebody for the expenses of such a staff.

Q. In selling your sheet music you fix a certain price on

your music according to the name of the composer and the nature of the work and other factors, don't you?

A. There is a list price established, taking into consideration a number of factors.

Q. Does the price vary on your compositions, or is there something of a uniform price?

A. No; they vary. The catalogues are evidence of that.

Q. If you were required to determine and fix the price to be charged for all uses including the right of public performance for profit within the State of Nebraska would that affect the sale of your sheet music in the State of Nebraska?

Mr. Nye: Objected to as calling for speculation.

A. I don't know as to that. As a practical matter I don't see how you could possibly do that without disfiguring your music. You would be put to expense. Certainly it would be objected to on the part of the trade generally to have all that stamped on your copies. You would have to print separate editions, which would be an enormous expense.

[fol. 923] Q. Take your editions that you sell within the State of Nebraska, that you sell for twenty-five cents; are there such editions?

A. Yes, that is the average price for a piece of music.

Q. If in addition to the twenty-five cents you were required to determine and fix the price to be charged for all uses of the composition, including television and public performance for profit and each and every other right, and the purchaser of every sheet of music had to pay the full and complete price for all of those uses in addition to the price of the sheet music, would that affect the sale of your sheet music in the State of Nebraska?

Mr. Nye: I object to the question as calling for speculation and conclusion.

A. We would go out of business in the State of Nebraska, on that basis.

Q. How would that affect the sale of your sheet music?

A. It would add substantially to the cost of the ultimate purchase to such an extent that the ultimate purchaser would not be in a position to pay it.

Q. A good deal of your catalogue is sold for the use of the home?

A. Yes.

[fol. 924] Q. A good deal of your music is sold to music teachers?

A. Yes, music educators.

Q. Colleges and conservatories?

A. And schools.

Q. And you publish music that is purchased for school orchestras and bands?

A. Definitely.

Q. All of those people I have mentioned just now are people in the State of Nebraska?

A. Yes.

Q. Could you sell your music to those people in that State of Nebraska if in addition to the prices of the musical compositions you affixed to that price and added to it the price to be charged for the use or rendition of this copyrighted musical composition for all uses and purposes?

Mr. Nye: I object to that question on the ground that it assumes a state of facts not warranted by the evidence.

A. It would be impossible to do that. You would throw the market wide open to foreign publishers and would deprive the American publishers of a living in the State of Nebraska if you did that in the State of Nebraska.

Mr. Frohlich: Your witness.

[fol. 925] Cross-examination.

By Mr. Hotz:

Q. Have you read the Nebraska act?

A. No, not in detail.

Q. Do you receive from the American Society of Composers, Authors and Publishers something else by way of income besides public performance rights money derived from that purpose?

A. Do we receive any other money? No.

Q. The reason I ask you is because when you had that statement before you you said it included some other figures.

A. Yes, ASCAP check and other money.

Q. What did you mean?

A. Permission granted to some other people to use our music for synchronization purposes.

Q. That has nothing to do with ASCAP?

A. No, that has nothing to do with ASCAP.

Q. You did grant permission to use your copyrighted music to others for public performance rights by fixing a sum of money to be paid for that purpose, by arrangement?

A. We only do that in the case of grand rights, so-called grand rights, and that is the best illustration, so-called symphonic works, a work that is not published for sale.

[fol. 926] Q. Used largely for public performances?

A. Used largely for public performances by the symphony people.

Q. In those instances you charge so much for that right and get your money right on the spot?

A. It is charged to the management and it is collected from the management.

Q. What I am getting at, it is one charge you make?

A. In some instances it is two charges; sometimes they give a second performance; if they give a second performance there is a second charge.

Q. So you charge for each performance?

A. Yes.

Q. Is that practice standard with you?

A. That varies with the class of music. There are "A" symphonies and "B" symphonies. It varies. There is also the first performance of a work.

Q. In regard to your deal with ASCAP as to public performance rights of your music, the American Society of Composers, Authors and Publishers fixes and determines the price that the user shall pay for public performance rights within the State of Nebraska?

A. Yes.

Q. In all these catalogues that have been introduced in [fol. 927] evidence of those musical compositions, vocal and instrumental, the copyrights are owned by you, are they not—that is, by your firm?

A. Yes.

Q. You own them and also certain renewal rights in reference to them?

A. Yes.

Q. Approximately how many are there, would you say?

A. I don't know. I have never counted them. It is an enormous repertoire.

Q. But it shows in the catalogues here?

A. Yes.

Q. Do you know how the ASCAP fixed the price that shall be paid to you?

A. Yes, definitely.

Q. How do they do it?

A. The net distributable income of the ASCAP is divided into two parts; half is allocated to the publishers, the other half is the composers' and authors' share. The publishers' share is distributed in the following manner: There is what is known as seniority rating. Part of that goes on the seniority rating of the concern. Part of it is distributed according to surveys made of the performances, and the balance is distributed by a committee which takes into con-
[fol. 928] sideration the contribution made by the individual publisher to the ASCAP repertoire.

Q. You are a member of the board of ASCAP?

A. I am.

Q. What percentage would you say of the music copyrighted, vocal and instrumental music there is in the United States that ASCAP handles in the manner such as you have mentioned?

Mr. Finkelstein: Objected to, no foundation; speculation.

A. Of what?

Q. Total of all copyrighted music, vocal and instrumental?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial, calling for speculation, no foundation laid.

(The pending question was read by the stenographer.)

A. About ninety per cent, I should say. Of course, I have no definite way of knowing.

Q. That is your best estimate as a member of the board of directors of the American Society of Composers, Authors and Publishers and as a publisher, one of the largest publishers?

[fol. 929] A. Yes, that would be my estimate.

Q. How many publishers, reputable, established publishing houses, are there that are members of ASCAP?

A. How many?

Q. Yes.

A. In all?

Q. Yes.

A. Well, I should say about ninety. How many are there? I don't know.

Q. In the bill of complaint that was filed by the attorneys for the Society, it was 123; is that right?

A. I guess that is right.

Q. That group that are members of ASCAP constitute substantially all of the publishers of consequence in the United States?

A. Yes, I should say so; I know of no important publisher that is not in it.

Q. In each instance, from your experience as a member of the board of directors of the American Society and as a publisher, the price for the public performance rights is fixed by ASCAP, your Society?

A. Yes, the license.

Q. The price for that user?

A. Yes, for the right to use the repertoire of ASCAP.

[fol. 930] Q. How many members of the board of directors are there from the publishers?

A. The number of publisher members is twelve publisher members; it is in the constitution.

Q. Besides yourself who are the other eleven that are on that board?

A. There are only eleven just now. Mr. Gustave Schirmer.

Q. Would you mind giving just what he is, his connection?

A. Of G. Schirmer, Inc. George Fischer, J. Fischer & Brother. Saul Bornstein, of Irving Berlin, Inc. Louis Bernstein of Shapiro, Bernstein & Co. Jack Bregman. Leo Feist, of Leo Feist, Inc. Will Von Tilzer, Broadway Music Company. Jack Mills, Mills, Inc. Max Dreyfus, Chappell & Company. Walter Douglas. What is Douglas' firm name now? Donaldson, Douglas & Gumble. Edwin H. Morris of Witmark. That takes care of the eleven, doesn't it?

Q. Yes. They are, I presume, among the largest publishing houses, the men you have given, they are very substantial firms?

A. Yes; generally speaking, they are representative of the industry.

Q. They all have catalogues similar to those that have been introduced here as Exhibit 7? I call your attention [fol. 931] to Exhibit 7 (shown to witness), consisting of thirteen books, which are a list of your musical composi-

tions which you have copyrighted and own. Do all of the publishing houses have a catalogue of musical compositions?

A. They all have catalogues of music, yes.

Q. They are printed and available for public use, that is, for persons to look at or buy from if they wish?

A. I don't think so; I don't think they all print their catalogues. The popular publisher doesn't print his catalogues as a rule.

Q. What do they have?

A. They print bulletins. They have no need f permanent catalogues. Schirmers and George Fischers is similar to ours.

Q. They are recorded in the form of typewritten sheets or something of that sort?

A. They are all filed with ASCAP in typewritten form.

Q. They are all filed and are available for use?

A. Let me make that perfectly clear. It is my understanding that the popular publisher does not distribute a catalogue the way a standard publisher does. He has no use for it.

Q. The popular music goes out too fast?

A. Yes.

Q. Are you familiar with the income of ASCAP?

[fol. 932] A. Yes.

Q. How much was it for 1937; do you remember?

A. I don't know definitely.

Q. I could get that definitely from them, but you, being on the board of directors, you would know.

A. I would hate to quote figures without having them before me.

Q. Approximately what was it?

A. Net distributable revenue?

Q. Yes.

Mr. Finkelstein: That is objected to as incompetent, irrelevant and immaterial.

A. $2,000,000,—I wouldn't want to say that definitely.

Q. What were ASCAP's expense items; what is their overhead?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

Mr. Hotz: I am asking for what it is; I am not asking for the nature.

Q. What is it?

A. It is the operation of the staff, the executive offices in the National Broadcasting Building, its field force; it has a very substantial operation in connection with the distribution of the money, allocating to the various catalogue [fol. 933] performances, it has a very substantial staff in that connection, and it also has its field managers.

Q. You don't know how much their overhead is?

A. I know roughly it is about twenty per cent of the total income. I wouldn't attempt to testify to figures from memory. I would have to have them.

Q. Do you know what the men are paid out in the field such as their representative in Nebraska, for instance; is he on a salary or does he get a certain percentage of public performance rights that is taken in?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. I don't know.

Q. Do you know how it is in New York, for example?

A. I am not definite here in New York; I think they are all salaries here in New York.

Q. What is Mr. Buck's salary?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. $30,000.

Q. What is Mr. Mills'?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. Forty.

[fol. 934] Q. And Paine's?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

Q. That is $40,000?

A. I think Paine's is $22,500; I would have to check that to see if it is correct.

Q. Those three men are the ones who are really in charge of the operations of ASCAP?

A. Yes, that is right.

Q. Do the directors get any salary?

A. No.

Q. Then, does Mr. Buck also have an income from ASCAP from performance rights?

A. Yes.

Q. Do you know what it is?

A. I do not.

Q. Do you know whether Mills or Paine have?

A. I know definitely they have not.

Q. Who receives the largest amount of money paid by ASCAP for public performance of copyrighted works among the composers?

Mr. Finkelstein: That is objected to as incompetent, irrelevant and immaterial.

A. Among the publishers?

[fol. 935] Q. No, composers?

A. I don't know.

Q. Do you know what the top amount is that is paid to any composer?

A. No.

Q. Do you know the top amount that is paid to any publisher?

A. I know who gets the highest amount.

Q. Is it Harms?

A. It is Harms.

Q. How much is it?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. I don't know; I don't get the figures for the other publishers.

Q. Who fixes the amounts that are paid to the various publishers and composers and authors; how is that done?

Mr. Finkelstein: That is objected to as incompetent, irrelevant and immaterial.

A. The amounts paid to the various publishers and authors?

Q. Yes.

A. The amounts paid to the various publishers is determined as I have explained before, by an allocation of the distributable amount.

[fol. 936] Q. Who does that?

Mr. Finkelstein: That is objected to as incompetent, irrelevant and immaterial.

A. What?
Q. What men?

Mr. Finkelstein: That is objected to as incompetent, irrelevant and immaterial.

A. The management; the distribution proportion is determined by the board and the management makes the distribution.
Q. The board itself makes the allocation?
A. The formula, as I have explained.
Q. And they all sit in on that; and they have something to say about that when it is discussed?
A. The formula? That is correct; that is agreed to.
Q. By the management you mean Mr. Buck, Mr. Paine and Mr. Mills?

Mr. Finkelstein: I object to that as incompetent, irrelevant and immaterial; assuming a state of facts not in evidence.

A. I imagine Mr. Paine as manager supervises that distribution.
Q. How long has Mr. Paine been identified with ASCAP?
A. A little over a year.
[fol. 937] Q. He is a new man?
A. He is a new man.
Q. Was he added to the staff, or did he take someone else's place?
A. He was added to the staff.
Q. What had been his business before?
A. Previous to that he was the manager of the Music Publishers Protective Association.
Q. What was that?
A. That was an association made up principally of popular music publishers, which functioned in the interest of popular music publishers.
Q. Did they have anything to do with public performance rights?
A. No.
Q. ASCAP has always had that in charge?
A. Trade practices chiefly they were concerned with.
Q. The Music Publishers Protective Association did nothing by way of granting licenses?
A. No; for performance, no.

Q. Did the organization do anything for licensing under the copyright act?

Mr. Finkelstein: I object to that as incompetent, irrelevant and immaterial.

[fol. 938] A. The organization itself did nothing, but Mr. Paine acting as agent and trustee for a number of publishers granting electric synchronization rights.

Q. Who fixed the price of those synchronization rights?

Mr. Finkelstein: I object to that as incompetent, irrelevant and immaterial.

A. The publishers themselves.

Q. Who fixed the price in connection with electrical transcription?

Mr. Finkelstein: That is objected to as incompetent, irrelevant and immaterial.

A. The publisher also.

Q. You were a member of the board of directors of the Music Publishers Protective Association in 1931?

Mr. Finkelstein: I object to the question as incompetent, irrelevant and immaterial, argumentative, and has no bearing on this case.

A. Yes, I was.

Q. For how long?

A. I don't remember; I was on and off that board, I think, for a number of years.

Q. Has that organization gone out of business?

Mr. Finkelstein: I object to that as incompetent, irrelevant and immaterial.

[fol. 939] A. I don't think so.

Q. Were you present in 1931 when the discussion came up as to license fees for electrical transcription?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial; assumes a state of facts not in evidence.

A. I imagine I was present at some of the discussions.

Q. You knew that the problems were before that board?

A. Yes.

Q. Did they make any agreement as to fees?

Mr. Finkelstein: I object to that as incompetent, irrelevant and immaterial.

A. Fees were suggested.

Q. Were they carried out?

A. I don't know just what the ultimate fee was. Electrical transcription, it was twenty-five to fifty cents per use; I don't recall the details of that.

Q. In connection with the public performance rights there would be nothing from the standpoint of mechanical work or printing that would prevent your organization, by agreement with the composer, of course, fixing the public performance rights on a piece of sheet music when it was sold, by having it stamped on there; you could stamp it on there if you and the composer wished?

[fol. 940] A. You couldn't, without mutilating the copy.

Q. Wouldn't it mean that the sale of this music carries with it public performance rights, wouldn't that be all that was necessary?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. I wouldn't know as to that. Would that be all that was necessary? It would be physically possible.

Q. That could be done?

A. That statement could be put on the music physically.

Q. And the only persons that are interested in those public performance rights to begin with are the composer and the publisher; those are the two persons, the composer and the publisher, aside from the user?

A. Generally, yes.

Q. If the composer at the time you took over his work made a deal with you that he was agreeable, it could be done?

Mr. Finkelstein: I object to the question as incompetent, irrelevant and immaterial, and hypothetical.

A. If we could determine a price, physically it could be printed on the copy. It might mutilate the copy; it might call for remaking our title pages.

[fol. 941] Q. I am talking about the future.

A. Yes, physically it could be done.

Q. You could arrange with the composer in consultation with yourself what price to charge?

A. No, not practically, because there is no way of determining what price is a fair price.

Q. The members of the board of directors of the Music Publishers Protective Association, up until 1934 or thereabouts, were about the same or constituted the same men as were on the board of directors representing the publishers on ASCAP?

Mr. Finkelstein: I object to that question as incompetent, irrelevant and immaterial; assuming a state of facts not in evidence, and refers to a state of facts prior to the passage of this statute.

A. If you could tell me who the board was at that time. There were undoubtedly members on the ASCAP board at that time. I don't know who constituted the board at that time.

Q. You don't recall?

A. No.

Q. You signed some interrogatories, did you not?

A. I did.

Q. Who fixes the prices of licenses to manufacturers for [fol. 942] electrical transcriptions by the Publishers Protective Association?

Mr. Finkelstein: I object to that question as incompetent, irrelevant and immaterial; assumes a state of facts not in evidence.

A. Who fixes the prices?

Q. Yes.

A. I guess a group of publishers discuss the matter and come to some sort of general conclusion as to what the prices should be, and they more or less vary from twenty-five to fifty cents, according to my recollection.

Q. Where do those discussions take place?

A. The discussions that I was present at I think took place in the office of the Music Publishers Protective Association.

Q. Has that work been taken over, that is, the work that was previously done by the Publishers Protective Association, has that been taken over by ASCAP?

A. No.

Q. They have nothing whatever to do with it?

A. No. As a matter of fact, it wasn't done by M. P. P. A.;

it was done by Mr. Paine who was acting as agent and trustee for a group of publishers.

Q. Paine was chairman of the board of directors of [fol. 943] the Music Publishers Protective Association in 1930 and 1931, was he not?

A. Yes.

Q. And at the meeting of the board of directors, of which you were one, of the Music Publishers Protective Association, fixed these prices that were charged for electrical transcription, that is, for each record manufactured fifty cents for the individual records and twenty-five cents for each of the popular numbers; is that right; do you recall that?

Mr. Finkelstein: I object to the question as incompetent, irrelevant and immaterial.

A. My recollection is that it was twenty-five cents minimum price and the fifty cent price for numbers that we considered, each individual publisher might consider as outstanding.

Q. At that time you were familiar with the copyright act in connection with the two-cent rate for manufacturing?

A. Yes. You mean the compulsory act?

Q. Yes.

A. Yes.

Q. There is one more question along that line, Mr. Fischer, and that is, whether these prices were fixed, twenty-five cents and fifty cents, for the manufacture of electrical [fol. 944] transcriptions, were arranged for and determined at the board of directors' meeting of the Publishers Protective Association.

A. I don't remember whether it was determined by the directors' meeting or at a meeting of the publishers held at the M. P. P. A. office; I don't recall that that was a directors' meeting; I don't think it was a directors' meeting.

Q. How many members did they have; do you remember?

Mr. Finkelstein: I object to the question as incompetent, irrelevant and immaterial.

A. I don't remember.

Q. Do you know who the members of the board of directors now are of the Publishers Protective Association?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. No.

Q. You don't know that. Are you a member of that organization now, at the present time?

A. No.

Q. Has it ceased to function?

A. I believe it is still in existence. I know it is still in existence.

Q. What is its purpose?

[fol. 945] Mr. Finkelstein: I object to the question as incompetent, irrelevant and immaterial.

A. I think the popular publishers still feel the need of a trade organization to regulate trade practices.

Q. Those prices are still maintained; that is, the prices for electrical transcription, that were fixed in 1930 or 1931 and adopted, are still maintained and are the prices that you now get?

Mr. Finkelstein: I object to the question as incompetent, irrelevant and immaterial; no foundation laid; assumes a state of facts not in evidence.

A. So far as our catalogue is concerned, yes.

Q. What is your knowledge of the other publishers?

A. I have no knowledge of the other publishers.

Q. As a member of the board of directors of the American Society of Composers, Authors and Publishers do you know what is being charged to the users in the State of Nebraska for the different uses?

A. I can't recall. The matter has been discussed, but I can't tell you just now what our revenue is.

Q. I have in mind the fixing of the fee that is paid by the user.

A. What kind?

[fol. 946] Q. The different users, for instance, hotels.

A. The hotel is charged for the use they make of the music. Motion picture houses are charged on the basis of seating capacity.

Q. In Nebraska; we are speaking of Nebraska.

A. Yes. I have never negotiated the contracts.

Q. That is not your job to negotiate the contract?

A. I never examined the contract; I know only the policy generally which would be applied to Nebraska.

Q. And radio stations are also fixed and determined at a fee that the board passed upon?

A. The formula as determined by the board is a sustaining fee and a standard fee.

Q. That is for the public performance of copyrighted vocal and instrumental musical compositions?

A. It is for public performance of the entire repertoire of ASCAP; it is not confined necessarily to that kind of music.

Q. And that repertoire of ASCAP I think you said constitutes ninety per cent of the music in the United States?

Mr. Finkelstein: I object to the question as contrary to the witness's testimony. There is no statement that it constitutes ninety per cent of all music in the United States; [fol. 947] the witness made no such statement.

Mr. Hotz: The record will speak for itself.

A. I said copyrighted music.

Q. Mr. Fischer, as president of one of the largest and oldest publishing houses in the United States would you state that substantially all of the sheet music which is in such form that it can be performed by commercial users is copyrighted?

A. Substantially?

Q. Yes.

A. No. I would make no such statement. There is a tremendous amount of public domain material.

Q. I am talking about sheet music for commercial usage.

A. I don't know what you mean by commercial usage. You speak of sheet music as applied to commercial usage. I would say there was a tremendous amount of sheet music of old classics.

Q. Arranged for public performance?

A. You said sheet music. We distinguish. There is also a large amount of available material in orchestra and band form.

Q. And that is copyrighted?

A. Some of it.

[fol. 948] Q. The arrangement is copyrighted?

A. The original editions are not copyrighted.

Q. It wouldn't do the user very much good unless he had them orchestrated?

A. The original is in the public domain and that is available to him as well as it is to us.

Q. Who does the orchestration work?

A. You mean, who makes orchestra arrangements?

Q. The publishing houses do?

A. The publishing houses have their own staff.

Q. And when they do that work it is copyrighted, isn't it?

A. The arrangement is copyrighted.

Q. And everything that you publish and sell is copyrighted, isn't it?

A. Oh, no.

Q. What percentage would you say of your works is not?

A. A very large percentage of it is in the public domain. The copyright has expired. A lot of it was not copyrighted. Our editions of the classics were not copyrighted.

Q. All arrangements that you have made of orchestrations were copyrighted?

A. Originally, but many of the arrangements were not renewed. Our concern has been in existence for a great many years.

[fol. 949] Q. In a large number of instances there have been new arrangements?

A. Not in a large number; in some instances.

Q. When it becomes popular and the publisher wants it then, of course, you make your arrangement and have it copyrighted, isn't that true?

A. Are you talking about re-arrangements or arrangements?

Q. Rearrangements.

A. We wouldn't be dependent on that. It would depend on a lot of other factors,—as to whether the old arrangements were meeting present day requirements or not.

Mr. Hotz: I think that is all.

Redirect examination.

By Mr. Frohlich:

Q. You gave some testimony, Mr. Fischer, about the Society membership owning ninety per cent of the copyrighted music?

Mr. Nye: You are speaking now of the American Society of Composers, Authors and Publishers?

Mr. Frohlich: Yes, I am speaking of the members of the American Society of Composers, Authors and Publishers.

A. Yes, I did.

[fol. 950] Q. Was that based on any definite knowledge that you possess?

A. In my opinion only; it was my opinion.
Q. It was a pure guess?
A. More or less.
Q. Did you ever make an investigation in the copyright office yourself to see if there were other copyrights that were owned by parties that were not members of the Society?
A. No. Of course, if I had in mind the compositions that were published by individuals, a great many of those—I recently was very much surprised to see how many individual writers copyright and publish their own works—I had reference to the repertoire that was in use and was of value. I don't know how many works are published annually by composers. There are a great many, I know that.

Mr. Hotz: That have no particular commercial value?
The Witness: That have no great commercial value.

Q. You yourself never made any investigation in the Copyright Office with reference to these entries?
A. No, but an investigation was made several years ago and the result of that investigation was amazing as to how [fol. 951] many works were published by individuals.
Q. Those compositions that were published by individuals not members of ASCAP are available for public performance for profit?

Mr. Nye: I object to the question as calling for a conclusion of law.

A. I was going to say that they have the performing rights. Whether they could commercialize it, I don't know. I doubt that they could.
Q. Did you ever participate in any negotiations between the Society and the Hotel Men's Association?
A. Yes.
Q. Can you tell us the first year you participated in that negotiation?
A. I was present at a number of negotiations.
Q. Did you have any participation in recent years in any such discussion?
A. As a member of the board of ASCAP, yes.
Q. Was there a conference between the Hotel Men's Association and the members of ASCAP?
A. Yes.
Q. Did you participate in it?

A. Yes.

Q. Were there discussions with respect to the use of per-
[fol. 952] formance rights of members of the Society in hotels throughout the country, at those conferences?

A. Yes.

Q. Was there a discussion of the rates to be paid by the hotels for public performance for profit of the compositions of members of the Society?

A. Yes.

Q. Did you participate in the negotiations that led up to an agreement with respect to such rate?

A. Some of the preliminary discussions, yes.

Q. Did the Hotel Men's Association's representatives, in these discussions, make offers with respect to what they thought was the correct price for the use of these compositions?

Mr. Nye: Objected to as calling for a conclusion, hearsay, not the best evidence.

Q. In your presence?

A. I don't remember the details of those discussions.

Q. Who represented the Hotel Men's Association in these discussions, do you recall?

Mr. Nye: Objected to as immaterial, not the best evidence.

A. There was a committee; I don't recall the names.

Q. Was Mr. Bowman on the committee?

[fol. 953] A. I think so, yes.

Q. In these discussions were the rates discussed?

A. Yes.

Mr. Nye: Objected to as calling for a conclusion.

Q. Was there a rate finally reached, satisfactory to the Society and the Hotel Men's Association?

Mr. Nye: Objected to as calling for a conclusion.

A. Contracts were finally negotiated and the rates must have been finally satisfactory to both parties.

Mr. Nye: I move to strike out, "the rates must have been satisfactory," as not responsive.

Q. Did these representatives of the Hotel Men's Association purport to deal on behalf of all the hotels in the United States?

Mr. Nye: Objected to as calling for a conclusion.

A. No, I believe they purported to negotiate for the Hotel Men's Association; I don't know whether they had a blanket power to represent all hotels.

Q. Did they purport to deal as representative members of the Hotel Men's Association?

Mr. Nye: Same objection.

[fol. 954] A. Yes. They had a very able attorney present.

Mr. Nye: I object to the voluntary statement of the witness and move to strike it out as not responsive.

Q. Who was their attorney?

A. I don't remember his name.

Q. Did you personally participate in any discussions with the representatives of the motion picture exhibitors?

A. No.

Q. Did you personally participate in any discussions with the representatives of the radio users?

A. Yes.

Q. How recent was the last participation?

A. About four years ago, three or four years ago.

Q. Was that in a conference between members of the board of directors of the Society and the radio people?

A. I think it was a conference between a committee appointed by the board and the committee appointed by the National Broadcasters Association.

Mr. Nye: I object to the question as calling for a conclusion, no foundation of the knowledge of the witness.

Q. Do you recall who represented the Radio Broadcasters?

[fol. 955] A. No, I don't remember the names.

Q. Were you a member of the committee representing ASCAP in that discussion?

A. Yes, I was.

Q. Did you discuss the rates with them?

A. Yes.

Q. Did you participate in any discussions between members of ASCAP and any other trade association of users?

A. No.

Q. Do you know whether there were any conferences or discussions with members of trade associations and ASCAP outside of the radio people, outside of the Hotel Men's Association and outside of the Motion Picture Exhibitors?

Mr. Nye: I object to the question as immaterial.

A. No.

Mr. Finkelstein: That is all.

Recross-examination.

By Mr. Hotz:

Q. These men that were there representing these various organizations are large users of music, are they not?

A. Yes.

Q. Hotels, radio stations and others?

[fol. 956] A. Yes.

Q. And what they were there for largely was kicking on the prices, protesting on the amount of money that was being charged to them as users?

Mr. Finkelstein: Objected to as incompetent and immaterial.

A. That would be natural in any negotiation; the buyer always wants to cut the price down and the seller wants to get it up; that would be perfectly natural.

Q. They had no alternative; there was no similar society such as the American Society of Composers, Authors and Publishers?

Mr. Frohlich: That is objected to, arguing a question of law with the witness.

A. There are other publishers' associations in the field.

Q. What are they?

A. Associated Music Publishers, Sesac, and I think there is another society; there are similar organizations in the field.

Mr. Hotz: That is all.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF STATE OF NEBRASKA, ET AL., APPELLANTS,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

FILED AUGUST 6, 1940.

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[fol. 957] DEPOSITION OF IRVING CAESAR

[fol. 958] IRVING CAESAR, called as a witness on behalf of the plaintiffs, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. What is your full name and residence?

A. Irving Caesar, and I live at Park Central Hotel, 55th Street and Seventh Avenue.

Q. New York City?

A. Yes.

Q. What is your occupation?

A. I write songs; song writer; publisher.

Q. How long have you been a song writer?

A. About twenty years; nineteen years.

Q. You write the words?

A. I write the words.

Q. Sometimes you write the music?

A. Sometimes I write the music; in a few cases I write my own music.

Q. I show you a list of compositions that have been compiled, purporting to be a list of your songs, and ask you if that as a true and accurate list of those compositions? (Paper handed to the witness.)

A. It is a true and accurate list but it can't be complete; [fol. 959] there may be some songs that are not down.

Q. So far as you know it is true?

A. So far as I know it is true and accurate.

Mr. Frohlich: I offer it in evidence.

(The paper just offered in evidence was marked Plaintiffs' Exhibit No. 13, of this date.)

Q. Mr. Caesar, you have had your compositions published by various publishers from time to time?

A. Yes.

Q. When did you join the American Society of Composers, Authors and Publishers? What year?

A. I think in 1923; I am not sure; you can look it up. I think it was 1923. I would like to know myself.

Q. I show you this contract, this document purporting to be a contract, dated July 18, 1935, and ask you if that is

your signature and if you recognize the other signature on it (handing paper to the witness)?

A. That is my signature.

Mr. Frohlich: I offer it in evidence and ask that a photostatic copy thereof may be substituted and marked in place of the original.

(The document just offered in evidence was marked Plaintiffs' Exhibit No. 14, of this date.)

[fol. 960] Q. Prior to the time you joined the Society, had you ever received any money for the public performance for profit of any of your compositions?

A. No, sir.

Q. After you joined the Society did you receive any money for the public performance for profit of any of your compositions?

A. Not immediately after; there was no distribution; the income of the Society was insufficient to make any distribution.

Q. Did a time come when you did receive such moneys from the Society?

A. Yes, the time did come.

Q. Have you been receiving money from the Society each year?

A. Each year, in quarterly payments.

Q. Did some of the compositions composed by you, which appear on this Plaintiffs' Exhibit 13, attain popularity?

A. Yes.

Q. Can you tell us which of them became very popular; mention a few of them?

A. "Suwanee," "I Want To Be Happy," "Tea for Two," "Just A Gigolo," "Crazy Living," "Lady Play Your Mandolin," "Is It True What They Say About Dixie," "That Is What I Want For Christmas." Is that [fol. 961] enough?

Q. That is enough. Did some of those compositions you have just mentioned sell as much as a million copies?

A. I don't know. I think that two may have. I would have to look at my royalty statements, if I could find them.

Q. Can you tell us offhand from memory how many copies of sheet music were sold of these compositions?

A. In total?

Q. Yes. Just take any one particular composition; take "Suwanee"; how many were sold of that?

A. I would say maybe 500,000. Say, Mr. Frohlich, in those days a song sold over a period of a year or a year and a half and maybe the first statement might have been for 400,000 and in the second statement for 200,000, and then drop down to 50,000. If a song has the same life today as —as I say, I would have to get the accumulated statements covering at least eighteen months' period to give you the number. Let me expand on that. I mentioned "Is It True What They Say About Dixie," that is a song I also published, and there I am a little more acquainted with the figures and am certain of them. That sold almost exactly 180,000 copies and about 20,000 orchestrations. That sale was concentrated in a very short period, in about 120 days I would say.

[fol. 962] Q. Going back to the earlier years, 1922, 1923, 1925, when a song became popular how long did it remain popular?

A. It remained popular anywhere from nine months to as many as twenty-one months.

Q. Which is the most recent popular song you have had?

A. The most recent popular hit I had was, "Is It True What They Say About Dixie."

Q. How long did that remain popular?

A. As I said, about from the time that it was first played until its last sale of say 100 copies in any one week, which of course is no sale at all—I would say 120 days. I would give it 120 days, four months, and that is a long time.

Q. What do you mean by a "hit"; what is your definition of a "hit"?

A. My definition of a hit is a song that not only is most frequently heard but is accompanied by sales. In other words, where the song creates a will to be purchased, which translates itself into music sales; that to me is a real hit.

Q. What was the average number of copies of a hit song away back in 1932?

A. A real hit?

Mr. Nye: Objected to as having no foundation for knowledge.

Q. Yes.

[fol. 963] A. A real hit might sell up to five million. I want to qualify that. "Suwanee" having sold only 600,000 copies, I want to qualify that as well; it was due to the fact that "Suwanee" was published by a house that did not deal

with out and out popular songs; whereas the average popular song sold to the public for twenty-five cents, "Suwanee" sold for 35 and also wholesaled for five or six cents above the average popular song; otherwise I think "Suwanee" might have sold two or three million copies.

Q. How many are sold in a real hit now?

A. I had a real hit in "Dixie." I don't know what the other publishers say, but that was a real hit; I know it. The records show it. They made a research and resume. I would say a real big hit might sell 200,000 copies, in spite of anything you hear. Of course, they force a sale to 250,000 or 280,000, but you can't always believe it.

Q. On these compositions you published you have your renewal rights?

A. You mean copyright renewal rights? Certainly, I had the renewal rights as creator, not as publisher.

Q. Have you renewed any of the compositions as yet?

A. I am not that old. I can't renew them for 28 years.

Q. When the original terms of copyright on these compositions expire, do you propose and intend to renew them?

[fol. 964] A. I certainly do.

Q. Do you expect to make arrangements with publishers for the publication of these renewal copyrights from time to time as they come along?

A. I do.

Q. Do you expect to receive royalties either by way of advance royalties or other arrangements on these compositions when they are renewed?

A. Yes, I do, and I also expect to receive a bonus, because they have proven themselves to have value.

Q. Taking all these compositions, in order to save time, taking the compositions as a unit, what do you *w*stimate to be the value of the renewal right to yourself in these compositions?

Mr. Nye: I object to the question, no proper foundation, speculation, an undetermined time not in evidence.

A. I would say this, that I doubt whether I would make a deal for the renewal rights for the simple reason I know these songs, many of them, have proven themselves to be assets to any well-balanced entertainment program and that as long as they continue to be so I can receive an income for their use.

[fol. 965] Mr. Nye: I move to strike out the answer as not responsive.

A. (Continued:) If I sold the renewal rights I might lose the money; I consider the songs better than money.

Mr. Nye: I move to strike out the answer as not responsive, a voluntary statement of the witness.

Q. If you did not sell the renewal rights, what would you do with the renewal rights?

Mr. Nye: Objected to as calling for speculation.

A. I would either arrange for a publisher to exploit them as a publisher does, or perhaps renew them for my own publishing company, I suppose.

Q. Have you your own publishing company?

A. Yes.

Q. You publish musical compositions at the present time?

A. Publish all my own compositions.

Q. Now, take a song like "Suwanee", when your time comes to renew that composition would you make a deal with a publisher for advance royalty on it?

Mr. Nye: Objected to as calling for a speculation at an undetermined time.

[fol. 966] A. I would expect to make a deal for advance royalty and in some cases a bonus.

Q. What is the average advance royalty paid today?

A. That depends on the importance of the composition.

Mr. Nye: Same objection.

Q. Take a composition that sold 600,000, do you know any composition that has been renewed in the last year or two that sold 600,000?

A. Yes; "Chinatown My Chinatown," one of Jean Schwartz's, or "Bedelia" or "Mr. Dooley"; I don't know what he got for that; I know he got a substantial drawing account covering several years.

Q. What did you get by way of royalties from "Suwanee", approximately?

Mr. Nye: Objected to as immaterial.

A. I would say that "Suwanee" might have been $20,000; I don't know; it is sixteen or seventeen years ago.

Q. Do you expect to get as much as $20,000 out of all your compositions when they are renewed, in the aggregate?

Mr. Nye: Objected to as speculative.

A. I wouldn't sell my rights for $20,000 in "Tea For Two".

Q. That is the one you wrote with Mr. Youmans?

A. Yes.

Q. Did it attain popularity?

[fol. 967] A. It is still one of the top songs of the country. That is a song that is being played without any exploitation back of it.

Q. What value do you place on that song for renewal rights, so far as advance royalties are concerned?

Mr. Nye: Same objection.

A. Without even speculating, I think I could get $20,000 from any publisher just for the renewal rights. As a matter of fact, as a publisher myself I would pay $20,000 to the present publisher if he would transfer the right to me.

Q. You have come in contact with a great many writers and composers in the great many years you have been in the business?

A. Yes, I know all of them.

Q. Do you know the publishers, too?

A. Yes, most of them; yes.

Q. Have you general familiarity with the music business?

A. Yes.

Q. Both with the composing end of it and the publishing end of it?

A. Yes. As you know, I am President of the Song Writers Protective Association.

Q. How long have you been such President?

A. Two years, almost two years.

[fol. 968] Q. Are you familiar with the prices of renewals in the business, the royalties that are paid?

A. Sure.

Q. Do you know what writers and composers receive from their publishers as a general rule for popular music?

A. As a general rule.

Q. With your knowledge and experience in this business what would you say you could obtain for the renewal rights of all of your compositions?

Mr. Nye: Objected to as calling for speculation, no proper and sufficient foundation laid for knowledge, and immaterial.

A. I will tell you what I figure. I would say, about—for all my compositions? $100,000, minimum. I wouldn't sell them. It is only $4,000 at four per cent; I wouldn't sell them. I consider my songs like something I have saved, like a piece of land I have bought. I wouldn't sell them.

Mr. Nye: You don't want the reporter to take down all this sort of side remarks?

Mr. Frohlich: That is part of the answer.

Mr. Nye: I move to strike out all of the answer except "$100,000", as volunteered by the witness.

A. Frankly, I don't think that is fair, because frankly [fol. 969] that is how I would consider them.

(Discussion off the record.)

Q. In any of the contracts that you made for the publication of your compositions, was there any provision in any of the contracts with any of the publishers for you to receive compensation for the public performance for profit of the composition?

A. Yes, in every contract. The contract is predicated on the proposition that I am a member of the American Society of Composers, Authors and Publishers, and that therefore I was entitled to receive my pro rata share of the reward that accrued to ASCAP for the public performance of my songs.

Q. Aside from that, was there any covenant on the part of any publisher at any time to pay you anything for the public performance for profit of your compositions?

A. No.

Q. From time to time your compositions were licensed to producers of records and mechanical rolls?

A. That is right.

Q. For mechanical reproduction?

A. That is right.

Q. Do you from time to time receive compensation for such, from your publisher?

[fol. 970] A. Yes.

Q. If you were not in combination with any other member of ASCAP, if you were acting alone, could you determine

and fix the price to be charged for the use or rendition of your musical compositions, your copyrighted musical compositions sold in the State of Nebraska, for all uses and purposes?

Mr. Nye: Objected to as calling for conclusion and speculation.

A. I could not, not even in the City of New York.

Q. Could you determine and fix the price to be charged for the public performance for profit of any of your compositions within the State of Nebraska?

Mr. Nye: Same objection.

A. No.

Q. For you to fix and determine the price to be charged for the public performance for profit of any of your compositions in the State of Nebraska would you have to take into consideration various elements that were germane to that problem?

Mr. Nye: Same objection.

A. Yes, of course I would.

Mr. Nye: I move to strike out the answer, except the word "Yes".

[fol. 971] Q. What would you have to consider in determining and fixing the price?

Mr. Nye: Same objection.

A. In the first place, the use to which it would be made. I suppose, the population in the State, the number of people to whom the music would be accessible at any time through any one source—as many factors as enter into making up a ratio.

Q. Would the size of an establishment have some bearing on it?

A. Yes, absolutely.

Q. Would these factors vary from time to time?

Mr. Nye: Same objection.

A. Naturally.

Q. Assuming that there are 367 places of entertainment in the State of Nebraska in which copyrighted musical com-

positions are used, how would you go about determining and fixing a price on these establishments?

Mr. Nye: Objected to as calling for speculation; improper in form.

A. If a hotel in Lincoln, for instance, used music to entertain its patrons, so that they could dance to it, and I thought that the music were an asset in bringing people in, that would possibly make me charge X, let us say. If, on the [fol. 972] other hand, it was music that was being used in a more modest way in some little hotel where the guests just sat around the lobby and they wanted to have a little three-piece orchestra so that they could while the hours away before going to bed, I would charge a quarter of X.

Q. Would you be in a position to go down personally to the State of Nebraska to look over these establishments for the purpose of obtaining information?

Mr. Nye: Same objection to that.

A. Naturally not.

Mr. Nye: Ojected to as calling for speculation.

Q. Would you have to employ somebody for that purpose?

Mr. Nye: Same objection.

A. I couldn't afford to.

Q. Could you afford to have somebody in the State of Nebraska to keep an eye on your compositions?

Mr. Nye: Same objection.

A. Not efficiently.

Q. Could you afford to have attorneys in the State of Nebraska to represent you in infringement suits for infringements in the State of Nebraska?

Mr. Nye: Same objection.

A. No.

[fol. 973] Q. Could you estimate what it would cost you?

Mr. Nye: Objected to as speculation, no foundation as to knowledge.

A. It is obvious it would be an uneconomic procedure.

Q. Have you any idea what it would cost you to do it?

Mr. Nye: Same objection.

A. I have an idea. I am a music publisher.
Q. Give us the idea.

Mr. Nye: I object to the idea.

A. The least I could do it for would be, say, $5,000. There I am allowing for only one personal contact with my representative in the course of a year and a minimum wage for my representative of $30 a week.
Q. You employ people in the music publishing business?
A. Yes.
Q. Pay them a salary?
A. I do.
Q. What would you have to pay to a man skilled in music, able to go around among the establishments and detect infringements?

Mr. Nye: Objected to; no foundation.

A. The minimum, I mean a very modest price even in New York, I would have to pay him $60 a week to travel around, and that would bring it up to $3,000 a year and allows no [fol. 974] money for telegraphing or contacting him at least once or twice a week.
Q. Would you need a man of that type out there?
A. Certainly.
Q. How much would you have to pay a lawyer to protect your interests out there?

Mr. Nye: Objected to; no foundation.

A. I don't know how high you would have to go in Nebraska.
Q. Suppose you could determine and fix the price to be charged and had all the information available, would you be able to do that with reference to all uses and purposes of your compositions?

Mr. Nye: Same objection.

A. You could not, for a very good reason.

Mr. Nye: I move to strike out the answer as argumentative.

Q. Will you explain why you can't do it?

Mr. Nye: I object to the question as calling for speculation.

A. Let us say that I have a song that I release to the public tomorrow and spontaneously it becomes a hit, strikes a responsive chord throughout the nation, as some songs do; that song obviously has a greater value for public performance than a song that does not attain that same spon- [fol. 975] taneous reaction. The life of a song being so short, by the time I ascertained how valuable that song was to the user the song would be dead.

Q. Can you at the present time determine and fix any price for television use of the composition?

Mr. Nye: That is objected to as highly speculative.

A. No, I cannot.

Q. Have you any information or data that would enable you to determine at the present time what price you should charge a user in the State of Nebraska of your composition, for twenty-eight years of the copyright and the twenty-eight years of renewal, on television?

Mr. Nye: Same objection.

A. No.

Mr. Nye: No foundation being laid of any knowledge on the part of the witness.

A. (Continued:) It is impossible. There is no information available. I just talked to the inventor of television, Vorkin, at Philadelphia; I just talked to him. He is just as much in the air as I am. That man is responsible for television.

Q. Have you any control, or can you tell the manufacturer of a mechanical record or music roll of any of *of* your [fol. 976] compositions to fix a price for public performance for profit of any of your compositions in the State of Nebraska?

Mr. Nye: Objected to as calling for a conclusion.

A. I have no control.

Q. And if a manufacturer of such roll or record should sell a roll or record in the State of Nebraska and fix a price on it, could you compel him in any way to give you a part of it?

Mr. Nye: Same objection.

A. I don't see how.

Q. Are you willing to have any manufacturer of music rolls or records acting as your agent or acting in your interest and behalf in fixing and determining the price to be charged for public performance for profit in the State of Nebraska?

Mr. Nye: Objected to as calling for a conclusion.

A. I am not.

Q. Have you any control over the manufacturer of records and rolls of your compositions?

Mr. Nye: Objected to as calling for a conclusion; not the best evidence.

[fol. 977] A. Have I any control?

Q. Any control whatever?

Mr. Nye: Same objection.

A. You mean, after he has manufactured them?

Q. After h*as* has manufactured them.

A. No. As a matter of fact I don't let them any more.

Q. Have you any control over any of these manufacturers of music rolls and records in any respect whatever once they manufacture your compositions?

Mr. Nye: Same objection.

A. No, sir.

Q. What have you received from the Society in 1936 by way of royalties?

A. In 1936?

Q. Yes.

A. Well, I would say approximately—do you mean from America?

Q. Just from the distribution of the American music.

A. I would say in the neighborhood of sixteen or seventeen thousand dollars; I think $16,000.

Q. What did you get in 1937?

A. Somewhere in that neighborhood. The figures are available. I am sure you can get them.

Q. What did you get in 1935?

[fol. 978] A. Maybe around 13-5. I am guessing, but as I say you can get that from the Society. It is O. K. with

me. I am willing to stand corrected according to the figures.

Q. Has your contract with the Society a value?

A. It has a value to me.

Q. What do you value it at?

A. Well, it is not transferable, so in dollars and cents it has no value to me, but I value it as my professional existence. I don't know. I can't put a price on it inasmuch as I cannot sell it. I cannot transfer it.

Q. Can you place any monetary value on it?

A. Oh, yes.

Mr. Nye: Objected to; no foundation of knowledge of the witness.

A. (Continued:) If an agency were to come along with a guaranty to do the same efficient service for me as the Society does, I don't see how I could keep from placing a value of say at least 7500 or $10,000 or even more. It may very well be that without such a satisfactory agency instead of receiving any moneys I might receive such an intangible sum that it would be easy for anyone to exact almost any terms for the service of collecting on a national basis.

Mr. Nye: I move to strike out the answer as not re-
[fol. 979] sponsive.

Q. Are you willing to have your contract with the Society declared invalid and unlawful?

Mr. Nye: Objected to as speculative, immaterial.

A. Naturally not.

Q. Is that contract between you and the American Society necessary to your continued existence as a composer and writer?

Mr. Nye: Objected to as calling for a conclusion.

A. It is of the very essence.

Q. Is the Society doing something for you that you cannot do for yourself?

Mr. Nye: Objected to as calling for a conclusion.

A. Absolutely.

Q. Have you ever written or composed any compositions that were used in productions, stage productions?

A. Many, many.

Q. Can you give us a few of such productions?

A. Well "Tea For Two," and "I Want To Be Happy" came out of "No, No, Nanette," which was a show I supplied the lyrics for; all my songs in "Greenwich Village [fol. 980] Follies" some years back, or lately "The White Horse Inn" at the Center Theatre.

Q. What compositions were there in "The White Horse Inn"?

A. There were many.

Q. Can you recall one or two?

A. "In the White Horse Inn", "I Cannot Live Without Your Love."

Q. Did you restrict any of those compositions that appeared in such productions?

A. Restrict them in what manner?

Q. Did you restrict them in any way, the use of your compositions from public performance for profit, for any period?

A. Not that I recall. Not being the publisher of "White Horse Inn" I wouldn't be as familiar with the restrictions on that score as the publisher; he would be; but I would have a general knowledge, and to my best knowledge I don't believe the compositions were restricted.

Q. You are a member of the board of directors of ASCAP?

A. Yes.

Q. As a member of the Board, did you at any time have any negotiations with persons representing the Hotel Men's [fol. 981] Association?

A. Not directly. We discussed it.

Q. Did you have any negotiations with any member of the Motion Picture Exhibitors?

A. Not directly.

Q. Did you have any negotiations with any representatives of the Radio Users Association or Radio Broadcasters?

A. With regard to rates?

Q. With regard to rates.

A. Not directly.

Q. Do you know whether there was discussion between the members of the board of ASCAP and representatives of the Hotel Men's Association and the Motion Picture Exhibitors Association from time to time with regard to rates?

Mr. Nye: Same objection.

A. Yes, to the best of my knowledge there was.

Q. Did this come up at meetings of the board of directors at which you were present?

A. Yes.

Q. Were they discussed?

A. Yes.

Q. Were there committees appointed from time to time?

A. Yes.

[fol. 982] Q. Did you discuss the reports of these committees from time to time as they came up?

A. Yes.

Mr. Nye: I object to that as self-serving and not the best evidence.

Q. I show you a contract that is in evidence here between Irving Berlin, Inc. and Truman Tomlin, Coy Poe and Jimmy Grier as Plaintiffs' Exhibit 3, and ask you whether you have seen similar contracts with other publishers and whether you have entered into contracts of that kind (handing paper to the witness).

A. Yes, I have.

Q. Is that contract referred to by any special name?

A. Standard Popular Song Writers' Contract.

Q. Is that a form of contract that is very much in use now in the business?

A. Yes.

Q. Particularly with popular song writers and publishers?

A. Yes, it is standard.

Q. Mr. Caesar, I want to read you a sentence from the statute and then ask you some questions on it.

A. What statute?

Q. The statute of Nebraska which is the subject of this [fol. 983] lawsuit. (reading Section 2, subdivision "(A)" of Legislative Bill No. 478) Now, is it possible for you to have affixed or to affix to any of the musical compositions composed by you and now sold within the State of Nebraska, a price for all uses and purposes?

Mr. Nye: I object to that as leading and suggestive, I object to it further as calling for speculation.

Q. Is it possible for you to do this on the compositions by you heretofore published?

Mr. Nye: Same objection.

A. Heretofore published?

Q. Yes.

A. Absolutely impossible. The cost of sending all my copyrights back to the press to have my imprint on would just prohibit me from selling any music in the State.

Q. A lot of your compositions have been sold in the State of Nebraska to dealers and jobbers in that State?

A. Yes.

Q. They are now in their possession?

A. Yes.

Q. Can you compel any of these dealers and jobbers to send back to you those copies?

A. No, I could not.

[fol. 984] Q. Take now compositions to be published in the future, is there any way in which you could yourself determine and fix a price for all uses and purposes under this statute of your musical compositions within this State?

Mr. Nye: Objected to as calling for speculation.

A. I answered that before; there is no way.

Mr. Frohlich: You may examine.

Cross-examination.

By Mr. Hotz:

Q. Do you also get money from ASCAP as a publisher?

A. Yes, I get an insignificant sum, because I am a very young publisher.

Q. Are you a publisher member or are you a writer?

A. I am a writer member.

Q. You are not a musician?

A. I am not a tutored musician; I am an ear musician.

Q. Do you write music?

A. Occasionally.

Q. Have you had any published?

A. A ballad, "If I Forget You", I wrote the words and music.

Q. But the greatest part of your works on this exhibit here shows you to be a writer of lyrics, is that right?

[fol. 985] A. Yes, I am a writer of lyrics.

Q. You choose different composers or they choose you, that write music, and then you put it to words, is that right?

A. Yes, we work in various ways. I mean, a fellow might have a good tune—you see, a melody is a half-expressed thought, and so the lyric writer comes along and tries to tell the melody writer what he *what he* said, in words; and vice versa. So you work various ways.

Q. Do you know the numbers of the copies of sheet music upon which you have written the words, that are copyrighted, that have been sold in the State of Nebraska?

A. I have no idea.

Q. You have no idea?

A. I have no idea, but I would say I hope it is in proportion to the population of the country; I hope I am as popular in Nebraska as elsewhere.

Q. When you are paid by ASCAP it is usually on the basis that has been adopted by the board, showing the number of pieces of music that have been put out?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

Q. Is it not? It is one of the things taken into consideration, the number of pieces published and sold?

[fol. 986] A. Not the number of pieces; that would mean nothing. There are thousands of sheets that I wouldn't give you a nickel for. That is not the consideration at all.

Q. What is the consideration?

A. The vogue and popularity of the music. Let me expatiate for a moment. It might be more important to me in the State of Nebraska if there was some artist who would make the best impression by singing one of my songs; say that I sent to the State of Nebraska a thousand fresh songs and no artist would be interested in one of them.

Q. Do all the pieces of music that you write words for have the same value, or are some better than others?

A. Some are better than others.

Q. The reason is because they have a popular appeal and the people like them better?

A. Yes, but you can't tell which are better until you find out whether the people like them.

Q. You say that you belonged to ASCAP for a number of years before you got anything at all from them?

A. I didn't say that; I said I belonged a number of years before the Society had anything to give me.

Q. Under your membership in that Society that you originally had you received no compensation from the

American Society of Composers, Authors and Publishers [fol. 987] for quite a while, did you?

A. Because the Society was not sufficiently well organized to——

Q. Have you been a member right along?

Mr. Finkelstein: Let him answer.

A. Because the Society was not sufficiently well organized to go into these various states and solicit contracts with the users of my music; but when they were sufficiently well organized then it reflected itself in income.

Q. Have you got a copy of the articles of association?

Mr. Finkelstein: Do you want to offer it in evidence?

Mr. Hotz: I want to ask a few questions about that.

Mr. Finkelstein: I will get a copy for you if you want to offer it in evidence.

Q. You have never studied the Nebraska act or read it, except the one section that was quoted?

A. I have read it, but like all laymen its meaning is vague. I don't mean any reflection on the Nebraska act.

Q. In the articles of incorporation——

Mr. Finkelstein: Article of association, Mr. Hotz.

Q. (Continued)—of the American Society of Composers, [fol. 988] Authors and Publishers, they have a clause I want to call your attention to. Here it is, Exhibit D attached to the bill of complaint filed in this action, on page 55; under, I think it is headed, "Application for Membership," under "Composers and Authors", of which you would be one, it states as follows: "Any composer and/or author of musical works who regularly practices the profession of writing music and/or the text or lyrics of musical works, and who shall have had not less than five works of his composition or writing regularly published, shall be eligible to membership in this class." I will have to pass this for the time being. The thing that I am trying to find——

Mr. Nye: Scratch out the question.

Q. What is the non-participating membership? That is what I am trying to find out.

A. The non-participating class is the one in which a writer is placed when in the estimate of the board it looks as though he is a writer. Of course, you know there are

millions of people who think they can write songs and sometimes they get under the line and get five or six songs published. Very often a man is elected to the non-participating class and at the same meeting his activities since his application and since he presented his first five songs having [fol. 989] made itself felt, he is immediately elected into a participating class.

Q. That is, by the board of directors?

A. Yes. If in looking over his catalogue they see that his catalogue is active.

Q. He is required, when he becomes a full pledged member, to assign the public performance rights of his works to the Society?

A. Yes. Let's say you have a nephew and he writes songs and he knows me very well and I like him and I succeed in publishing five songs for him over a year. I take these songs to the Society and say that I published them.

Q. The Society has the fixing of the public performance rights, that is, the price that the user pays for the use of those songs, the American Society of Composers, Authors and Publishers, that is, the directors?

A. They don't fix any price on them.

Q. They fix the price that the user pays for the public performance rights on the catalogue of ASCAP?

A. On the repertoire of ASCAP. I don't know whether you want this on the record. Suppose the New York Public Library were a private institution and the citizens of the City of New York got together and said, "Why can't these millions of books be accessible to us?" The City said, "In [fol. 990] order to pay for this thing we will have to tax you a little; we will have to put a five cent tax on this privilege." But the citizens might say, "That is too much. What part of the five cents is for Dickens' works and what part is for someone else's works?" The City of New York couldn't answer that. The City would simply say, "Here are millions of works; they will all be accessible to you for five cents." That would be a proper way of going about it. It wouldn't work. It wouldn't be pragmatic. It might be an ideal way of doing it, but it wouldn't work.

Q. Are you a member of the membership committee of ASCAP?

A. Not membership committee.

Q. Are you the member of any committee?

A. Rules committee, administrative, on many committees. I am too busy right now.

Q. You have been actively engaged in the affairs of ASCAP for about how long?

A. I think I have been a member of the board now for about twelve years. I don't know how long. You could find out.

Q. Who are the members of the Membership Committee of your organization?

[fol. 991] A. Joe Young is on the membership committee for one. I believe Will Von Tilzer is on the membership committee. He is a publisher. Joe Young is a writer. I am not sure if Walter Fischer is a member of the membership committee. He may be. I think there are five or six, almost evenly divided between writers and composers.

Q. What is the duty of the membership committee?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. It is their duty to look into an applicant's qualifications, either as a writer or a publisher.

Q. Do you know the highest amount that is paid to any composer or writer?

A. Anybody in the AA class. I get as much as anybody.

Q. Do you think that $16,000 is about the top?

A. For composer or author, in that neighborhood, yes. If you ascertain what the AA class has received for the last year or two that would be the highest amount.

Q. How many classes?

A. AAA, BBB——

Q. How much does each class pay?

A. Pro rata to the importance of the contribution of each class.

Q. All in the same class receive the same amount?

[fol. 992] A. Yes. I was just going to tell you. Pro rata of the contribution of that class in each group of work, divided by the number of men who qualify to be in any one class. That is as particularly as I can put it.

Q. The fewer men there are in it the greater the division of profits for that class?

A. Yes, it would work out that way. There is no reason why it shouldn't.

Q. Give those classes and the amounts in each class.

A. I couldn't tell you that off hand. You mean, in the last distribution?

Q. You are a member of the board of directors and you naturally must know what the classes are.

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. They vary every quarter.

Q. What are they?

A. AAA, BBB, CCC, DDD, Class 1, Class 2, Class 3, Class 4—you can get it; there is no reason you can't get it.

Q. How many classifications are there for the authors and composers?

A. How many classifications are there? Thirteen.

Q. About thirteen classes?

A. Yes.

[fol. 993] Q. And they range from nothing up to $16,000?

A. The only class that gets nothing, I don't call that a class, because they are non-participating members, but starting from Class A-4 they get very little and in my opinion should get less.

Q. How much do they get?

A. They probably get ten dollars a quarter.

Q. And their dues are ten dollars?

A. No, their dues are ten dollars a year; they get ten dollars a quarter, that is $40 a year. We are paying that as a nuisance value. I say that as President of the Song Writers.

Q. The class in which $16,000 is paid, that is the highest class?

A. Yes.

Q. What do you call that?

A. AA.

Q. How many members in that class?

A. I want to qualify a little. There are permanent A and permanent B and permanent C.

Q. Are you in permanent A?

A. To become permanent you must have become inactive, but you must have made sufficient contributions so that in case of your death or incapacity there is a logical reason [fol. 994] why, due to the fact that your numbers still have a vogue in popularity and are accessible to the user, you should be compensated for it.

Q. Can you answer the question, how many members there are in the class to which you belong?

A. Yes.

Q. How many?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. Approximately I would say there must be fifty-five men. I don't know.

Q. Going on down the list, in the next class could you give us an idea of that?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. I doubt whether I know. You could get them.

Q. How much is the next class below you paid per year?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. I don't remember, speaking for myself; and I see no reason why you should not get the facts, if you want them. There are no secrets in the Society.

Q. What class does Gene Buck belong to?

A. I don't know. I am not going to trust my memory.

[fol. 995] Q. He is in your class, isn't he?

A. No, he is in B or BB. I don't see why you shouldn't have all this in the record.

Q. Who fixes the salaries of the officers?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. The board of directors.

Q. Who elects the board of directors?

A. The board of directors are elected this way: The publishers have the right to put up twelve men and the writers have the right to put up twelve men—I mean, that is how it is constituted. There are four men elected for one year—I mean to say, they are not elected; we might put up two or three candidates; four men for two years——

Q. The board itself cho-ses them?

A. Yes, the board does. You would have to do that, because otherwise Class 4, being the most numerous, might give us a board of directors of Class 4 mentalities.

Q. And Class 4, I presume that is one of the lower classes, the lowest?

A. Lower than a whale's belly.

Q. And that is the class that constitutes, I suppose, a majority of the composer and author groups?

[fol. 996] A. Numerically, yes.

Q. What percentage would you say it was of the total?

A. I don't know. You can get the membership list and get all that information, and calculate it.

Q. From ASCAP?

A. Yes, I am sure there is no objection to that.

Q. You have no way of telling us how much money you derived for public performance rights of your works in the State of Nebraska?

A. No.

Q. Does the Association keep any records by States to show?

A. Income from the various states?

Q. No, not income from the various States, but the individual use of your productions in the State of Nebraska.

A. I don't think so. They might have a survey; sort of take a cross-section occasionally. It wouldn't be in the cards; it wouldn't be an economical process. I go back to my New York Public Library example.

Q. You could tell, could you not, the number of your compositions that are sold in the State of Nebraska; there would be a place of finding that out, from your publishing house?

A. The number of sheets of music sold?

[fol. 997] Q. Yes.

A. Nobody could break down his records.

Q. How many he sold and what they were?

A. He couldn't, for this reason—he could if he sold direct, but songs must be sold through jobbers.

Q. He could tell what he sold to jobbers for Nebraska?

A. No. How could he tell us that?

Q. By going to the jobber.

A. The jobbers don't keep their accounts that way.

Q. There are records kept of the total number of copyrighted musical compositions that are produced and printed?

A. If you will permit me, I will tell you how it is done.

Q. There are, are there not?

A. Of the total number?

Q. Your printer tells you the number you have ordered?

A. Yes, but that doesn't help us. The salesman represent-

ing the music jobber goes into the State of Nebraska and he calls on a music store; the music store says, I want six of this and four of this and two of that, and so on down the line. He sends the order in to his jobber and the jobber sends to that music store a shipment of music. Now, then, when he bills them he probably bills them for twenty-six [fol. 998] copies of sheet music at 18 or 21 or 28 cents a copy. Now, if you want a jobber to break that down for the publisher and the publisher to break figures down, it couldn't be done. If they would, they would have to charge sixty cents a copy, because the bookkeeping would make it too high for the service rendered. Anything can be done. If you are willing to pay me $25 for a sheet of music, I will have you gentlemen represent me in the State of Nebraska.

Q. You have never attempted to figure out whether you could have your public performance rights paid to you right on the spot?

A. I have attempted to figure it out and every time I figured it out I am better satisfied the way I am. Of course, I have attempted to figure it out. It is my business to make as much as I can.

Re-direct examination.

By Mr. Frohlich:

Q. Would you be willing to permit the publishers of your musical compositions to fix and determine the price for the public performance of your copyrighted musical compositions?

Mr. Nye: I object to that as calling for speculation.

A. No.

[fol. 999] Q. You are the President of the Song Writers Protective Association?

A. Yes.

Q. That is composed of what?

A. That is composed of lyric writers and composers.

Mr. Nye: I object to this line of testimony as immaterial.

Q. Have you discussed with these men the question of public performance for profit?

Mr. Nye: I object to the question as laying the foundation for hearsay.

A. We discuss everything pertaining to the music business, naturally.

Q. What is the consensus with regard to permitting publishers to fix the price for public performance for profit of these compositions?

Mr. Nye: Objected to as hearsay, calling for speculation; improper in form.

A. It is not speculative because there is a suit pending now to take away from the publishers the right to fix the price on fine records, so if the writers have decided not to let them fix the price on records imagine what they would do about fixing the price for public performance rights.

[fol. 1000] Q. Would the writers let the publishers fix such a price?

A. It is nonsense. That is exactly what the organization exists for. It has a vigilance committee to keep the publishers in order.

Recross-examination.

By Mr. Hotz:

Q. Just one more question. You say this organization which you are President of——

A. Song Writers Protective Association.

Q. What is its membership made up from?

A. Its membership is made up of melody writers, music writers, and lyric writers who wish to protect themselves.

Q. They don't collect any money?

A. No.

Q. For public performance rights?

A. No.

Q. They don't fix the rate of contract?

A. No.

Q. That is done through ASCAP?

A. Yes.

Q. Your organization is for the purpose of seeing that you get a fair and square deal with publishers and users?

[fol. 1001] A. Not users, I wouldn't want to make any answer that would imply that the deal at present is an unfair one.

Q. Does the publisher have an association independent of ASCAP?

A. They have the Music Publishers Protective Association.

Q. That association does fix the prices for copyrighted musical compositions?

Mr. Finkelstein: Objected to on the ground it is incompetent, irrelevant and immaterial.

A. Yes.

Q. You are a publisher?

A. Yes.

Q. Are you a member of that organization?

A. Yes, the M. P. P. A., sure.

Q. The only organization that fixes the price for the use of the copyrighted music, vocal and instrumental, is ASCAP; that is the association that does it for public performance rights?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. That is misleading; it doesn't fix prices for the use of individual sheets of music. It fixes a price for the accessibility and availability of its mass of copyrights.

Q. In the catalogue?

[fol. 1002] A. Yes.

Mr. Frohlich: What do you mean by "fixing prices," Mr. Hotz? What do you mean by that? Why don't you define it?

Q. Who determines the amount that the user shall pay?

A. We determine what the user shall pay in ratio to the use he makes. A small hotel that uses compositions for playing to people sitting around the lobby pays almost nothing. A large hotel where a thousand people come in and dance, I think they should pay more.

Q. And the determination of that sum and the collection, they are what ASCAP is organized to do?

A. That is right.

(Adjourned until 3 o'clock p. m.)

[fol. 1003] DEPOSITION OF EDWIN H. MORRIS

[fol. 1004] (After Recess) 3 p. m.

EDWIN H. MORRIS, called as a witness on behalf of the plaintiffs, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. What is your name and address?
A. Edwin H. Morris, Oak Lane, Hummocks Road, Larchmont, New York.
Q. What is your occupation, Mr. Morris?
A. Music publisher.
Q. With what firm are you connected?
A. Harms.
Q. Harms Incorporated?
A. M. Witmark & Sons, Remick Music Corporation.
Q. How long have you been connected with those companies?
A. Since 1929.
Q. What is your official connection with the companies at this time?
A. Vice-President.
Q. Have you anything to do with the management of the business of these companies?
[fol. 1004-A] A. Yes, I manage the companies.
Q. How many years have you been engaged in the publishing business?
A. Approximately ten.
Q. Do you know the other publishers of music in the City of New York?
A. Yes, quite well.
Q. Have you an acquaintance among the authors and composers of music in the City of New York?
A. Yes.
Q. Your companies, are they members of the American Society of Composers, Authors and Publishers?
A. Yes.

Mr. Frohlich: Will it be stipulated that the contracts between Harms, Inc., Remick Music Corporation and M. Witmark & Sons and the American Society of Composers,

Authors and Publishers are substantially identical with the contract, Exhibit 2?

Mr. Nye: The same in form and substance.

Mr. Frohlich: It is stipulated that the contracts between the members of the American Society of Composers, Authors and Publishers and the Society, including contracts [fol. 1005] of writers, and contracts of publishers, are substantially the same as the contract Exhibit 2 in evidence.

Q. Mr. Morris, where is the main office of Harms, Incorporated?

A. 1250 Sixth Avenue.

Q. Where is the main office of Witmark?

A. They are all the same.

Q. All the companies that you represent are located in the same place?

A. The same building.

Q. Are they occupying those offices under any leasehold?

A. Yes.

Q. Do you know how long a lease you have there?

A. Five years with an option for five more.

Q. What rental do you pay under that lease?

A. Do you want each company?

Q. Yes.

A. This is not accurate.

Q. Give us an approximate figure.

A. Approximately 12-5.

Q. For each company?

A. For all; I can't give you the separate amounts.

Q. $12,500 would cover the rental for all the companies? [fol. 1006] A. Yes.

Q. Have you many employees?

A. Approximately fifty to sixty, that is in that particular division.

Q. Harms, Inc. is engaged in the business of publishing sheet music?

A. That is right.

Q. And has it specialized in any particular kind of sheet music?

A. For a number of years, production music, show music.

Q. What do you mean by production music?

A. Legitimate theatre.

Q. You mean that Harms, Inc. publishes musical compositions that are contained in musical shows that are produced upon the spoken stage?

A. Musical shows, that is right.

Q. Is M. Witmark & Sons specializing in the same kind of music business?

A. No, not in recent years; popular and picture compositions.

Q. Did they formerly specialize in production music?

A. In former years, some years back.

Q. What kind of music business does Remick Music Corporation do?

A. Popular and some picture.

[fol. 1007] Q. Have you a form of contract which is typical of the contract entered into between Harms, Inc. and its writers and composers for its production music?

A. I think I have.

Q. Will you be kind enough to produce that contract?

A. Here are two contracts, one for Lew Fields and Vincent Youmans (producing papers).

Mr. Frohlich: I offer them in evidence.

(The papers just offered in evidence were marked Plaintiffs' Exhibit No. 15, of this date.)

Q. Have you another form of contract between Harms and a composer or writer?

A. Yes; George Gershwin (producing paper).

Q. Is this all one contract?

A. And Cole Porter.

Q You have produced a contract between Harms and George Gershwin and a contract between Harms and Cole Porter?

A. Yes.

Mr. Frohlich: I offer them in evidence.

Mr. Nye: I object to the materiality of these exhibits.

(The papers just offered in evidence were marked respectively Plaintiffs' Exhibit No. 16, and Plaintiffs' Ex-
[fol. 1008] hibit No. 17, of this date.)

Mr. Frohlich: May we be permitted to make photostatic copies and to include the copies in the record in place of the originals, with the same force and effect as the originals?

Mr. Nye: Yes.

Q. Will you outline very briefly to us, Mr. Morris, the procedure followed by Harms, Inc. in arranging for the

publication of sheet music pursuant to a contract such as the contracts that have just been received in evidence; what is done?

A. The composer submits a number for publication. If it is acceptable it is published in regular sheet music form, and if we intend to exploit it to any degree it is necessary to have dance orchestrations and vocal orchestrations. That about covers the material necessary.

Q. Is it customary for Harms Inc. to copyright its musical compositions as unpublished works or as published works?

A. I am a little confused on that. I believe we follow both practices.

Q. Is there any set practice on it?

A. Maybe you can clarify that a little more.

[fol. 1009] Q. Do you frequently or do you at all, after you have obtained the rights of a composition from the author or composer, refrain from publication by registering such composition for copyright under section 11?

A. Quite frequently. If it is our intention to publish we send a manuscript.

Q. When you thereafter publish the composition then you copyright it as a published work?

A. Yes.

Q. Is there any particular reason why Harms, Inc. sometimes copyrights a work as an unpublished work instead of a published work?

A. Yes; so as to protect the composer as well as ourselves.

Q. Is it done in order to keep the publication from interfering with any other rights in the composition?

A. I don't quite understand that.

Q. Well, now, your company specializes in production numbers. When a production is on the stage it appears in the production, the particular composition to which you have obtained the rights from the author and composer; is it desirable from any financial or business point of view to permit the composition to be played on the stage before the composition is sold to the general public?

A. I haven't had much experience with shows. That is [fol. 1010] a field I haven't handled. Mr. Max Dreyfus handled that.

Q. Is it the practice of Harms, Inc. on occasion to restrict musical compositions?

A. It has been, yes.

Q. What compositions are restricted by it?

A. At the moment?

Q. At the moment.

A. Very few at the moment; in the past there was quite some number.

Q. What compositions were restricted?

A. "Rhapsody In Blue"; a good many of the productions such as "No, No, Nanette," "Hit The Deck," "Scandals", and numerous other musical comedies.

Q. For how long a period were some of these compositions restricted?

A. A number of them were on the Society's restricted list for several years.

Q. Was there any particular reason for restricting those compositions?

Mr. Nye: I object to that as calling for speculation.

Q. Does the restriction of a composition bear any relation to the performance of the number on the stage or in a motion picture?

[fol. 1011] Mr. Nye: I object to the question as calling for a conclusion.

Q. Is there any relation between those two things?

A. No.

Q. So you can't tell us why you restrict these compositions?

A. Yes, I can tell you.

Q. Why?

Mr. Nye: Objected to as calling for a conclusion.

A. Most of the producers request that numbers be restricted so that it won't in any way injure the musical play during its run, and I believe in some of the agreements it is stipulated that the right of restriction rests with the producer.

Q. If the particular number so restricted were played, were open to the public and could be performed on the radio and in hotels and elsewhere, would that effect the life or value of the composition in the production or in the picture?

A. Yes, I believe it would; it would shorten the life.

Q. It would shorten the life of the production or the picture?

A. Yes.

Mr. Nye: Give me an objection before that last answer; [fol. 1012] calls for a conclusion and opinion, without foundation.

Q. Do you know how much money is invested in these musical productions,—the average musical production that is put on as a musical?

Mr. Nye: No foundation; calling for a conclusion and speculation.

A. I can give you one specific play that I happen to know about, "Fifty Million Frenchmen," approximately $275,000.

Q. Who produced that play?

A. Gest.

Q. E. Ray?

A. Yes.

Q. Did that play contain any songs published by Harms Incorporated?

A. It did.

Q. What were the names of the songs?

A. I will have to refresh my memory. I may get a little help from the boys here if they can remember it. It is very difficult to remember titles.

Q. Were any numbers restricted by Harms, Inc.?

A. The entire score was restricted during the run.

Q. That was restricted during the full run of the play in New York?

[fol. 1013] A. Yes.

Q. Did I understand you to testify that you came to Harms, Inc. about ten years ago?

A. Approximately nine or ten years ago.

Q. Approximately at that time can you remember the names of any outstanding hits that were published by Harms, Inc.?

A. I would much prefer to use one of the other companies which I am much more familiar with.

Q. Which company are you much more familiar with?

A. Witmark at that time.

Q. Can you tell us what outstanding hits were published by M. Witmark & Sons?

A. During the first year I remember "Tiptoe Through The Tulips," "Painting The Clouds With Sunshine," "Song Of The Nile."

Q. How many copies of the sheet music of those songs were sold, if you know?

A. In the case of "Tiptoe", approximately 650,000; "Painting the Clouds," 700,000; "Song of the Nile", about 450,000.

Q. Can you tell us the names of any recent hit songs published by M. Witmark & Sons?

A. "Vini Vini."

Q. Is that an outstanding popular hit?

[fol. 1014] A. Yes.

Q. And about how long ago was that published?

A. About six months ago.

Q. Can you tell us approximately the number of copies of sheet music that were published?

A. About 45,000.

Q. Does that represent about tops in the sale of sheet music today?

A. Pretty near; there are occasionally hits that may run more, but that is about it.

Q. Has Harms, Inc. or Witmark or Remick sold any millions of copies of any composition in the last five years?

A. There hasn't been any of those since I have been in the business.

Q. What is the life of a hit song today?

A. Depending on the type, from six to ten weeks.

Q. What was the life of a hit song published ten years ago, published by one of your companies?

A. Six months.

Q. In your contracts with composers and writers do you undertake to pay them a percentage of the moneys received from the manufacture and sale of mechanical reproductions of their compositions?

A. Yes, we do.

[fol. 1015] Q. Has that been the practice in all of your contracts over the years?

A. Yes.

Q. Do you have any contracts with any composer or writer under which you undertake to pay such writer or composer for any public performance for profit of their composition?

A. No.

Mr. Nye: I object to the question as calling for a conclusion.

Q. Your companies own the copyrights of the compositions published by them?

A. Yes, that is right.

Q. Do they license manufacturers of piano rolls and disk records to mechanically reproduce the compositions, under written contract?

A. Yes.

Q. Have you with you any such form of contract?

A. I don't know whether I have that or not. No, I have not.

Mr. Nye: We will stipulate that it is the same in substance, if it is. Let him look at it (handing paper to the witness).

The Witness: That is the same.

Mr. Frohlich: It is stipulated that the mechanical repro-[fol. 1016] duction contracts issued by Harms, Inc., Remick and M. Witmark & Sons, are substantially identical with Plaintiffs' Exhibit 12.

Mr. Nye: We agree to that, in substance.

Q. Under your contracts with mechanical companies do you reserve any control over the sale of the records and piano rolls by those companies, in the State of Nebraska?

Mr. Nye: Objected to as calling for a conclusion.

A. Yes, the contract calls for what we call home consumption.

Q. Are these companies permitted to sell these disks in the State of Nebraska and in other States of the Union?

A. Yes, every State.

Q. You don't appoint these companies as your agents to fix the price or collect any moneys for you on any rights in connection with the public performance for profit of those compositions, do you?

A. No, we do not.

Q. Would you be willing to permit those companies to fix and price and to collect any moneys for you for the public performance for profit of these compositions within the State of Nebraska?

[fol. 1017] Mr. Nye: Objected to as calling for a conclusion and speculation.

A. No.

Q. Let me read to you a section of the Nebraska law which is at issue in this case (reading Section 2, subdivision "(A)" of Legislative Bill No. 478).

Now that I have read this section of the act to you, would you be able—when I say "you" I mean your companies, Mr. Morris—would you be able to determine and fix a price to be charged for the use or rendition of your copyrighted musical compositions within the State of Nebraska for all uses and purposes?

Mr. Nye: I object to the question as calling for conclusion, speculation; no foundation.

A. No.

Q. Have copies of your musical compositions been sold within the State of Nebraska over the years?

A. Yes.

Q. Have they been sold to jobbers and dealers within that State?

A. Yes.

Q. Do any of your companies have any branch offices in the State of Nebraska?

A. No.

[fol. 1018] Q. Now, the copies of the compositions that were sold to dealers and jobbers in the State of Nebraska are now property of the dealers and jobbers?

A. Yes.

Q. Have you any control over them or can you demand they back?

Mr. Nye: Objected to as calling for a conclusion.

A. No.

Q. If you were to determine and fix the price to be charged for the public performance for profit of your copyrighted musical compositions within the State of Nebraska, what factors would you have to take into consideration?

Mr. Nye: Objected to as calling for speculation.

A. Well, the number of licensees.

Q. Assuming that there are 367 establishments in the State of Nebraska that use music, copyrighted musical compositions published by your firm, how would you go about it to determine what price each of those 367 establishments would have to pay you on each one of your compositions for public performance for profit?

Mr. Nye: Objected to as calling for speculation.

[fol. 1019] A. I would know how to go about it.

Q. Would you be able to fix at this time the price for the television rights of any of your compositions within the State of Nebraska?

Mr. Nye: Objected to as calling for speculation; wholly immaterial.

A. No.

Q. Have you any data or information in your possession now from which you can determine the value of any composition published by you with respect to the television rights within the next twenty-eight years to come?

A. No, I have not.

Q. Have you any facilities now that would help you to ascertain in which of the establishments in Nebraska your music is being used without the payment of any license fee?

A. No.

Q. Would you have to employ anybody for that purpose if you wanted to obtain that information?

Mr. Nye: Objected to as calling for a conclusion.

A. Yes, we would.

Q. Suppose you wanted to determine what establishments were correctly playing your music copyrighted by [fol. 1020] you and what establishments were infringing on your music, how would you go about it?

Mr. Nye: Objected to as calling for a conclusion.

A. I would have to employ people and send them all over the State of Nebraska.

Q. Would you have to employ a lawyer to bring suits for infringement where there were infringements?

Mr. Nye: Objected to as calling for speculation.

A. Yes.

Q. Would the people that you would employ for the detecting of infringement have to be skilled in music?

A. They would have to be experience- in our business.

Q. Are you familiar with salaries paid to people who are skilled in music?

A. In what vocation, what type of work?

Q. For the purpose of investigating?

A. No. I assume any men in that field would be all right.

Mr. Nye: I move to strike out the answer except the word "No".

Q. You said you would have to have a staff of people in Nebraska. Does it mean that you would have to have an office there?

[fol. 1021] Mr. Nye: Objected to as calling for a conclusion.

A. Yes.

Q. Can you give me an estimate of what it would cost to employ a staff of clerical help and attorneys to protect your rights within that State?

Mr. Nye: I object to the question; no foundation laid for the witness's knowledge; also calling for a conclusion.

A. I could not determine what the lawyer's fees would be, but we would undoubtedly have to spend a substantial amount of money, a great deal more than we could afford, for that service.

Mr. Nye: I move to strike out the answer as not responsive.

Q. Can you give us an idea in dollars and cents?

A. We will estimate that we would put on one man in charge at $5,000 a year,——

Mr. Nye: I move to strike out the answer.

A. (Continued:) —and clerical help.

Mr. Nye: I move to strike out the answer; assumes facts not in evidence; it being clear that the witness is speculating and is not expressing an opinion on any reasonable foundation therefor.

[fol. 1022] Q. Would you have to engage an office down there?

Mr. Nye: Objected to as calling for a conclusion.

A. Yes, we would have to open quarters there.

Q. Would you have to put some men there?

A. Yes.

Q. Would you have to pay rent?

A. Yes.

Q. Would you have to pay the salary of the man in charge.

A. Yes.

Q. How much do you think you would have to pay?

Mr. Nye: I object to the question as calling for the expression of opinion without proper foundation.

A. Based on present salaries paid men doing the same type of work for the Society, I assume at least $5,000.

Q. Your firm has had experience over the past twenty years with attorneys in New York in trying infringement cases on copyright work?

A. Yes.

Q. You are familiar with the fees paid those attorneys?

A. Since I have been in the business.

Q. For ten years?

[fol. 1023] A. Yes.

Q. What would it cost you to employ a lawyer skilled in copyright law to bring infringement suits down there?

Mr. Nye: Objected to as calling for a conclusion; no foundation being laid for the witness's knowledge.

A. I don't know the lawyers in Nebraska very well. It is pretty hard to give you a figure down there.

Q. If you were to determine and fix the price to be charged for the use or rendition of your copyrighted musical compositions within the State of Nebraska, at the time copies of your compositions were first sold in that State, would you be able at this time to fix in advance a price adequate and fair to you and to the user for the full period of the copyright?

Mr. Nye: Objected to as calling for a conclusion; speculation; no foundation having been laid.

A. I don't think we could do it.

Mr. Nye: I move to strike out the answer for the reason that it is clearly based on speculation and not on knowledge.

Q. Could you determine at the time that you first sold a copy of a composition in the State of Nebraska what [fol. 1024] the vogue and popularity of that number would be in the future?

Mr. Nye: Objected to as calling for a conclusion.

A. No.

Q. Does it take a considerable period of time to find out

whether a composition has any popularity or becomes valuable to the user?

A. A composition can become popular, depending on the nature of the composition, in a few months or a few weeks in some cases, but as to the value for the future that as very difficult to determine, as to whether it will have any lasting value.

Q. Would the size of the establishment in which your composition is to be played in the State of Nebraska have anything to do with the price to be charged for the public performance for profit of your compositions?

Mr. Nye: Objected to as calling for a conclusion.

A. Yes.

Q. Would the size of the audience reached have something to do with it?

A. Yes.

Q. Would the extent of the use have something to do [fol. 1025] with it?

A. Yes.

Q. Would the nature of the establishment have something to do with it?

A. Yes.

Q. Would the profits made by the establishment have something to do with it?

A. Yes.

Mr. Nye: I object to all these questions as extremely leading.

Q. Would these factors that I have just mentioned vary from week to week?

Mr. Nye: Objected to as calling for a conclusion and speculation.

A. Yes.

Mr. Nye: And leading.

Q. Do your companies participate in the royalties paid by the Society each year?

A. Yes.

Q. What royalties did they receive from the Society in the year 1935?

A. Just a moment. M. Witmark & Sons, $80,716; Remick, $67,108; Harms, $94,615.

Q. What moneys did they receive in 1936?
[fol. 1026] A. Witmark, $42,275; Remick, $35,008; Harms, $50,545.
Q. What moneys did they receive in 1937?
A. Witmark, $89,843; Remick, $75,413; Harms, $137,358.
Q. Do you consider your contracts between Harms, Remick and Witmark and the Society valuable to you?

Mr. Nye: Objected to as calling for opinion.

A. Yes, we do.
Q. What do you value those contracts at in dollars and cents?

Mr. Nye: Objected to as calling for a conclusion and speculation, without foundation.

A. Just how do you mean?
Q. In dollars and cents; what are your contracts worth, with the Society?
A. A great deal, an immense amount; I can't give you an exact figure; it would be speculation.
Q. Are they important to your business?

Mr. Nye: Same objection.

A. They are the life of our business.
Q. Without those contracts could your company stay in business?

Mr. Nye: Same objection.

A. It would be the difference between staying in business [fol. 1027] and going out of business.
Q. Are those contracts the chief source of your revenue today?
A. Yes.
Q. Are you willing to have those contracts with the Society declared invalid?

Mr. Nye: Objected to as calling for a conclusion; immaterial.

A. No.
Q. Does Harms, Inc. publish a catalogue of its compositions?
A. Yes, we do.
Q. Have you brought such a catalogue with you?
A. No, I have not.

Q. Does Witmark publish a catalogue?
A. Yes, all companies have catalogues.
Q. You haven't got them with you?
A. No.
Q. When did Harms become a member of the Society, do you know?
A. In 1914.
Q. When did Witmark become a member?
A. 1914.
Q. When did Remick become a member?
[fol. 1028] A. I am not certain of that date; I think it was the same.
Q. Do you know of your own knowledge prior to 1914 if either of those companies ever received from any source whatever any moneys for public performance for profit of the compositions published by them?
A. No, they did not.

Mr. Frohlich: Your witness.

Cross-examination.

By Mr. Bennett:

Q. Mr. Morris, I think you said you were a director of the American Society of Composers, Authors and Publishers?
A. That is right.
Q. Are you a member of any of the committees of the Society?
A. No, I am not.
Q. How long have you been a director?
A. About five years.
Q. I notice in giving the income you received from the Society in 1935, 1936, and 1937, there is a very marked discrepancy between the figures of 1935 and 1936. Can you explain the reason for that?
A. Our companies withdrew from ASCAP at the end of 1935 in an effort to set up our own performing rights bureau.
Q. When you say "our companies" you mean Witmark, [fol. 1029] Remick and Harms?
A. Yes.
Q. Who owns those companies?
A. Warner Brothers Pictures.
Q. What other companies does Warner Brothers own?

A. We have some other companies that are subsidiaries, such as New World, T. B. Harms, Shubert—that is about all I think of.

Q. Were those companies all members of ASCAP prior to January 1, 1936?

A. Yes.

Q. Did they withdraw from ASCAP?

A. Yes.

Q. Do you know the total amount of money paid to all of the Warner companies, the Warner owned companies, by ASCAP during 1935?

A. Approximately $300,000.

Q. When did you give notice that you were going to withdraw from ASCAP?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. Probably in November of that year; I didn't handle it so I can't give you definite dates on that.

Q. Did you have anything to do with the other Warner [fol. 1030] owned companies other than those three other subsidiaries?

A. Yes.

Q. You handled those along with Witmark, Remick and Harms?

A. Yes.

Q. What are your duties as Vice-President?

A. Selection of songs for publication, contact between the New York office and the studio and the engaging of writers, and the general overseeing of what we call the professional department, people to exploit the songs and the sales, and of course my duties at ASCAP as director.

Q. You said that part of your duties are sales?

A. That is right.

Q. Will you state approximately the gross amount of sheet music sales by Warner Bros. subsidiaries for the first six months of 1935?

A. I don't have those figures.

Q. Can you approximate it?

A. No, I couldn't even hazard a guess.

Q. Can I refresh your recollection?

A. You may.

Q. Suppose I tell you that your first six months sales were $585,000 for 1935?

Mr. Finkelstein: I object to the entire testimony as being [fol. 1031] incompetent, irrelevant and immaterial, not within the issues.

A. I just couldn't tell whether that figure is anywhere near the right amount at that time.

Q. You are in charge of sales?

A. No, general supervision. Our sales are broken down in accordance with types of merchandise.

Q. Can you state approximately what your sheet music amounted to for any of the companies, either Witmark, Harms or Remick?

A. For each period?

Q. Yes.

A. No, I could not.

Q. Can you state the amount of your sheet music sales for the first six months of 1936, for those companies?

Mr. Finkelstein: Same objection.

A. For 1936? No.

Q. Can I refresh your recollection on that?

A. Yes.

Q. If I told you it was $140,000 approximately, does that help you?

A. No.

Q. Don't you know as a matter of fact that your sheet music sales in the first six months of 1936 materially de- [fol. 1032] creased?

A. Yes.

Q. Don't you know approximately how much that decrease was?

A. No.

Q. You don't know that it was 75 or 50 per cent of what it was the preceding year?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial; the witness has already answered and said he does not know.

A. No, I do not.

Q. Your records will show that, will they not?

A. Yes.

Q. Your records will show the amount of sheet music sales?

A. Yes.

Q. Can you ascertain that figure by calling your bookkeeping department or whatever department has charge of your records?

A. Yes, I believe I could.

Q. Will you do that?

A. Yes. Do you want me to get it afterwards or now?

(Discussion off the record.)

Q. Mr. Morris, on January 1, 1936, what did the music [fol. 1033] companies that you represent do with respect to selling licenses for public performance for profit of their copyrighted works?

A. I can't give you much information there because I did not handle it and had nothing to do with it.

Q. You don't know?

A. I have a very vague idea.

Q. You don't know how many licenses were issued for the Warner Bros. music companies?

A. No, I do not.

Q. Do you know the amount of license fees?

A. That we collected?

Q. That you collected?

A. No, I couldn't tell you that.

Q. Prior to the withdrawing from the Society you made surveys, did you not, to determine the ratio of the performances of Warner compositions with respect to the entire ASCAP catalogue?

A. Yes, that was done.

Q. Will you state approximately the ratio between Warner Brothers companies' performances and ASCAP as a whole?

A. I believe there were around 20 or 22 per cent.

Q. Are you talking about performance or the ratio of in- [fol. 1034] come received by the Warner group from ASCAP?

A. The performance as I remember it.

Q. Don't you know that checks made at that time showed between 30 and 40 per cent?

A. No, I do not.

Q. When did Warner Brothers subsidiaries return to ASCAP, re-enter as members?

A. July of 1936.

Q. Why?

Mr. Finkelstein: Objected to as calling for speculation; hypothetical; incompetent, irrelevant and immaterial to the issues.

Mr. Bennett: The witness is an official of the companies and has testified that he handled various phases and supervised various phases of the business; that he is a director of ASCAP, has been for the last five years, and it must be within his knowledge as to why they returned to the Society.

A. Mr. Warner made that decision. He decided that the method that we had undertaken was not practical or good business.

Q. What do you mean by "good business"?

A. The fact that he could not make it a paying proposition.

[fol. 1035] Q. You mean you couldn't make it a paying proposition as a non-member of ASCAP?

A. I don't believe that entered into it, as I remember; simply that the expense of contacting licensees and the local expenses that were incurred because of the infringements made it physically and financially almost impossible.

Q. What was the ratio of performances of Warner copyrighted music during the first six months of 1936 as compared with prior years?

A. During the period that we had withdrawn from the Society?

Q. Yes.

A. Very small, I think. I don't know what it was.

Q. To what do you attribute the smallness, when you say it was used from 20 to 22 per cent prior to January 1, 1936?

Mr. Finkelstein: Objected to as hypothetical and speculative; no proper foundation; incompetent, irrelevant and immaterial.

A. The terms that were asked were not agreeable to the radio people.

Q. You mean by that you could not sell licenses to perform, is that it?

A. Not at the fees we were asking.

Q. Do you know what fees you were asking?

[fol. 1036] A. No, that I am not familiar with, although in general I knew we wanted considerably more money than we had been getting.

Q. Will you state whether ASCAP commencing January 1, 1936, reduced its license fees to licensees in proportion to the amount of copyrights withdrawn by Warner Bros. when they left the Society?

Mr. Finkelstein: I objected to the question on the ground that it is incompetent, irrelevant and immaterial, on the ground that this man was not connected with the Society in January 1936 and there is nothing to show that he has any knowledge of what ASCAP did in that respect, and no proper foundation.

Mr. Bennett: He was a director at the time.

A. There has been so much talk back and forth, that I want to get it straight. I was not a director in January 1936.

Q. You were in December 31, 1935?

A. No, not during the last two months; I had been replaced by Mr. Herman Starr.

Q. Do you know whether the fees of ASCAP to the licensees were reduced by reason of the loss of the Warner copyrights?

[fol. 1037] A. I don't know what they did.

Q. You really don't know?

A. No.

Q. Don't you know as a fact that ASCAP refused to reduce the fees?

Mr. Finkelstein: I object to that on the ground it has already been answered, and on all the other grounds heretofore stated.

A. No, I do not.

Q. Have you gained that knowledge since you again became a director of ASCAP?

A. There has never been any discussion on the point.

Q. Please answer yes or no. Have you gained that knowledge?

A. No.

Q. You never heard that ASCAP refused to reduce its fees to compensate for the loss of the Warner copyrights to its licensees?

A. No.

Q. Approximately how many copyrights are owned by each one of the Warner subsidiaries, owned by you?

A. Each one or the total?

Q. You may give the total for the whole group, if you wish.

[fol. 1038] A. I would say more than six thousand; how many more than that I don't know; I don't know the exact amount.

Q. Mr. Morris, do you know of any publishers regularly engaged in the music publishing business who are not members of ASCAP?

A. I know of one or two publishers that handle catalogues. I do not consider them in the publishing business of the same nature that we are.

Q. Do you know of any reputable publishers that are not members of ASCAP?

A. No, I do not.

Q. Would you say then that substantially all of the publishers regularly engaged in sheet music publication and sales are members of ASCAP?

A. I believe so.

Q. Do you know whether the publishers regularly maintain lists of their copyrighted compositions similar to the catalogues that you have?

A. No, I don't believe they do.

Q. Is it the practice of most of them to maintain such catalogues?

A. I don't believe so.

Q. Are your catalogues complete; that is, do they contain all of the copyrights which are owned by the respective [fol. 1039] companies?

A. I believe so.

Q. Now, in connection with your sales of sheet music, referring back to that fact a moment, do you compete with other publishers in exploiting and selling your sheet music?

A. No.

Q. Why do you say you do not compete?

A. Well, we are dealing with copyrights and we are the only ones having that particular song, that composition.

Q. Do you maintain a staff for the purpose of exploiting?

A. Yes.

Q. If you did not exploit by plugging, as it is called, what would happen to your compositions?

Mr. Finkelstein: Objected to as speculation.

A. I don't know; I have never tried.

Q. Why do you do it?

A. Because I believe it is a proper method of conducting our business.

Q. Isn't it a basis for advertising your wares?

A. It is a basis of selling.

Q. If there is no competition then you don't need to exercise any ingenuity for selling?

[fol. 1040] A. How can we bring it to public attention if we do not take it around and show it?

Q. Surely, unless you are competing with one of the others or many of the other publishers the public would come to you?

Mr. Finkelstein: Objected to as improper in form, arguing with the witness; speculation.

A. I don't believe so.

Q. Then as a matter of fact you are competing with the other publishers of sheet music?

Mr. Finkelstein: Same objection.

A. No, I don't believe that.

Q. Mr. Morris, as director of the sales isn't it your duty to see that the purchaser of music purchases copyrighted compositions owned by your companies in preference to buying compositions of some other publishers?

A. No, that has no function with selling; that is no part of the duty of the sales manager or anyone directing sales. We are selling "Vini Vini", and some one else is selling "Love Walked In". The public can buy them both so far as we are concerned. We don't care. Because we are the only publishers of "Vini Vini".

Q. But you make an effort to have "Vini Vini" put on the program to the exclusion of some other composition [fol. 1041] owned by someone else, isn't that true?

A. We don't work on that basis. We simply try to get our number on. We want our number heard.

Q. If your number is on, then that excludes necessarily someone else's number at that particular time?

Mr. Finkelstein: Objected to as argumentative, hyprothetical, speculative.

A. An orchestra leader can only play so many numbers on a program.

Q. Who fixes the price at which the performance rights for the copyrighted compositions owned by your companies are made available to users of music?

A. The administrative committee, I believe, of the Society. You are talking about performance rights, public performance rights?

Q. That is right. You are talking about the American Society of Composers, Authors and Publishers?

A. That is right.

Q. From your experience as a music publisher and as a member and director of the American Society, will you state whether it is not a fact that approximately ninety per cent of the usable music, commercially usable music, is copyrighted and covered by the Society's license?

Mr. Finkelstein: Objected to; no proper foundation; [fol. 1042] nothing shown that the witness knows anything about it; has not been qualified; and incompetent, irrelevant and immaterial to the issues.

A. There are many compositions that are not the property of the American Society, such as Associated Publishers and people like that.

Q. That doesn't answer the question. (The pending question was read by the stenographer). I will say, commercially usable music for public performance for profit.

A. I am not an expert on that; I can't answer that.

Q. You testified that all of the reputable musical publishers regularly engaged in the music business are members of the Society. Who as a practice owns the copyrights of *of* musical compositions?

A. The publisher.

Q. Does that help you to answer the question propounded?

Mr. Finkelstein: Same objection.

A. I understand what you want. The only thing is, there are many compositions throughout the country by different people that I don't know anything about.

Q. I am talking about commercially usable copyrighted music.

A. That is what makes it difficult; I don't know.

[fol. 1043] Mr. Finkelstein: I object to the form of the question, misleading.

Q. Let me state it this way, then. What percentage of the copyrighted music comes under the ASCAP license today? When I say today I mean at the present time.

A. Copyrighted music?
Q. Yes.
A. I haven't the faintest idea.
Q. What would be your best opinion?

Mr. Finkelstein: I object to the question as calling for speculation, hypothetical; witness has already answered it; incompetent, irrelevant and immaterial.

A. I can't give you any more information; I don't know.
Q. Would you say that there was 90 per cent, or that that is too much or too little?

Mr. Finkelstein: Same objection, and on the further ground that counsel is attempting to compel the witness to answer something that he has already answered.

A. I couldn't fix it, Mr. Bennett.
Q. What percentage do the catalogues of your particular companies bear to the whole of ASCAP music?
A. That I don't know. The total number of copyrights?
[fol. 1044] Q. Approximately.
A. I haven't any idea.
Q. As a director of ASCAP you know the method by which royalties are divided amongst the members?
A. Yes.
Q. Is it not a fact that one of the things taken into consideration in the distribution of the royalties is the number of copyrights?
A. Yes, that is true.
Q. In respect to the income, then, the ratio of the amount received by you and the other members of ASCAP, what would you say that the total of your copyrights bears to the total? You must have that knowledge.

Mr. Finkelstein: No foundation laid for the question; incompetent, irrelevant and immaterial.

A. I can't measure the copyrights that way.
Q. Would you say it was ten per cent?
A. I couldn't say.
Q. Fifteen?
A. I haven't the slightest idea.

Mr. Finkelstein: Same objection.

Q. Mr. Morris, who receives the highest amount from ASCAP of any of the publishing companies?

[fol. 1045] Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. I believe Harms, Inc.

Q. Do you know who receives the second highest?

Mr. Finkelstein: Same objection.

A. No, I don't know.

Mr. Bennett: That is all.

Q. Mr. Morris, have you received and do you know the gross amount of sheet music in dollars sold by the Warner music subsidiaries during the first six months of 1935?

A. Yes.

Q. Will you state the amount?

A. $696,782.90.

Q. Do you know the gross amount sold by the same companies for the last six months of 1935?

A. $718,000.

Q. Now, will you state the gross amount of sheet music sales by those companies for the first six months of 1936, when the companies were not members of the American Society of Composers, Authors and Publishers?

A. $229,000 even.

Q. Will you state the date on which the companies re-
[fol. 1046] turned to membership in the Society?

A. July, 1936.

Q. Will you state the gross amount of sheet music sales for the last six months of 1936, during which period the companies were again members of the Society?

A. $616,000.

Mr. Bennett: That is all.

[fol. 1047] Deposition of George W. Meyer

[fol. 1048] George W. Meyer, called as a witness on behalf of the plaintiffs, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. What is your name and address?

A. George W. Meyer, 205 West 57th Street, New York City.

Q. What is your business?
A. Composer.
Q. Composer of music?
A. Composer of music.
Q. Do you write lyrics?
A. Occasionally.
Q. How many years have you been a composer?
A. About thirty.
Q. I show you a list of compositions purporting to be your compositions, and ask you whether that represents a true and accurate list of the compositions that you composed (handing list to the witness)?
A. Do you want me to look all through this?
Q. Look at each page; it won't take you long to tell.
A. These are all my compositions; whether there are any omissions or not I couldn't tell you.
Q. This accurately represents the bulk of your composi-
[fol. 1049] tions?
A. Yes.

Mr. Frohlich: I will offer it in evidence.

(The paper just offered in evidence was marked Plaintiffs' Exhibit No. 18, of this date.)

Q. Will you tell us, Mr. Meyer, which of your compositions were hit numbers or very popular numbers, outstanding over the past twenty years?
A. "Tuck Me To Sleep In My Old Kentucky Home," "My Mother's Rosary," "When You're A Long Long Way From Home," "For Me And My Gal," "Brown Eyes, Why Are You Blue," "Sittin' In A Corner," "Hiawatha's Melody Of Love," "Lonesome," "I Believe In Miracles," "I'm Sure Of Everything But You," "A Girlie Was Just Made To Love," "That Mellow Melody." It is pretty hard to remember all of them.
Q. Did any of your compositions ever gross a million copies in sales?
A. Many of them.
Q. Name some.
A. "When You're A Long Long Way From Home," "My Mother's Rosary," "Tuck Me To Sleep"—close to three million.
Q. When were those three composition first published?
A. "Tuck Me To Sleep" in 1921; the others before that.

[fol. 1050] Q. Have you had any recent hits, within the last two or three years; outstanding hits?

A. "I Believe In Miracles," that was an outstanding hit.

Q. And any other compositions?

A. "I'm Sure Of Everything But You."

Q. How many copies of those compositions were sold, those two you have just named?

A. "I Believe In Miracles," I believe was around 96,000 copies.

Q. And the other one?

A. The other was around 115,000. They were No. 1 in the Lucky Strike survey.

Q. Are you acquainted with members of your profession?

A. Yes.

Q. Do you know most of the song writers and composers?

A. Yes.

Q. And are you acquainted with the publishers?

A. Yes, I guess so.

Q. Do you know whether it is the usual and customary thing for a popular outstanding hit, at the present time, to sell under 500,000 copies?

A. I don't know of any that sold that or near it.

Q. Has any song within the last five years, published by any publisher that you know, or composed or written by [fol. 1051] any composer or writer that you know of, sold as many as one million copies?

A. None that I know of.

Q. Do you know what this diminution of sales was due to?

Mr. Nye: I object to the question as calling for speculation, no proper foundation having been laid of knowledge on the part of the witness.

A. I am under the impression that it is due to radio.

Mr. Nye: I move to strike out the answer as not being a statement of fact but an impression of the witness.

Q. Those three songs you mentioned which grossed more than one million copies in the sales of sheet music, how long did those three songs remain popular?

A. From three months to a year.

Q. And on the two songs that you mentioned, within recent years as outstanding hits, how long did they remain popular?

A. Oh, at most four months.

Q. Does a popular, outstanding hit today retain its popularity for as much as a year?

A. Very few.

[fol. 1052] Q. Do you know of any song within recent years that has been popular as much as a year?

A. No, I do not.

Q. What is the average life of an outstanding, popular song today?

A. Anything over three to six months I should think would be tops. It would have to be very outstanding to be six months.

Q. Now, when you entered into contracts with various publishers over the past twenty years with respect to the publication of your various compositions, have you in any of those contracts provided that you should be paid compensation for the public performance for profit of those compositions by your respective publishers?

Mr. Nye: Objected to as calling for a conclusion.

A. No.

Mr. Finkelstein: Mr. Nye, you wouldn't want all those contracts put in evidence? If you want all those contracts put in evidence, if that is what you regard as the only evidence, we might have to produce all those contracts.

(Discussion off the record.)

Q. I show you this contract, Mr. Meyer, Plaintiffs' Ex-
[fol. 1053] hibit 3, which is a contract between Irving Berlin, Inc. and Truman Tomlin, Coy Poe and Jimmy Grier, on a form known as Standard Uniform Song Writers Contract, and ask you if the provisions of this contract are substantially identical with the contracts that you have made within recent years with your publishers on your respective compositions (handing paper to the witness).

A. Yes, they are the same, except that there might be a difference in the royalty rate. I might get three cents a copy for orchestrations where there is two cents there.

Q. You heard me read to Mr. Morris, the preceding witness, the section of the Nebraska statute with regard to de-

termining and fixing the price for all uses and purposes of the copyrighted compositions, didn't you?

A. Yes.

Q. Are you able to determine and fix a price on your compositions for the purpose of public performance for profit of your compositions within the State of Nebraska?

Mr. Nye: I object to the question as speculative, calling for a conclusion.

A. I would not have the least idea how to go about it.

Q. Have many of your compositions been sold to dealers and jobbers of music in the State of Nebraska?

[fol. 1054] Mr. Nye: Same objection.

A. I guess so; I never had anything to do with the sales department.

Q. Have you ever been within the State of Nebraska?

A. Yes, I played in vaudeville in Lincoln, Nebraska.

Q. Did you play any of your compositions in that State?

A. Yes.

Q. Did you ever hear any other people play or perform your compositions in that State?

A. On that bill.

Q. Played your compositions or sung them?

A. Yes, sir.

Q. If you determined to go ahead and fix a price for all uses of your compositions within the State of Nebraska, and assuming that there are at least 367 places or establishments within the State of Nebraska which use music, what would you have to do in order to determine and fix such price for all uses?

Mr. Nye: I object to that, the witness having already answered that he had no idea of what he had to do to determine or fix a price.

A. No; I don't know.

Q. You have no experience outside of being an author [fol. 1055] and composer?

A. That is right.

Q. You have relied, since your membership with the American Society of Composers, Authors and Publishers, upon that contract with the Society, for your compensation for the public performance of your works for profit, have you not?

A. I have.

Q. Is the Society doing something for you that you are unable to do for yourself?

Mr. Nye: I object to the question as calling for a conclusion and speculation.

A. Positively.

Q. Are you financially able at the present time to employ an investigator skilled in music to go round in the State of Nebraska among the various establishments for the purpose of detecting infringements of your compositions?

Mr. Nye: I object to the question as calling for speculation.

A. No.

Q. Are you financially able to employ an attorney, at the present time, in the State of Nebraska, to bring suits to protect your compositions?

Mr. Nye: I object as calling for speculation and no [fol. 1056] foundation being laid for any knowledge on the part of the witness.

A. No.

Q. Mr. Meyer, assuming that there are 367 establishments in the State of Nebraska or more, assuming that those establishments every day in the week play copyrighted musical compositions, and assume that these establishments play some of your compositions from time to time, are you in a position at the present time, financially or otherwise, to send a man down into the State of Nebraska for the purpose of making inquiry with respect to the use of your compositions in those 367 establishments?

Mr. Nye: I object, on the ground that the question is improper, hypothetical, based on facts not in evidence, calling for speculation.

A. I am not in that position.

Q. Have you ever brought any infringement suits to protect your public performance for profit rights anywhere?

A. Only through ASCAP.

Q. But other than through ASCAP, have you personally brought any such suits?

A. No.

Q. When did you join ASCAP?

A. 1914, I think it was March 26th.

[fol. 1057] Q. Prior to 1914 did you receive any revenue whatever for any public performance for profit of any of your compositions?

A. I did not.

Q. When for the first time did you begin to receive compensation for public performance for profit of any of your compositions?

A. 1921.

Q. From whom did you receive such compensation?

A. ASCAP.

Q. Have you been in receipt of such compensation regularly since 1921, from ASCAP?

A. Yes, I have.

Q. What did you receive from ASCAP as such compensation in the year 1935?

A. I haven't the figures.

Q. Give me an approximate figure.

A. 1935? I would say around $12,000.

Q. What did you receive in 1936?

A. Probably around 14 or $15,000.

Q. What did you receive in 1937?

A. Around $18,000.

Q. What was your receipt from the sale of sheet music from all your compositions and from all your publishers [fol. 1058] in 1935?

A. I don't believe it was a thousand dollars.

Q. What was the receipt from the sale of sheet music from all your publishers on all your compositions for 1936?

A. No more.

Q. What was the receipt from the sale of sheet music from all your publishers on all your compositions for 1937?

A. Just a minute. For 1936 it might have been $1200.

Q. How much in 1937?

A. Three or $400.

Q. What did you receive from the sale of sheet music on the average each year from 1914 to 1935—I will correct that, until 1925, that is an eleven-year period; give us the average, about, each year.

A. I know there was one year I received about $60,000.

Q. What year was that?

A. That would be 1921.

Q. What did you receive in other years during that period; can you refresh your recollection on that?

A. It was never less than twenty, between twenty and twenty-five.

Q. Was it ever less than twenty?

[fol. 1059] A. I think on a- average, over eleven years, I think it must have averaged about twenty-five.

Q. Between 1925 and 1935 what did you receive on the sheet music, in that ten years?

A. In 1926 I had a song, "Brown Eyes, Why Are You Blue," that sold a million and a quarter, and the next song I had that sold anything at all was "Song Of The Nile", that was in 1929; that sold about 450,000.

Q. I want from you in dollars and cents the average amount that you received over that ten-year period from 1925 to 1935.

A. In those ten years it must have averaged between two and three thousand dollars a year.

Q. Let us break that period up. For the period between 1925 and 1930, what would be the average from the sale of your sheet music?

A. That five years?

Q. That five-year period.

A. The average would be about six or $7,000.

Q. Take the second period, from 1930 to 1935, what did you average from the sale of sheet music each year during that period?

A. I don't think I averaged a thousand dollars. I am giving you that from memory.

[fol. 1060] Q. For the period from 1920 to 1930 how much did you average from mechanical reproductions, each year during that period? I refer to royalties.

A. I must have averaged about $5,000 a year.

Q. How much have you averaged since 1930 for mechanical royalties?

A. Maybe $200.

Q. Each year?

A. Yes.

Q. Would you be willing to permit the publisher of your compositions to determine and fix the price to be charged for the use or rendition of your copyrighted musical compositions within the State of Nebraska for public performance for profit?

A. No.

Q. Do you consider your contract with the Society valuable to you?

A. Very valuable.
Q. Can you give us an estimate of its value?

Mr. Nye: Objected to as calling for speculation based upon no foundation or knowledge.

Q. What do you think it is worth to you in dollars and cents?

Mr. Nye: Same objection.

[fol. 1061] A. What do you mean by that?
Q. If you were asked to value the contract in dollars and cents?
A. I would value it between fifteen and $20,000 a year.
Q. You have been a member of the Society since 1914?
A. Yes.
Q. You have executed contracts similar to the present contract during the years, have you, Mr. Meyer?
A. Yes.
Q. Each five-year period?
A. Yes.
Q. Is there a reasonable likelihood that you will continue to execute similar contracts with the Society in the future?
A. Yes, every likelihood.
Q. Mr. Meyer, have you renewed any of the copyrights for any of the compositions that you have published?
A. Yes.
Q. How many have you renewed, do you remember?
A. Fifty or sixty.
Q. When these renewal periods came along did you negotiate for the renewed publication of these compositions for the ensuing 28 years, with the publishers?
A. No, I did not.
[fol. 1062] Q. With whom did you negotiate?
A. Famous Music Corporation.
Q. Did that company enter into negotiations with you?
A. Yes.
Q. Did you receive different sums on different songs or was it a lump sum?
A. A lump sum.
Q. How much did you receive from them?

Mr. Nye: Objected to as immaterial.

A. $4,000.

Q. Do you expect to negotiate in the future with any person, firm or corporation for the renewal of your copyrights when the original terms expire?

A. I expect to negotiate with the publishers who at present have them.

Q. Approximately how many copyrights have you at the present time which will be renewed?

Mr. Nye: Objected to as calling for speculation.

A. You mean year by year?

Q. Yes.

A. I guess I must have about five hundred copyrights.

Q. What do you expect to receive from the publishers [fol. 1063] with whom you negotiate on each renewal, based on what you have received in the past?

Mr. Nye: Objected to as calling for speculation.

A. I don't know. I will make the best deal I can.

Q. You know something about this business, don't you?

A. Sure.

Q. Are publishers paying anything for renewals of their copyrights, at the present time, to writers?

A. I haven't heard so.

Q. Have you heard at all the instances where publishers paid the writers on their renewals advance royalties against the new term?

Mr. Nye: Objected to; calls for hearsay.

A. Yes.

Q. Do you know what is being paid by publishers to writers on these renewals as advance royalties?

Mr. Nye: Objected to as calling for hearsay.

A. No, except that different numbers have different values.

Q. Take some outstanding song or hit that you have published. You testified to a number of outstanding songs. Can you help me out and repeat the names of some of those songs?

A. "Tuck Me To Sleep In My Old Kentucky Home". [fol. 1064] Q. Was that a very popular song in its day?

A. Yes.

Q. Will the time come when the original copyright will expire?

A. Yes.
Q. Can you expect to renew the copyright?
A. Yes.
Q. And you expect to negotiate with the publisher who is at present holding the copyright, for renewal?
A. Yes.
Q. Do you expect to ask him for an advance royalty for the renewal?

Mr. Nye: Objected to as speculative.

A. I don't know. I expect to ask for as much as I can get.

Mr. Nye: I move to strike out the answer.

Q. Now, Mr. Meyer, with 500 copyrights that you own and expect to renew, what would you say is in the aggregate the value of those renewal rights to you?

Mr. Nye: Objected to, calling for speculation, no foundation; immaterial.

A. I would say $25,000.
Q. Have you ever written any music for stage productions, production numbers?
A. Yes.
[fol. 1065] Q. Will you give us some of the numbers that you have written for that purpose?
A. There was "The Black Birds".
Q. Was that the name of the show or composition?
A. The name of the show.
Q. What did you write for the production?
A. Nothing outstanding. Do you want any names?
Q. Yes.
A. They were very valuable to the show but they were never popularized; "Mandy, Make Up Your Mind," "I'm A Little Black Bird Looking For A Blue Bird." It was a colored show.
Q. Did you restrict any of your numbers or cause them to be restricted?
A. No, I don't believe so.

Mr. Frohlich: You may examine.

Cross-examination.

By Mr. Hotz:

Q. You are, I presume, in the first class or division of the composer members of the American Society of Composers, Authors and Publishers?

A. Double A.

Q. That is as high as you can get?

A. Yes.

[fol. 1066] Q. In 1921 I believe you said that you got as much as $60,000 from ASCAP one year, is that right?

A. No, royalties on songs.

Q. Those were royalties, from songs, from your publishers?

A. Yes, sheet music, phonographs and foreign orders.

Q. And all other similar income?

A. I believe the income from the Society that year was about $700, if I remember correctly.

Q. Now it is twisted around; it is reversed?

A. Yes.

Q. In other words, you receive your substantial income from the Society and very little from the publishers?

A. Yes.

Q. And that is true largely with all composers and authors; they have the same experience with you?

A. Except those that are out in the picture colony at the Coast; they are doing better.

Q. In connection with the sheet music sales, when you received your large income from royalties from sheet music, that was by determination of the price that was charged; you got a certain percentage of the price that was charged by the publisher to the customer; you got a certain percentage of that money?

[fol. 1067] A. If a song sold for ten cents in the five and ten cent store, I got a cent a copy; if it sold for 18 cents, the royalties were three cents a copy. Is that what you mean?

Q. Yes.

A. It was all by contract.

Q. It was all by contract that you made with your publisher at the time you made your deal with him?

A. Yes.

Q. At the present time, in connection with ASCAP the price that ASCAP charges for public performance rights for copyrighted musical compositions ASCAP fixes and de-

termines the public performance licenses or rights that are charged to the users, isn't that right?

A. I believe so.

Q. In other words, you don't fix them?

A. No, I do not.

Q. And there is no publisher that fixes them?

A. Not that I know of.

Q. It is done by ASCAP, the organization known as ASCAP?

A. Yes.

Q. About how many composers and authors are there in the class, in the first division, that you are in, about how many are there?

[fol. 1068] A. Fifty or fifty-two; I believe fifty-two.

Q. One gentleman this morning that was in that class thought it was fifty-five.

A. I think it is fifty-two.

Q. Do you know how many are in the next class underneath that?

A. Twenty-eight ~~or thirty~~, I should say. I am giving you a guess.

Q. I understand you don't have the books before you, but you are a member of the board of ASCAP?

A. Yes.

Q. And have been for some time?

A. Yes.

Q. You are one of the composer members of the board?

A. Yes.

Q. And the classifications of these various composers and writer members, it is a part of your job to fix them, I suppose?

A. Yes.

Q. What committees are you on?

A. I am on the rules committee and the audit committee.

Q. You say there are 52 of the first division and 28 of the second division, and how many of the third division?

A. It would only be a guess; I couldn't tell you.

[fol. 1069] Q. Could you give us an approximation?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial, calling for a speculation on the part of the witness.

Q. Is it a large number or a small number?

Mr. Finkelstein: Same objection.

A. It would be anything from 30 to 50.

Q. Then you come down into a class where the large number of authors and composers are grouped, do you not, and finally into a class——

A. Each class has a certain percentage.

Q. How many classes are there?

A. About sixteen.

Q. About sixteen classes? And how many composer members are there in the Society?

A. About a thousand, Joe?

Mr. Young: Yes.

A. (Continued): Yes, about a thousand.

Q. In what class are the largest number of composers and authors?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. They are pretty well distributed in all classes.

Q. You think they are pretty well distributed throughout?

[fol. 1070] A. Yes.

Q. What do the bottom ones, the lowest ones receive by way of income per annum from ASCAP?

A. There is one class that never writes, and has not written a song in twenty years, maybe more; they get $20 a year. The bottom class and they don't write, haven't written in years.

Q. The next ones, the class above that, there is some activity there? What do they get? That shows some activity?

A. They get $80 a year.

Q. Do you know how many there are in that class?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. How many in that class?

Q. Yes.

A. There would be a great number in that one, because all the new members that come into the Society are in that.

Q. What do you call that class; how are they designated?

Mr. Finkelstein: I object to the question as incompetent, irrelevant and immaterial.

A. Class 3.

Q. How many would you say were in Class 3?

Mr. Finkelstein: Same objection.

[fol. 1071] A. Seventy or eighty.
Q. Give us the next class, Mr. Meyer.
A. The next class is two.
Q. That is Class 2, is that right?
A. Yes.
Q. How many members in that?

Mr. Finkelstein: Same objection.

A. About the same, I guess.
Q. What do they receive?

Mr. Finkelstein: Same objection.

A. I think they get $400 a year.
Q. About $400 a year. Then the first class is what?
A. No. 1.
Q. And that is how many members?

Mr. Finkelstein: Same objection.

A. What do you mean? First class?
Q. You designated them No. 2, you have just testified.
A. That is where the boys start to move up.
Q. What is No. 1 paid a year?

Mr. Finkelstein: Same objection.

A. About $800 a year.
Q. Then you come into what is the next higher class. How do you designate that?
A. D.
[fol. 1072] Q. What do they get?
A. I don't know.
Q. Is it $1200?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial, no foundation laid, calling for speculation.

A. Between nine hundred and a thousand dollars.
Q. And then you come into the next class. How do you designate that?
A. Double D.
Q. About what do they get; how many members in that class?

Mr. Finkelstein: I object to the question as incompetent, irrelevant and immaterial.

A. I would say about $1200. Those figures are not authentic.

Q. We expect to check them more closely with the records of the Society if we can, but for this purpose it will do. What is the next class?

A. C.

Q. How many in the class and what are they compensated?

A. About the same, I guess.

Mr. Finkelstein: Same objection.

Q. They probably receive a little higher sum?

[fol. 1073] A. Certainly, every class gets a little more money; they get about $1400.

Q. The next class is what?

Mr. Finkelstein: Same objection.

A. Double C. They get a percentage.

Q. Of what? Of the gross?

A. Of the gross.

Q. That is collected by the Society?

A. Yes, and that varies.

Mr. Finkelstein: Same objection.

Q. And that varies?

A. Yes.

Q. How many in that class?

Mr. Finkelstein: Same objection.

A. About fifty or sixty.

Q. And that percentage is what?

Mr. Finkelstein: Same objection.

A. It varies.

Q. What is that percentage, four, five, two?

A. It is a matter of bookkeeping.

Mr. Finkelstein: Same objection.

Q. Who fixes that amount; who fixes the percentage?

Mr. Finkelstein: Same objection.

A. The percentage was originally fixed, I guess, when [fol. 1074] they first started dividing money.

Q. Can you tell what it amounts to in dollars and cents?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. Approximately what it was last year?

Q. Yes.

A. Maybe around $4,000.

Q. Let us get the next class; what is the next class?

A. The next class is B.

Q. How many members in that?

Mr. Finkelstein: Same objection.

A. I don't know; maybe forty or fifty.

Q. Do they also work on a percentage basis?

A. Yes.

Q. And that percentage is fixed by the Society?

A. Yes.

Q. You don't know that percentage?

A. Say between eight and nine thousand dollars.

Q. But it is based on a percentage?

A. Yes, all percentages from now on, from double C on.

Q. It is all on percentage. Does the percentage itself vary from year to year?

A. It does.

[fol. 1075] Q. They are not based on dollars and cents? In percent?

Mr. Finkelstein: Same objection.

A. Not, not in percent.

Q. What is the next?

Mr. Finkelstein: Same objection.

A. Double B is next. No, I have those figures wrong. Double B would be around $9,000. B would be around six, between six and seven. After that comes A; A would be around twelve thousand.

Q. And double A?

Mr. Finkelstein: Same objection.

A. Double A, $17,000; around sixteen, double A, and A was $12,000.

Mr. Finkelstein: I move to strike out the answer, incompetent, irrelevant and immaterial.

Q. Can you give me the percentage now? I will ask that once more. I don't mean dollars and cents, but the percentage.

Mr. Finkelstein: I object on the ground it is incompetent, irrelevant and immaterial.

A. I don't know how they arrive at the percentage.

Q. Who arrives at that percentage? That is all bookkeeping. Somebody must be delegated with the authority to fix the percentage. Do you know who that is? Is it [fol. 1076] Mr. Buck, Mr. Mills, Mr. Paine?

Mr. Finkelstein: Same objection.

A. The classification committee originally and they fixed that percentage.

Q. The classification committee?

A. That started in 1921.

Q. Would you say from your experience with the Society and your knowledge of its affairs through being on its board of directors that it had a substantial number of copyrighted musical compositions that are used and sold commercially?

Mr. Finkelstein: That is objected to; no foundation laid; the question is vague and indefinite.

A. I would.

Q. Do you say that it would constitute a substantial number?

A. Yes.

Q. You have never made any personal effort, between yourself and your publisher, to sit down and figure out the public performance rights of your compositions, alone, have you?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial, and on the ground that the contract speaks [fol. 1077] for itself.

Mr. Hotz: I didn't ask him about the contract; I asked him if he had ever made any personal effort to sit down with his publisher and figure out the public performance rights.

Mr. Finkelstein: To use Mr. Nye's expression, it is speculative.

A. I have not.

Mr. Hotz: That is all.

Q. I want to ask Mr. Meyer one more question. Who is your publisher?

A. Now?

Q. Yes.

A. Nobody.

Q. You don't have anyone special?

A. No. Mr. Morris at Herms, or anyone. I go around when I have a song.

Q. You do business with a large number of publishers?

A. Yes.

Q. Those publishers with whom you do business also receive compensation for public performance rights through ASCAP?

A. Yes.

[fol. 1078] Q. Divided equally between the composers and authors on one side and the publishers on the other?

A. Yes.

Q. And the only agency that has any existence through which these public performance rights are fixed and collected is the American Society of Composers, Authors and Publishers?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial; assumes a state of facts not in evidence.

Q. Just a minute; you have confused me. —on public performance rights of copyrighted vocal and instrumental music.

A. That is the only agency I know.

Mr. Hotz: I think that is all.

(Adjourned to May 25, 1938, at ten o'clock a. m., at the same place.)

[fol. 1079] DEPOSITION OF ELLA HERBERT BARTLETT

[fol. 1080] 1450 Broadway, New York, N. Y.

May 25, 1938, 10 a. m.

Met pursuant to adjournment.

Appearances:

As before.

ELLA HERBERT BARTLETT, called as a witness on behalf of the plaintiffs, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. What is your full name and address?

A. Ella Herbert Bartlett, 116 East 68th Street, New York City.

Q. Mrs. Bartlett, are you the daughter of the late Victor Herbert?

A. I am.

Q. Have you any brothers or sisters?

A. I have a brother.

Q. What is his name?

A. Clifford Herbert.

[fol. 1081] Q. You and Clifford were the only children of Victor Herbert?

A. Yes, the only living ones.

Q. What was your father's occupation in his life time?

A. Composer, or shall I say musician.

Q. Is that everything that he did?

A. Composer, conductor; I suppose that about covers it.

Q. Did he follow the profession of composing music for many years?

A. Yes.

Q. Are you able to tell us, without looking at any list or document and without refreshing your recollection from any such list, the important works that your father composer?

A. The important operettas, do you mean?

Q. Yes.

A. "M'lle Modiste," "Red Mill", "Naughty Marietta," "Babes in Toyland," I am trying to remember——

Q. Would your recollection be refreshed if I show you a list of these works which appeared in your affidavit which you made in this case?

A. Yes.

Q. Will you look at this list (handing paper to the witness)?

[fol. 1082] A. Do you want the biggest ones?

Q. You may just look at this list.

A. "M'lle Modiste," "Naughty Marietta," "The Century Girl," "Old Dutch," "The Cinderella Man," "Prince

Ananias," "The Wizard of the Nile," "Serenade," "Idol's Eye," "Cyrano de Bergerac," "The Ameer," "Singing Girl," "Viceroy," "Dolly Dollars," "Babette," "Tattooed Man," "Wonderland," "It Happened In Nordland," "Song Birds," "Camille," "Prima Donna," "Red Mill," "Sweet Sixteen," "The Duchess," "Only Girl," "Princess Pat," "Enchantress," "Lady of the Slipper," "Velvet Lady," "Eileen," "The Debutante," "The Madcap Duchess," "Madeleine," "Natoma," "Sweethearts," "My Golden Girl," "Girl In The Spotlight," "Orange Blossoms," "Dream Girl," "Angel Face," "Her Regiment," "Oui Madame."

Q. Can you name a few of the shorter compositions that your father composed, or would it help you to refresh your recollection if I show you this list which I have?

A. It helps me. I know some of them.

Q. Will you please look at this list (handing paper to the witness)?

A. These are largely orchestral things, piano pieces and things of that kind: "The Whiteman Suite," "Suite Romantique," and "Suite Columbus." And then little individual numbers: "Fluerette," "Souvenir," "Sunset," "Devo-[fol. 1083] tion," "Dream On," "McKinley March," "22nd Regiment March," "The Irish Rhapsody," "Al Fresco," "Heart Throbs," "The Belle of Pittsburgh," "Badinage," "Indian Summer," "Pan Americana," "Yesterthoughts," "American Fantasie," "Valse a la Mode," "American Rose Waltz," "Christ is Risen," "Air de Ballet," Woodland Fancies," "Punchinello," "Star Light Waltz," and "Forebodings." Of course, those are not complete.

Q. This is just a partial list of the works composed by your father?

A. Yes.

Q. Did these compositions which you have just mentioned, that is to say, the light operas, and operettas and musical comedies in the first group, and the shorter pieces in the second group, attain popularity and celebrity in their day?

A. Yes.

Q. Were they well known to the public?

A. Yes.

Q. Were any of these operettas that you mentioned in the first group successful operettas?

A. Yes, I would say most of them.

Q. Were they successful both financially and artistically?

A. Yes.

[fol. 1084] Q. Have you ever been in the State of Nebraska yourself?

A. No. I have been to California. Do you go through there then?

Q. No. Now, from time to time as your father composed these compositions and short compositions that you have mentioned, did he enter into contractual relations with music publishers for the publication of the sheet music of the compositions and of the scores of these operettas and musical comedies?

A. Yes.

Mr. Frohlich: We will offer in evidence as Plaintiffs' Exhibit 19, an agreement between Victor Herbert and M. Witmark & Sons, dated June 8, 1910, a copy of which is annexed as Schedule VI to the affidavit of Ella Herbert Bartlett verified June 8, 1937, and submitted in support of the motion for temporary injunction.

Exhibit 20 is an agreement between Victor Herbert and M. Witmark & Sons dated April 2, 1914, a copy of which appears as Schedule VII annexed to said affidavit of Ella Herbert Bartlett.

Mr. Nye: We object to the two exhibits as immaterial.

[fol. 1085] Mr. Frohlich: Will you stipulate that copies of the two contracts just described and offered in evidence, which appear as Schedules VI and VII to said affidavit, are true and accurate copies of the original contracts? I make the statement that they are.

Mr. Nye: We so stipulate.

(The copies of the two contracts just offered in evidence as Plaintiffs' Exhibit No. 19 and Plaintiffs' Exhibit No. 20, were marked accordingly.)

Mr. Frohlich: It is stipulated that the following contracts are original contracts, objection as to foundation waived:

Plaintiffs' Exhibit 21-A. Agreement between Victor Herbert and M. Witmark & Sons, dated September 6, 1898, with respect to the comic opera "Fortune Teller".

Plaintiffs' Exhibit 21-B. Agreement dated April 9, 1905, between Victor Herbert and M. Witmark & Sons, relating to musical and dramatic composition entitled "M'lle Modiste".

Plaintiffs' Exhibit 21-C. Agreement dated October 23, 1906, between Victor Herbert and M. Witmark & Sons, [fol. 1086] relating to the musical play entitled, "The Red Mill".

Plaintiffs' Exhibit 21-D. Agreement dated March 27, 1903, between Victor Herbert and M. Witmark & Sons, relating to the musical and dramatic composition entitled "Babes In The Woods".

Plaintiffs' Exhibit 21-E. Agreement dated the 16th day of ——, 1919, between Victor Herbert and T. B. Harms and Francis, Day & Hunter, relating to the musical composition tentatively entitled "Little Miss Wise".

Mr. Frohlich: I offer in evidence these five contracts just described as Plaintiffs' Exhibits 21-A to 21-E inclusive.

Mr. Nye: Objected to as to materiality.

(Copies of the documents just offered in evidence as Plaintiffs' Exhibit No. 21-A to Plaintiffs' Exhibit No. 21-E, consisting of five documents, were marked accordingly.)

Q. These seven contracts that have just been received or marked in evidence as Plaintiffs' Exhibits 19, 20, 21-A to 21-E, do they represent typical contracts that were made [fol. 1087] from time to time between your father and his various publishers?

A. Yes.

Q. You are familiar with the terms of all of these contracts, all of your father's contracts?

A. I am familiar with them.

Q. "The Red Mill" was a musical comedy, wasn't it?

A. Yes.

Q. And had a long and extended run?

A. Yes.

Q. This contract, Plaintiffs' Exhibit 21-E, which refers to "Little Miss Wise", was that a tentative title?

A. Yes.

Q. Was the play produced under this contract later?

A. Yes.

Q. What was the new title?

A. "Angel Face".

Q. This contract, Plaintiffs' Exhibit 21-D, which refers to "Babes In the Woods,"—was that a tentative title?

A. Yes.

Q. Was that title later changed?

A. Yes.

Q. What was the new title?

[fol. 1088] A. "Babes In Toyland."

Q. This play, "The Red Mill," that consisted of many musical parts, didn't it?

A. Yes.

Q. There were opening numbers and opening choruses and finales and ensemble numbers throughout the play, isn't that so?

A. Yes.

Q. That division into smaller musical units is true as to every one of the musical operettas and musical comedies that your father wrote?

A. Yes.

Q. Do you know approximately how many copyrights of separate musical compositions were obtained on the "Red Mill"?

A. That one operetta alone?

Q. That one operetta alone.

A. I don't know. Offhand I would say about thirty, something like that.

Q. Would it refresh your recollection if I show you this list which you had attached to your affidavit in this proceeding?

A. Yes.

Q. Will you look at this list, Schedule I, and see if that [fol. 1089] will refresh your recollection? (Paper handed to the witness.)

A. Yes. These are all the different arrangements, too; that is the reason I didn't know; here are six arrangements for the same number.

Q. This list contains all of the copyrights obtained on the operetta "The Red Mill"?

A. Yes.

Q. Does the list include various arrangements of the same composition?

A. Yes.

Mr. Frohlich: I offer in evidence this schedule I attached to Mrs. Bartlett's affidavit in the same proceeding, being a list of all of the copyrights that were obtained on the separate compositions including all of the arrangements of those compositions from time to time on the play, "The Red Mill," deemed marked Plaintiffs' Exhibit No. 22.

Mr. Nye: To which offer it is objected as immaterial. We waive foundation.

(The paper just offered in evidence was deemed marked Plaintiffs' Exhibit No. 22, of this date.)

[fol. 1090] Q. I call your attention to the operetta "Naughty Marietta," and ask you whether that was a very successful and well known operetta of your father's?

A. Yes, very.

Q. Would your recollection be refreshed if I show you Schedule II attached to your affidavit in this proceeding, with respect to the number of copyrights that were obtained on the separate musical numbers in that play (handing paper to the witness)?

A. Yes.

Q. Does that schedule truly represent the copyrights of the various compositions and of their various arrangements?

A. Yes.

Mr. Frohlich: I will offer it in evidence and ask that it be deemed marked in evidence, this Schedule II attached to Mrs. Bartlett's affidavit, being the list of all of the copyrights obtained from time to time on the various numbers contained in "Naughty Marietta"; to be deemed marked plaintiffs' Exhibit No. 23.

Mr. Nye: Defendants waive foundation, and object to the offer as immaterial.

(The paper just offered in evidence was deemed marked Plaintiffs' Exhibit No. 23, of this date.)

[fol. 1091] Q. Was "Mademoiselle Modiste" a well known play or musical comedy composed by your father?

A. Yes.

Q. Did that likewise contain separate musical compositions?

A. Yes.

Q. Were various arrangements made from time to time of a number of those compositions?

A. Yes.

Q. Would your recollection be refreshed if I were to show you this document purporting to contain a list of the various arrangements which were copyrighted from time to time, being Schedule III attached to your affidavit in this proceeding?

A. Yes.

Q. Will you please look at this list, Mrs. Bartlett (handing paper to the witness)?

A. Yes.

Q. Does that schedule truly represent the copyrights of the various compositions and of their various arrangements?

A. Yes.

Mr. Frohlich: I will offer in evidence this schedule III and ask that it be read in evidence and deemed marked [fol. 1092] in evidence as Plaintiffs' Exhibit No. 23. The document offered in evidence is Schedule II attached to Mrs. Bartlett's affidavit on the motion for temporary injunction, being a list of the copyrights and of the various compositions and of the arrangements of a number of those compositions that were contained in the play "M'lle Modiste".

(The document just offered in evidence was deemed marked Plaintiffs' Exhibit No. 24, of this date.)

Mr. Nye: Defendants waive foundation; and object to the offer as immaterial.

Q. "M'lle Modiste" was originally copyrighted, according to Schedule III, in October, 1905; is that correct?

A. Yes.

Q. Were there from time to time renewals of various copyrights of the musical numbers contained in "M'lle Modiste"?

A. Yes, they have all been renewed.

Q. All the compositions of "M'lle Modiste"?

A. Yes.

Q. With the possible exception of some of the later arrangements that have not yet expired?

[fol. 1093] A. Yes.

Q. I show you a list purporting to be the renewals of the copyrights of a number of compositions of "M'lle Modiste," and I ask you if it refreshes your recollection and whether you can testify from your own recollection after looking at this list whether these renewals are accurate (handing paper to the witness).

A. I would say so.

Mr. Frohlich: I will offer in evidence the document entitled "Renewals of Copyrights—M'lle Modiste," consisting of two pages annexed to Mrs. Bartlett's affidavit in that same proceeding, to be deemed marked Plaintiffs' Exhibit No. 25.

Mr. Nye: Foundation waived; we object to the offer as immaterial.

Q. I show you this document entitled "Schedule IV Red Mill," and ask you whether you can testify, looking at this document, whether or not this represents a true and correct statement of original copyrights and renewals of the musical compositions in the "Red Mill" (handing paper to the witness).

A. Yes.

Mr. Frohlich: I offer in evidence this document entitled [fol. 1094] "Schedule IV Red Mill" "Original copyrights issued to M. Witmark & Sons as trustees for Victor Herbert and Henry Blossom Jr., renewals issued to Ella H. Bartlett, Clifford Herbert and Marjorie Wilson," which is attached to Mrs. Bartlett's affidavit in the same proceeding.

Mr. Nye: Foundation waived; we object to the offer as immaterial.

(The document just offered in evidence was deemed marked Plaintiffs' Exhibit No. 26, of this date.)

Q. Who is Marjorie Wilson, Mrs. Bartlett?

A. She is the widow of the author.

Q. Who is Henry Blossom, Jr.? He wrote the lyrics, I believe?

A. Yes.

Q. I show you this list, which is entitled "Schedule V. Babes In Toyland. Original copyrights issued to M. Witmark & Sons as trustees for Victor Herbert and Glen McDonough," and ask you whether that truly represents the list of copyrights and renewals of copyrights of the musical compositions in "Babes In Toyland"? (Paper handed to the witness.)

A. I would say yes.

[fol. 1095] Mr. Frohlich: I will offer in evidence this schedule "V" annexed to Mrs. Bartlett's affidavit in the same proceeding.

Mr. Nye: Foundation waived; we object to the offer as immaterial.

(The paper just offered in evidence was deemed marked Plaintiffs' Exhibit No. 27, of this date.)

Q. Was your father in his life time a member of the American Society of Composers, Authors and Publishers?

A. Yes.

Q. When did he join the Society, if you know?

A. I am afraid I don't know the date.

Q. Can you tell us approximately the year?

A. No.

Q. What year did your father die?

A. He died in 1924.

Q. After his death did you and your brother Clifford join the American Society of Composers, Authors and Publishers?

A. Yes.

Q. Have you been members of that Society ever since?

A. Yes.

Q. Have you been in receipt of any compensation for [fol. 1096] public performance for profit of your father's compositions since his death?

A. Yes.

Q. From whom have you received any such compensation?

A. From the American Society.

Q. What compensation did you receive from the Society in the year 1935? Just give us the approximate figures.

A. $10,000.

Q. Was that money paid to you alone, or to you and your brother?

A. I would say that was about my share; I can't give it exactly.

Q. Your brother also received some compensation from the Society?

A. Yes.

Q. Did you and your brother inherit under the will of your father the various copyrights of the compositions that he had composed in his life time?

A. He left the copyrights to my mother and to me and gave none to my brother.

Q. When did your mother die?

A. In 1927.

Q. Did you inherit from your mother the copyrights that had been left to her?

[fol. 1097] A. No, she left them to my brother.

Q. Did you inherit any of them at all?

A. I had two-thirds. Father left me two-thirds of his copyrights in the will, and to mother one-third. Mother in turn left her share to my brother.

Q. So that Clifford owned one-third and you two-thirds?
A. Yes.
Q. From time to time these copyrights were renewed. In whose name were they renewed?
A. As they were renewed they were all renewed in my brother's and my names.
Q. After they were renewed did you continue to have contractual relations with various publishers to publish the musical compositions of your father?
A. Yes.
Q. Are they now being published under those arrangements?
A. Yes.
Q. Did you within recent years sell any rights in any of your father's plays, for motion pictures?
A. Yes.
Q. Will you please state what works you sold for that purpose?
A. "Babes In Toyland," "M'lle Modiste" and "The [fol. 1098] Red Mill," and "Naughty Marietta."
Q. To whom were the grand rights in "Babes In Toyland" sold?
A. We sold those to R. K. O.
Q. What did you receive as compensation for the sale of those rights?
A. $50,000, for a lease of ten or eleven years; I don't remember exactly.
Q. To whom did you sell the grand rights in "M'lle Modiste"?
A. To Warner Brothers.
Q. What did you receive for them?
A. $50,000, as I remember.
Q. What other plays do you remember that were sold?
A. "The Fortune Teller."
Q. To whom did you sell that?
A. To Warner Brothers.
Q. What did you get for that?
A. $25,000 for the music alone, because they owned the book.
Q. What was the other play?
A. "The Red Mill."
Q. To whom did you sell that?

A. That was sold to Hearst; I think that was Cosmopolitan Productions at that time.

[fol. 1099] Q. What did you get for that?

A. As I remember that, it was $50,000 on a ten-year lease.

Q. Did you sell any other plays?

A. Yes.

Q. Any to Metro-Goldwyn-Mayer?

A. Yes.

Q. What did you sell?

A. "Sweethearts."

Q. What did you get for that?

A. $50,000.

Q. Did you sell any others?

A. "Rose of Algeria."

Q. What did you get for that?

A. The same.

Q. $50,000?

A. Yes. And "The Red Mill."

Q. What did you get for the "Red Mill"

A. $50,000.

Q. To whom did you sell "Naughty Marietta"?

A. Metro-Goldwyn-Mayer.

Q. What did you get for that?

A. $50,000. They had some sort of claim on the book, so that was the reason it was a little bit less; they had some arrangement with the author.

[fol. 1100] Q. In all of those instances where you sold these rights, were they for a limited period?

A. They all were, with the exception of three.

Q. What was the limitation?

A. They were sold on the basis of ten or eleven years, rights for ten or eleven years.

Q. When you sold these rights, just what rights did you sell?

A. The rights to make a picture, a moving picture.

Q. A moving picture of the particular play?

A. Yes.

Q. In any of those instances where you have rights to make picture versions of the play, you didn't sell the right of publication?

A. No.

Q. That has been reserved to your publisher?

A. Yes. Only the rights to make motion pictures using the book, lyric and music.

Q. From time to time have you been in receipt of royalties from the publication of the musical compositions composed by your father?

A. Yes.

Q. Have these royalties been very substantial in recent years?

[fol. 1101] A. Quite.

Q. How much did you receive by way of royalties from the sales of sheet music on all of the plays in the year 1935? Give us an approximate figure; you don't have to give us the exact amount.

A. That is, just sheet music?

Q. Yes.

A. Like my statement from Witmark?

Q. That is right.

A. I would say six or $7,000 a year on that alone, just sheet music.

Q. Just sheet music from all of the works?

A. Yes; that is approximate.

Q. What did you receive from the same source in 1936?

A. I would say about the same; they didn't change very much.

Q. About the same in 1937?

A. Yes; I think in 1937 they were a little higher.

Q. Did you also receive in 1935 any moneys from your publishers for the mechanical reproduction of your father's works with respect to disk records and piano rolls?

A. Yes.

Q. Can you tell us approximately the aggregate of all of the moneys that you received in the year 1935 from that source?

[fol. 1102] A. I don't believe I can.

Q. Was it more than the sheet music, or less?

A. Less.

Q. Did the same hold true for 1936 and 1937?

A. Yes.

Q. The moneys that you received from sheet music and from mechanicals, was that money that came to you alone?

A. Yes, that is what I had in mind.

Q. Did Clifford Herbert, your brother, also receive moneys from the sale of sheet music and from mechanicals of these compositions in these years?

A. Yes.

Q. You have nothing to do with what he receives?

A. No.

Q. With respect to these motion picture leases which you made on five or six of the works you mentioned, did you retain all of the moneys for yourself?

A. No.

Q. Did Clifford Herbert share in some of these moneys?

A. Yes, he did.

Q. Can you tell us for the record what his share was and what your share was? You have told us he inherited your mother's share.

Mr. Hotz: She has told us it was one-third and two-
[fol. 1103] thirds.

A. Up to the time of the renewal; after that time if it has been renewed then he gets one-half.

Q. What did you receive from the Society in 1936 as your own share?

A. Well, about $10,000.

Q. What did you receive in 1937?

A. It has gone up a little.

Q. A little more than $10,000?

A. Yes.

Q. You have a contract; your most recent contract with the Society was made in 1935, wasn't it?

A. Yes.

Q. Do you consider that contract of value to you?

Mr. Nye: I object to the question as calling for a conclusion.

A. Yes.

Q. Would you want that contract declared invalid and unlawful?

Mr. Nye: Objected to as calling for speculation.

A. No.

Q. A great many of your father's compositions will come up for copyright renewal in the next five or six years,
[fol. 1104] won't they?

A. Yes.

Q. Are you able to give us an estimate of what you consider the value of these works to you for renewal purposes?

Mr. Nye: I object to the question as calling for pure speculation, no proper foundation having been laid.

A. Taking one operetta as an example, if I sold it for motion pictures and publishing and dramatic rights and everything, I would say at least $100,000 each.

Q. You have had some experience in selling the rights of your published works, haven't you?

A. Yes.

Q. You have some notion of the value of those rights?

A. Yes.

Q. And you are acquainted with the values of the publication rights of these compositions?

A. Yes.

Q. As well as the values for motion picture rights?

A. Yes.

Q. Based upon your experience with respect to these rights, so far as publication and motion pictures are concerned and the royalties that you have received from the [fol. 1105] sale of those rights from time to time, is it your testimony that each of these operettas or musical comedies has a value of $100,000 to you with respect to the renewal rights?

Mr. Nye: I object to the question as extremely leading, calling for speculation.

A. Yes; I would say of course some are more valuable than others.

Q. Striking an average?

A. Striking an average, $100,000.

Q. When you strike an average, do you take into consideration all of these factors, your own experience, the moneys that you have received in the past?

A. Yes.

Q. You testified that from time to time you have received royalties from the sale of mechanical reproductions of your father's musical compositions by reason of phonograph records and piano rolls, is that right?

A. Yes.

Q. After you have received your renewal rights on some of these compositions, has your publisher to your knowledge granted to companies like Victor, Brunswick and other manufacturers of records and rolls the right to manufacture these compositions in like manner for the renewal period? [fol. 1106] A. Yes.

Q. Have you been receiving royalties on those rights?

A. Yes.

Q. Have you any control over the sale or disposition of the records and rolls that are sold by the manufacturers of these records and rolls?

Mr. Nye: I object to the question as calling for a conclusion.

A. No.

Q. Are you able to compel any of the manufacturers of these records and rolls to affix to the particular record or roll of your father's composition a price to be charged for the public performance for profit of that record or roll in the State of Nebraska?

Mr. Nye: I object to the question as calling for speculation and conclusion.

A. No.

Q. Would you be willing to permit the manufacturers of the rolls and records of your father's compositions to affix on such record or roll sold in the State of Nebraska any price for the public performance for profit of such composition?

Mr. Nye: Objected to as calling for speculation.

[fol. 1107] A. I wouldn't think so.

Q. Would you be willing to permit the publisher of any of your father's sheet music sold within the State of Nebraska to determine and fix a price to be charged for the use or rendition of the particular copyrighted musical composition within the State of Nebraska?

Mr. Nye: I object to the question as calling for speculation and assuming a state of facts not warranted by the evidence and the law.

A. No, I don't think so.

Q. Assuming that there are upwards of 367 places of amusement and entertainment in the State of Nebraska which use musical compositions, are you in a position to determine and fix a price on each of your father's compositions for the public performance for profit of that composition in the State of Nebraska at the present time?

Mr. Nye: I object to the question as calling for speculation, and as leading.

A. No.

Q. If you were required to determine and fix a price to be charged for the use or rendition of these copyrighted musical compositions within the State of Nebraska, particularly with respect to the public performance for profit [fol. 1108] of these compositions, would you personally be in a position to do that?

Mr. Nye: The question is objected to as calling for speculation.

A. No.

Q. What would you have to do to determine and fix the price for the public performance for profit of these compositions in the State of Nebraska?

Mr. Nye: Objected to as calling for speculation and conclusion, no foundation as to knowledge.

A. I should think I should have to have a lawyer or someone out there looking after that for me.

Mr. Nye: I move to strike out the answer as speculation.

Q. Would you have to employ somebody to look into the different establishments and give you some information in regard to them?

Mr. Nye: I object to the question as leading and calling for speculation.

A. Yes.

Q. Would you be able to determine and fix the price to be charged for all purposes and uses of your father's compositions, without some definite information with respect [fol. 1109] to the nature of these establishments in the State of Nebraska which use music?

Mr. Nye: Objected to as speculative, assuming facts not warranted.

A. No.

Q. Are you financially able to employ an investigator to look into these establishments and to see whether or not they were infringing your father's music in the State of Nebraska?

Mr. Nye: Objected to as leading, calling for speculation.

A. I wouldn't be able to pay an awful lot for it. I don't know what the fees would be.

Q. Are you financially able to pay a lawyer to bring suits for infringement in the State of Nebraska, on your father's compositions?

Mr. Nye: I object to the question as assuming a hypothesis not warranted by the evidence; speculation.

A. It is sort of a hard question to answer.

Q. I mean a good lawyer.

A. A good lawyer? Probably I couldn't afford to pay a good lawyer.

Q. Did your father ever receive any compensation in his [fol. 1110] lifetime from the public performance for profit of his copyrighted musical compositions, for the small uses, that is to say, for picture theatres, for hotels, for dance halls,—if you know?

A. Not until the American Society started to collect them.

Mr. Nye: Note my objection to the question as calling for hearsay.

Q. Did your father in his life time personally attempt to determine and fix a price for the public performance for profit of his compositions, with respect to these so-called small rights, if you know?

Mr. Nye: I object to the question as calling for hearsay and without foundation.

A. I would say no, I don't know.

Q. Are your father's compositions played at this time over the radio stations of the United States?

A. Yes.

Q. Are they played frequently?

A. Yes.

Q. You yourself have heard them?

A. Yes.

Q. Are they played on the hook-up stations of the National Broadcasting Company and the Columbia Broadcasting System?

[fol. 1111] A. Yes.

Q. Have you yourself heard them played time after time on those hook-up stations?

A. Yes.

Mr. Frohlich: I think that is all. You may examine.

Cross-examination.

By Mr. Hotz:

Q. Mrs. Bartlett, where do you live?
A. In New York City.
Q. Where does Clifford live, your brother?
A. No place in particular; he travels around; he has no home.
Q. Where was your father born?
A. In Dublin.
Q. Was he an Irishman by birth?
A. By birth.

Mr. Frohlich: I meant to ask one or two questions on citizenship. May I ask them now?

By Mr. Frohlich:

Q. Was your father a citizen of the United States?
A. Yes.
Q. Are you a citizen of the United States?
A. Yes.
[fol. 1112] Q. And were you born here?
A. Yes.
Q. Is that true of your brother Clifford?
A. Yes. My father became a citizen, I think, within two years after he got here—immediately took out papers.

By Mr. Hotz:

Q. There is a distinction, of course, between music that is written for plays, for example, operettas, musical plays of all sorts such as "The Red Mill" and others, and the individual pieces or songs that have been composed, is there not?
A. Yes.
Q. The American Society of Composers, Authors and Publishers have nothing whatever to do with the public performance rights of those operettas and plays; they don't have anything to do with them, do they?
A. You mean when they are broadcast?
Q. No, for public performance rights.
A. You mean if they were given on the stage, for instance, or something like that?
Q. That is a matter that you handle through your publisher?

A. No, I don't handle that through the publisher; we handle that through the Library, the Witmark Harms [fol. 1113] Music Library. I will explain that to you. In St. Louis they have an operetta during the summer, and they do, say, "The Red Mill" for a week; they pay so much to the Library and then it is divided between us. The American Society has nothing to do with a performance like that.

Q. That is what I meant. The American Society of Composers, Authors and Publishers have only to collect for public performance rights of the vocal and instrumental compositions where the individual song is sung or played?

A. I believe that is right.

Q. It is over that source that you have delegated and given full and complete authority to the American Society of Composers, Authors and Publishers in reference to those matters, isn't that right?

A. Yes.

Q. You have delegated and given to the American Society of Composers, Authors and Publishers the right to fix and determine the prices that are to be charged to the users of that style of musical compositions, copyrighted musical compositions, isn't that true?

A. Yes.

Q. You have no control over that?

A. No.

Q. They do that?

[fol. 1114] A. Yes.

Q. You receive as pay and compensation from the American Society of Composers, Authors and Publishers a fixed sum in accordance with the classification that you have been assigned to by the Society?

A. Yes.

Q. You know what your classification is, how it is described or designated?

A. Yes, double A, that is the top.

Q. That is the top?

A. Yes.

Q. From some of the other witnesses, composers and song writers that have testified here, they have told us that the popular music such as they write has a short life, probably four months.

A. Yes.

Q. And that the sales of musical compositions fell off materially and that their income from their publishers has dropped down considerably, that is, based on the royalties they received from the publishers.

A. Yes.

Q. In your case I notice they have not fallen off.

A. We were speaking from 1935 on; but I would say, from father's life time they were down, but I would say [fol. 1115] that the difference is that it is more or less like classical music; it is not like popular songs that last a short time.

Q. It is what you call standard type rather than the popular type?

A. Yes.

Q. In reference to these sums of money that you testified that you received from R. K. O., Warner Brothers, Hearst organization, Metro-Goldwyn-Mayer and various other picture concerns from time to time you have received from twenty-five to $50,000, the American Society of Composers, Authors and Publishers have nothing to do with that, either?

A. No.

Q. Is that all individual contracts and arrangements that you have made between yourself, your publisher and those users?

A. Yes, they are individual contracts; the publisher doesn't share.

Q. Then the publisher does not have anything to do with it?

A. No.

Q. Who fixes that?

A. When Mr. Burkan was alive it was Mr. Burkan's idea to give a ten-year lease instead of selling them outright; [fol. 1116] we have followed that plan.

Q. Your attorney is Mr. Frohlich, now, this firm here?

A. Yes.

Q. And they attend to those matters for you?

A. Yes.

Q. So far as the legal end of it is concerned?

A. Yes

Q. You have never read this bill out in Nebraska to know what the bill contains, I suppose?

A. No, I have not.

Q. You have not inquired into the problems out there that the users have had with the American Society of Composers, Authors and Publishers?

A. I just heard about it in a general way.

Q. Just in a general way?

A. Yes.

Q. Do you know that one of the features of that bill out there is that there has been a claim made that confusion has arisen in connection with the fixing of public performance rights, that is, the amount that should be paid by the small user, hotel, dance hall, restaurant and so forth, and that the American Society of Composers, Authors and Publishers fixed different sums to be paid, and that the bill [fol. 1117] out there is seeking to remedy that situation?

A. I just knew that was what they wanted to do.

Q. In connection with the mechanical rights, that is, the portions of music that are owned and controlled by you and your brother where there are records and rolls, that is handled, is it not, under a special contract by which a certain number of cents per roll or record is given to you?

A. Yes.

Q. Right at the time?

A. Yes, through the publisher.

Q. Through the publisher?

A. Yes.

Q. You divide that by arrangement between yourself and the publisher?

A. Yes.

Q. And your income, then, is based upon the number of records or rolls that are manufactured?

A. Yes.

Q. And in connection with the radio, the broadcasting, do you have any special contract with the National Broadcasting Company?

A. No.

[fol. 1118] Q. You have none with the Columbia?

A. No.

Q. And none of the net works?

A. No.

Q. The public performance rights in connection with music, copyrighted vocal and instrumental music in which you are interested, that is handled through ASCAP, is it not?

A. Yes.

Q. And after these records and rolls are bought and paid for by having a certain amount paid by the manufacturer that is all the further interest that you have, except the division of the money between yourself and your publisher in accordance with your contract, is that right?

A. Yes.

Q. In connection with the matter of sheet music, where it is used by individuals and firms in Nebraska for public performance rights, have you ever attempted to sit down with your publisher and figure out a sum of money that could be obtained at the time that music was sold that would include the public performance rights, so that would end it right there at the time the music was sold or purchased?

A. No.

Q. You have never done that?

[fol. 1119] A. No.

Q. You know the number of copies that have been sold, do you not?

A. Yes.

Q. And you know that from the fact that you collect royalties on the sale price?

A. Yes.

Q. Just generally, what are some of those; what division do you make?

A. Do you mean to take one number, for instance "Kiss Me Again" from "M'lle Modiste"?

Q. Yes. What would you say was your average royalty from sheet music?

A. On this one number?

Q. The average on sheet music that is sold?

A. I would say five or six thousand dollars.

Q. Translating that into percentage, two, three, four, five cents, what would it average?

A. On the sheet music most of the contracts are alike; I get three cents on each copy that is sold. Is that what you mean?

Q. Yes, that is what I mean.

A. Three cents on each copy.

Q. Having received $6,000 a year from that source, as-

[fol. 1120] suming that you get three cents from each copy—I am trying to get at the number of copies in that way.

A. It is only on the sheet music we receive three cents. If it is an arrangement we get different—probably fifteen per cent or ten per cent of the price.

Q. Now, on the arrangements, by that you mean orchestrations?

A. Yes.

Q. Arrangements for bands?

A. Yes.

Q. And the additional fee is charged of fifteen cents instead of three cents, you know that those are for public performance, do you not?

A. Yes.

Q. That the arrangement is made for public performance?

A. Yes.

Q. You have never attempted to work out for your publisher at the time that you fix those sums for the orchestrations and getting up works for public performance, you have never attempted to arrange with your publisher, or discuss the matter of having included therein a fee that would also cover public performance rights?

A. No.

Q. If you did do that and if you were able to obtain [fol. 1121] an agreeable sum that you and your publisher agreed upon, that would compensate you, would it not, for public performance rights, if it was satisfactory and the user paid the price?

A. I don't see how they could agree upon it.

Q. If you and your publisher arranged a certain sum, you would know that based upon the number of copies that were sold you would know what you were going to receive, would you not, in dollars and cents?

A. I don't see how you could figure it ahead like that. To use a word that has been used so often, I would say it was highly speculative.

Q. For instance, in receiving $6,000 for your sheet music at three cents a copy, that would anticipate two hundred thousand copies; am I right on that?

A. I think so.

Q. Suppose you have included in there another three cents for public performance rights, you would know that you were going to receive $6,000 for public performance rights, would you not, from the users, and you would get it right directly from your publisher the same as you do the royalty for three cents?

A. I don't know; I don't like that.

Q. You are not prepared to answer?

[fol. 1122] A. I don't like that.

Q. You don't like the idea. But nevertheless you don't mean to say that it could not be done if you and your publisher sat down and tried to work it out; you wouldn't want to go on record as saying that it could not be done?

A. I would almost say that.

Q. You have a record, have you not, of all of the numbers of pieces, vocal and instrumental music, upon which your father had obtained copyrights, from your publisher; they are all available?

A. Yes.

Q. He renders you a statement semiannually or thereabouts?

A. Yes.

Q. Showing the number of pieces that have been sold?

A. Yes.

Q. And it is upon that that your royalties are based?

A. Yes.

Q. Do you remember back as far as the case that your father had against Shanley, Victor Herbert against Shanley?

A. No.

Q. Or how it arose, or the circumstances?

A. No, I reall- do not.

[fol. 1123] Q. Who is your publisher, mostly?

A. Witmark published most of the things, but Schirmer also published a great many.

Q. G. Schirmer?

A. Yes. M. Witmark & Sons.

Q. Aside from Schirmer, those are all part of the Warner organization, are they not?

A. There are also other publishers. Walter Fischer, he published quite a few.

Q. They are all members of the American Society of Composers, Authors and Publishers?

A. Yes.

Q. And of course you are a member?

A. Yes.

Q. Is your brother Clifford?

A. Yes.

Q. I don't believe you are on the board of directors, are you?

A. Am I?

Q. Yes.

A. No, I am not.

Q. You know, do you not, that the American Society of Composers, Authors and Publishers have delegated to them by you and others the public performance rights, that is, [fol. 1124] the handling of the public performance rights?

A. Yes.

Q. You know that?

A. Yes.

Q. And you are also familiar with the fact, I think you told me before, they are authorized to fix and determine the fee or license that was fixed for public performance rights of copyrighted musical compositions in the State of Nebraska?

A. Yes.

Q. Is it your observation as member of the American Society of Composers, Authors and Publishers or do you know where there was any dissatisfaction among the composers and authors in reference to the classifications in which they were placed?

Mr. Frohlich: I object to the question as incompetent, irrelevant and immaterial, hearsay and speculative.

Q. If she knows.

A. I really don't know.

Q. You couldn't answer that?

A. No.

Q. Who owns the copyrights on the musical compositions that formerly were your father's?

[fol. 1125] A. My brother and I.

Q. Have you assigned them to your publisher?

A. Assigned the publishing rights.

Q. To the publisher?

A. Yes.

Q. And you are paid for that assignment of those rights and the renewals, a certain royalty on each and every copy that is sold?

A. Yes.

Q. And that is covered by your contracts that are in evidence; I presume they are, are they not?

A. Yes.

Mr. Frohlich: They are all covered by the contracts.

Q. And in turn the publisher, by and with your consent and your brother's consent, has delegated to the American

Society of Composers, Authors and Publishers the complete and final authority in connection with the public performance rights of the copyrighted vocal and instrumental musical compositions?

A. The small rights.

Q. And the fixing of the fees and licenses therefor?

A. Yes.

Q. And that is universally the custom with persons who [fol. 1126] are the writers and owners of musical compositions in New York?

A. Yes.

Q. And with the publishing houses?

A. Yes.

Mr. Hotz: I think that is all.

[fol. 1127] DEPOSITION OF WILL VON TILZER

[fol. 1128] WILL VON TILZER, called as a witness on behalf of the plaintiffs, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. What is your full name and address?

A. Will Von Tilzer, 1619 Broadway, New York City.

Q. Mr. Von Tilzer, what is your occupation?

A. I am in the publishing business.

Q. Music publisher?

A. Yes.

Q. How many years have you been in that business?

A. Since 1914.

Q. You are a brother of Harry Von Tilzer?

A. Yes.

Q. He is a well known songwriter and composer?

A. Yes.

Q. Are you a member of the American Society of Composers, Authors and Publishers?

A. I am.

Q. When did you first join that Society?

A. 1914.

Q. And you have been continuously a member of that Society since 1914?

[fol. 1129] A. With the exception of one year and nine months.

Q. What was that year?

A. That was 1919 into the year 1921.

Q. Since 1921 you have been continuously a member of the Society?

A. Yes.

Q. Each five years have you entered into an agreement with the Society?

A. Yes.

Q. Similar to the latest agreement of 1935?

A. Yes.

Mr. Frohlich: I presume that is in evidence by stipulation?

Mr. Nye: Yes.

Q. Where is your business located?

A. 1619 Broadway.

Q. How do you acquire the rights under which you publish musical compositions?

A. Under contracts with writers.

Q. And the composers?

A. Authors and composers.

Q. Have you with you any typical or representative contract that you use?

A. Yes.

[fol. 1130] Q. May I see it?

A. I have two, covering different periods; one was used from 1914 until the time of the uniform contract (producing papers).

Q. You have produced one contract which is entitled Standard Uniform Popular Songwriters Contract, which is dated April 27, 1934, between Broadway Music Corporation —by the way, that is the name of your company?

A. Yes.

Q. —and Allan Flynn, on a composition, "Be Still My Heart".

A. Yes.

Mr. Frohlich: It is stipulated that that contract is identical with the contract in evidence, Plaintiffs' Exhibit 3.

Q. You have also produced a contract between the Broadway Music Corporation and Charles McCarron and another, on a musical composition, "When The Sun Goes Down In Tennessee And The Moon Begins To Rise," dated January 16, 1917. Are the signatures at the foot of the contract the signatures of the parties to the contract just mentioned?

A. Yes, that is right.

Q. Is that contract typical of the contracts at or about that period?

[fol. 1131] A. Yes.

Q. And for some years succeeding that period?

A. Yes.

Mr. Frohlich: I offer it in evidence.

(The paper just offered in evidence was marked Plaintiffs' Exhibit No. 28, of this date.)

Mr. Frohlich I assume that we have the right to substitute photostatic copies in place of these original exhibits?

Mr. Nye: We are not going to object to the photostating of the exhibits so long as we can read the photostats.

Q. Now, Mr. Von Tilzer, you have had a great deal of experience in publishing music over these years?

A. Yes.

Q. And you are personally acquainted with a great many writers and publishers throughout the country?

A. Most of them.

Q. Prior to the time that you joined the American Society did you or your company ever receive any compensation for the public performance for profit of any of your compositions?

A. No.

[fol. 1132] Q. When for the first time did you receive any moneys or compensation for the public performance for profit on your compositions?

A. From the American Society? I think it was around 1921 or 1922; I don't remember the time; it was around that time.

Q. About 1921 or 1922?

A. I think it was around that time when it first declared a dividend.

Q. Have you been receiving compensation from the American Society since that time?

A. I have.

Q. Is that the only source from which you receive compensation for the public performance for profit of your musical compositions?

A. Yes.

Q. How much did you receive from the Society in 1935, approximately?

A. I received approximately twenty-three or $24,000.

Q. How much did you receive from the Society in 1936?

A. I would like to say around those three or four years, at that time, it was approximately about $24,000.

Q. 1935, 1936, 1937, average about 24 or $25,000?

[fol. 1133] A. It averaged about $24,000.

Q. When you publish a musical composition do you in many instances make a contractual arrangement with manufacturers of records and piano rolls for the mechanical reproduction of those compositions on records and rolls?

A. Yes.

Q. And you are paid by those manufacturers for the records and rolls that they manufacture?

A. That is right.

Q. Have you with you a typical contract form that you give to those people?

A. No.

Q. When you give a manufacturer of rolls and records the right to manufacture and sell those rolls and records, he from time to time issues a statement to you and sends you checks for the number that he sells?

A. That is right.

Q. Do you give such manufacturer of rolls and records any right of public performance for profit with respect to such rolls and records?

A. I do not.

Q. Would you ever give or want to give such manufacturer such rights?

[fol. 1134] Mr. Nye: I object to the question as calling for speculation.

A. My answer is no, emphatically no.

Q. Have you any control over the sale of those records and rolls which are manufactured by the particular manufacturer with whom you contract?

Mr. Nye: Objected to as calling for a conclusion.

A. To the best of my knowledge we have. I don't believe that the law has given us that protection, but it is my under-

standing that in a contract for a specific purpose that you only give them those rights and not the other rights.

Mr. Nye: I move to strike out the answer as stating a conclusion.

Q. Have you any contractual arrangement with any manufacturer of rolls or records of your compositions under which you can compel him to determine and fix the price within the State of Nebraska for the public performance for profit of the rolls and records that he sells in the State of Nebraska?

Mr. Nye: I object to the question as calling for a conclusion; not the best evidence.

A. I don't know the law there. I would like to have such an arrangement in our contract. I see why you wanted [fol. 1135] the contract here. I am sorry I haven't a specimen contract we make.

Q. Would you be willing to permit a manufacturer of your rolls and records to determine and fix a price to be printed on the particular rolls or records of your compositions under which he fixes the price for the public performance for profit of that roll or record within the State of Nebraska?

Mr. Nye: I object to the question as calling for speculation, assuming in the hypothesis facts not warranted by the record.

A. I would not.

Q. Would you be willing to permit any manufacturer of rolls or records of your compositions to act as your agent in the State of Nebraska in order to fix and determine the price to be charged for the public performance for profit of your compositions in the State of Nebraska?

Mr. Nye: Same objection.

A. I would not.

Q. Assuming that there are 367 places or establishments in the State of Nebraska which use copyrighted musical compositions for public performance for profit, would you be able to determine and fix the price for the public performance for profit of your compositions with respect to [fol. 1136] those 367 users in the State of Nebraska?

Mr. Nye: Same objection.

A. I don't think it would be possible for us to do it.

Q. If you were going to determine and fix a price for the public performance for profit of your compositions in the State of Nebraska, would you be required to obtain information with respect to the nature and size of the various establishments in Nebraska, that used your music?

Mr. Nye: Same objection; and that is *is* leading.

A. Absolutely.

Q. Would you be able to obtain data and information with respect to the 367 establishments in the State of Nebraska without being required to employ someone in the State of Nebraska to make inquiry in your behalf?

Mr. Nye: Same objection.

A. No.

Q. You have over the years employed people in your establishment that are skilled in music?

A. Yes.

Q. What would you have to pay to some man in the State of Nebraska to go around to each of the establishments using your music and obtain the information with respect to the nature and extent of these establishments?

[fol. 1137] Mr. Nye: I object to the question as assuming facts not in evidence, speculative, no foundation.

A. I would say between one hundred and two hundred dollars a week to get a man I deem capable of giving me that information.

Q. Would you have to employ somebody in the State of Nebraska for the purpose of detecting infringements of your compositions in that State?

Mr. Nye: Same objection.

A. I would say so.

Q. Would the person you would employ have to be skilled in music?

Mr. Nye: Same objection.

Q. What do you think you would have to pay such a person?

Mr. Nye: That is objected to as having no foundation and speculative.

A. I should say such a man, a capable man to do that sort of work, would cost not less than $100 a week.

Q. Would you be compelled to employ a lawyer in the State of Nebraska to bring infringement suits on your behalf against infringers?

Mr. Nye: Objected to as calling for conclusion.

[fol. 1138] A. It seems that that would follow naturally.

Q. What do you estimate that you would have to pay a lawyer?

Mr. Nye: Objected to, no foundation, conclusion.

A. My experience doesn't put me in a position to estimate the cost of the legal end.

Q. Do you feel that you are financially able to employ investigators and an attorney in the State of Nebraska to protect you against infringements of your compositions in that State?

Mr. Nye: I object to the question as calling for a conclusion, and assuming facts not warranted by the evidence.

A. I am not.

Q. Have you in the course of your career as a publisher published socalled hit songs?

A. Many of them.

Q. Can you tell us the names of a few of the more important hits that you published?

A. Yes. "You Made Me Love You," that was my first hit, in 1914. "I May Be Gone For A Long Long Time," "My Little Girl," "Old Frenchy," "I Used To Love You But It's All Over Now," "Dapper Dan," "I'll Be With [fol. 1139] You In Apple Blossom Time," "Chile Bean," "Oh By Jingo," "Muddy Water". Do you want them all, or is that enough?

Q. Just a few.

A. That is a representative bunch.

Q. Did any of these songs sell as many as a million copies?

A. Yes.

Q. Which ones?

A. "My Little Girl" was over a million.

Q. When was that published?

A. Off hand I should say about 1917; it may have been 1918; I can't say for sure.

Q. For how long a period was it popular?

A. That song? You picked a song that has an interesting story. I remember it because it was peculiar. At that time, that period in the history of our industry—do you want that story?

Mr. Nye: I don't think you need to write it down.

Mr. Frohlich: Keep it off the record.

(Statement by witness, off the record.)

Q. For how long a period was "You Made Me Love You" popular?

A. Close to a year, and it kept on selling in the following year.

[fol. 1140] Q. For how long a period were these other songs popular?

A. About the same; they averaged a year of very good sale and then tapered off for another year; they wouldn't drop off at once, just taper off gradually.

Q. So that a popular song was popular for a year and then tapered off for the following year?

A. Yes. It was a real means of support for the following year.

Q. Were there many hit songs that sold over a million copies all over the country?

A. Every year there were three or four songs that ran a million copies.

Q. Were there any that sold more than a million copies?

A. Yes, three or four.

Q. What was a hit song that you had within the last four or five years?

A. I had two in 1934. One song that was acknowledged as the top song of the year, called "Be Still, My Heart;" it had a wonderful and record popularity, stood way out, and was acclaimed by other writers as well as critics as being one of the best songs of that period.

Q. How many copies of that song did you sell?

A. Somewhere between eighty and ninety thousand.

[fol. 1141] Q. How long was the song popular?

A. I think that ran a little bit longer than the average does at this time. I think it was five or six months, because we were not a big organization at that time and the general activities were not so great.

Q. What was another song that you had in 1934?

A. "Believe It, Beloved;" that was outstanding.
Q. How long did that continue its popularity?
A. About four months.
Q. How many copies were sold?
A. 64,000.
Q. Have you had any hit songs after that period?
A. No; I have had songs that were played and that sold a number of copies. I had a song in the first part of 1937; it was popular as far as playing.
Q. What is the name of it?
A. "The Mood That I Am In."
Q. Was that played extensively over the radio?
A. Yes.
Q. Did you sell many copies?
A. Four or five thousand copies.
Q. For how long a period was it played over the radio?
A. For about three months.
Q. With your knowledge, experience and background as [fol. 1142] a music publisher for this period, to what do you attribute the falling off in sales of sheet music, of popular compositions, in recent years?

Mr. Nye: I object to that as calling for a conclusion, wholly immaterial, and calling for speculation; no foundation.

A. I can make the mere statement that it is radio. I can go on and take an hour of time and show why.
Q. Just tell us in a few words what happens to a musical composition today, particularly with respect to the manner in which radio plays it.

Mr. Nye: I object to the question as calling for a conclusion, no foundation, improper form of hypothetical question.

A. Obviously I should say to anyone that knows music and knows the field, that when radio takes hold of a song if they like it at all people get so much of that number that it has the same effect on the public that a wonderful dish of food would have if you ate it every day three times a day; they get tired of it; they are satiated with it. That is what has been happening to music for some years now.
Q. Has there been a diminution or falling off in the sales of your sheet music for the last ten or twelve years?

A. So much so, Mr. Frohlich, that a year ago this last [fol. 1143] April our concern finally came to the conclusion that it is almost useless, with our knowledge of the business and all, for us to put out these new popular songs. We are giving most of our time today to our standard works, songs that have been big hits in the past. Because, as in the case of this song, "The Mood That I Am In," we had had to spend a great deal of money and effort, and it works out selling four or five to ten thousand copies, which means a loss to such an extent that when you pay royalties on the song you are paying an additional loss on top of your original.

Mr. Nye: I move to strike out the answer as not responsive.

Q. Is that situation true with respect to popular music generally in the industry?

Mr. Nye: Objected to as calling for speculation.

A. That is my belief. I don't think that any of the publishers are making any money today.

Mr. Nye: I move to strike out, "That is my belief."

Q. Do you know of any music that sold as many as ten million copies?

A. No, I don't know of any one song.

[fol. 1144] Q. Could you continue the operation of your business if you were not in receipt of moneys from the American Society of Composers, Authors and Publishers?

Mr. Nye: The question is objected to as calling for conclusion and speculation.

A. Positively not.

Q. Your contract with the Society is valuable to you?

A. It is the only thing we have in the business of any consequence.

Q. How much do you think that contract is worth to you in dollars and cents?

Mr. Nye: Objected to as calling for speculation and conclusion, no foundation having been laid.

A. The only way I can answer that intelligently would be to say that I can only base the value of my business upon my receipts from the Society.

Q. Using that as a basis, what do you think your contract is worth to you?

Mr. Nye: Same objection.

A. Would that mean what I think my business is worth to me, would it mean that?

Q. What is this American Society contract worth to you today, in dollars and cents?

[fol. 1145] Mr. Nye: Same objection.

A. Conservatively, I would say $250,000.

Q. This last contract that you made in 1935 is the last of similar contracts made each five years?

A. Yes.

Q. If this American Society of Composers, Authors and Publishers is to continue, is there a reasonable expectation that you will enter into future contracts for five-year periods similar to the one now in existence?

A. That is right.

Q. Would you be willing to have your contract with the American Society of Composers, Authors and Publishers declared void and illegal?

Mr. Nye: Objected to as calling for speculation.

A. My answer to that would be that it would put me out of business.

Q. Would you be willing to have it declared void?

Mr. Nye: Same objection.

A. No, I would not.

Q. Do you publish any compositions that are used in productions on the stage?

A. I think it was around 1919, I think we had some production numbers at that time.

[fol. 1146] Q. When you publish a song at the present time, or at any time when you publish a song, are you able to tell immediately upon publication of the song whether it is going to be popular or not?

Mr. Nye: Objected to as calling for a conclusion.

A. My answer is no.

Q. If you were required to determine and fix the price to be charged for the use or rendition of your copyrighted musical compositions in the State of Nebraska on each

composition that is sold in that State, for all uses and purposes including public performance for profit, could you determine at that time when the composition is first sold in the State of Nebraska what price you could charge for public performance for profit, this price to be fixed for the complete length of the copyright of the composition?

Mr. Nye: I object to the question on the ground that it calls for a conclusion, and as hypothetical, assuming facts not warranted.

A. I believe that an answer to that question would be impossible, an intelligent answer.

Q. If you published a song and sold it for the first time today in the State of Nebraska, could you determine and fix a price to be placed on that song for television rights [fol. 1147] within that State?

Mr. Nye: I object to the question as calling for speculation.

A. I would be unable to.

Q. Do you know at the present time what value television may have in respect to your copyrighted musical compositions in the future, in the State of Nebraska?

A. No, I do not.

Mr. Nye: Same objection.

Q. Are you able to obtain data or information from any source that will help you to ascertain such value?

Mr. Nye: Same objection.

A. I am not.

Q. Could you tell today when you publish a composition in the State of Nebraska what value to fix on your composition for public performance for profit with respect to the hotels in the State of Nebraska?

Mr. Nye: Objected to as calling for a conclusion.

A. Do you mind asking that question again? (The pending question was read by the stenographer.) I would not be in a position to do that.

Q. Can you now, if you publish a composition in the State of Nebraska, determine and fix the price to be charged [fol. 1148] for the purpose of public performance for profit

of that composition for the full twenty-eight years of the copyright of the composition and the renewal period of twenty-eight years?

Mr. Nye: Same objection.

A. I would not be able to do so.

Q. Could you do it at any time?

Mr. Nye: Same objection.

A. No.

Q. Have you sold many of your compositions in the State of Nebraska over these years that you have been a publisher?

A. I think I can say safely I have. My answer is yes.

Q. Have you any office in the State of Nebraska, any branch office of your own?

A. We have not.

Q. Have you any agent or representative in that State?

A. The answer is no.

Q. How do you sell your sheet music in that state?

A. I should say that our music is sold through the jobbers in that State, music jobbers.

Q. When you sell your sheet music to jobbers and dealers in the State of Nebraska, have you any further control over [fol. 1149] over the sale or disposition of that music or copies of the musical compositions that you sell?

Mr. Nye: Objected to as calling for a conclusion; not the best evidence.

A. The jobbers are not in Nebraska; they are in other sections of the country, and then their representatives——

Q. Do you know of your own knowledge whether any of your music has ever been sold by jobbers to dealers within the State of Nebraska?

A. Yes, I am quite sure of that. I say yes to that.

Q. Are copies of the sheet music of your compositions on the shelves of dealers, let us say, in Omaha in the State of Nebraska at the present time?

A. It is possible. I couldn't say with any degree of authority that that is so at this time, in view of the fact that we have no current song, as I stated earlier.

Q. Would you be in a position to go to a dealer or jobber in the State of Nebraska who has your music and compel

him to fix a price on that music for public performance for profit of your compositions in the State of Nebraska?

A. I would not.

Mr. Nye: I object to that; calls for conclusion; no foundation.

Q. Has your music been performed within the State of [fol. 1150] Nebraska over the last fifteen or twenty years?

Mr. Nye: I object to the question on the ground that there is no foundation laid.

A. Yes.

Q. Have you yourself ever been in the State of Nebraska?

A. Many years ago, over twenty years ago.

Q. Did you hear any of your music performed in that State when you were there?

A. No, I went through there too rapidly; I was on a sales trip at that time.

Q. During the past ten years has your music been performed over radio stations in the United States?

A. Yes.

Q. Have you heard it performed over the National hook-up on the National Broadcasting stations?

A. Yes.

Q. Have you heard it performed on the national hook-up of the Columbia Broadcasting System?

A. Yes.

Q. How was sheet music sold prior to 1922?

Mr. Nye: Objected to as to form; immaterial.

A. In those days a good song, even though it was not exploited very often sold over a hundred to 300,000 copies [fol. 1151] without a penny being spent in exploitation. That is history. It can be proven that there were hundreds and thousands sold at those figures. It seems to me that the point was that the public were buying music in those days instead of listening to music.

Mr. Nye: I move to strike out the answer as not responsive.

Q. Is the public buying music today?

A. If we depended on the sale of music we would be out of business.

Q. Does that hold true of the other publishers in the United States?

A. Yes, that is true, with the exception of standard works, standard and classic.

Q. Taking the public by and large would you say that held true?

A. Yes.

Q. If it were not for the moneys derived from public performance for profit, would any of these popular publishers be in business today?

Mr. Nye: Same objection.

A. I don't think they could continue; I know we could not.

Q. How about your receipts for mechanical reproduction of records and rolls, has there been any falling off or [fol. 1152] diminution in the revenue received from that source within the past ten or fifteen years?

A. The history of the decline of the mechanical values is practically the same as sheet music.

Q. What did you receive on the compositions that you sold, that was a hit, and sold a million copies?

A. "You Made Me Love You"?

Q. What did you receive for the mechanical rights?

A. I couldn't say offhand, but I do know that around 1918, 1919 and 1920 that it was a very important phase of the business; it was a common occurrence for us to receive as much as eighteen to $20,000 in one quarter, from the Victor and also from the Columbia Phonograph Company, just one quarter.

Q. On a hit number?

A. On a catalogue, on numbers current at that time; that was the money we were getting at that time.

Q. Has that fallen to any extent in recent years?

A. It has fallen to nothing, practically.

Q. What did you get in 1937 from all sources for your mechanical rights on all of your compositions?

A. Here are some figures for you, if you care to look at them (producing paper). For the years 1934, 1935, 1936 and 1937.

[fol. 1153] Q. I will ask you about them. You have given me a tabulation of some figures that you have prepared, showing gross amounts received by your company from

sheet music and mechanical reproduction for the years 1934, 1935, 1936 and 1937. Have you a duplicate of that with you?

A. Yes (producing paper).

Q. What did you receive in 1934 from all sales of your sheet music?

A. $21,237.64.

Q. What did you receive from mechanical returns, which would include, I presume, piano rolls as well as records?

A. $1,244.71.

Q. What did you receive for the year 1935 from the gross sales of your sheet music?

A. $33,822.76.

Q. What did you receive from mechanical reproductions that year?

A. $1,658.04.

Q. What did you receive from the sale of sheet music all told, on all your compositions, in 1936?

A. $11,461.95.

Q. What did you receive for mechanical reproductions that year?

[fol. 1154] A. $4,310.48.

Q. What did you receive from the sales of sheet music in 1937?

A. $3,833.16.

Q. What did you receive from mechanical reproductions that year?

A. $2,456.46.

Mr. Frohlich: You may examine, Mr. Hotz.

Cross-examination.

By Mr. Hotz:

Q. Isn't the falling off in the sheet music business from 1935, which was $33,000, down to $3,000 in 1937, due to the fact that they were not producing popular hits?

A. I don't think that was the reason.

Q. It did have an effect, didn't it?

A. Will you ask that question again? I want to be sure I get you right. (The pending question was read by the stenographer.) No, that was not the reason. The reason was that we were losing money on songs we were publishing. While the gross sales during the years 1934 and 1935

were much greater than the gross sales of 1936 and 1937, that was not due to paying us with the business we were doing. It was because of the fact that we were trying to make a go of the thing and, as the last figure which we do [fol. 1155] not use here shows, we were showing losses in our company, and we got tired after a while of putting all this energy and effort back of it and ending up with a loss.

Q. The public were not satisfied to buy this music; that is what it amounts to; the sheet music that you were offering for sale?

Mr. Finkelstein: That is objected to as argumentative.

A. That is not how we feel about it; we feel we had good songs.

Q. The fact remains that the public were not buying them or else your gross sales would have been up if you were getting your share of the business, that is obvious?

A. Against that I would like to offer——

Q. Answer the question, if you can.

A. It is hard to answer it by yes or no. In fact there is no direct answer to it. During those years we had the twenty-one and $33,000 sales and we lost money. In consequence the following years we went down because it was unsatisfactory. We didn't put the effort behind our exploitation.

Q. During the years you have just testified to, 1934, 1935, 1936 and 1937, would you say that your publishing house produced what is usually termed a hit in popular music? [fol. 1156] A. During the years 1934 and 1935 the answer is yes, but the results were not hit results.

Q. In 1936 and 1937 you did not produce any hits?

A. Apparently it didn't turn out that way.

(Adjourned until two o'clock p. m.)

(After Recess) 2 p. m.

WILL VON TILZER, resumed:

Cross-examination (continued).

By Mr. Hotz:

Q. Mr. Von Tilzer, what is the name of your firm?

A. Broadway Music Corporation.

Q. You are the President of it?
A. Yes.
Q. How long have you been operating under that name?
A. Since 1914.
Q. A stock company, I presume?
A. Corporation.
Q. A New York corporation?
A. Yes.
Q. Headquarters here in the City?
[fol. 1157] A. Yes.
Q. You are a stockholder in it?
A. Yes.
Q. A substantial one?
A. Yes.
Q. You spoke about phonograph records or records and rolls. The term has been used frequently throughout the taking of this deposition as "records and rolls." I wish you would explain to us, no other witness has, just the process that is used in the manufacture of records and rolls, without going into the technical and scientific method of their production; but tell us with whom you dealt and the name of the concern and your general arrangements with them.
A. The principal record companies are R. C. A. Victor,——
Q. Located where?
A. Headquarters, New York offices. Camden, New Jersey, is the manufacturing plant; New York office, 153 East 24th Street. There is Decca Record Corporation, and there is American Record Corporation.
Q. Give us the address of those.
A. Decca is 50 West 57th Street; American Record Corporation, 1776 Broadway; Brunswick Record Corporation, 1776 Broadway, and Columbia Phonograph Company, same [fol. 1158] address. The music roll companies, there are very few left. There is one, Q-R-S was on 138th Street in the Bronx; those are music rolls, Q-R-S.
Q. Those concerns go around to the different music publishing houses, such as yours, and go over your catalogue and pick out those they think will be popular and for that reason will have some sale value to their trade, is that right?
A. Yes. It is pretty well known by *by* everyone connected with the industry the songs that are desirable. They

come to our place or telephone us; we negotiate as to the right to record it, and the usual procedure and contract.

Q. Under the terms of those contracts, some of which are in evidence here, you as the publisher and owner of the copyright of the musical compositions, vocal and instrumental, are paid a fixed sum per record as manufactured; isn't that the usual plan?

A. It is stipulated.

Q. It is stipulated in the contract, and I presume that you are somewhat familiar with the provisions of the copyright law that was amended not so long ago in that record?

A. I do not—it is hard——

Mr. Frohlich: Of course, this characterization of the contract is subject to proof by the best evidence, and where [fol. 1159] the contract is "records manufactured and sold", that is subject to the terms of the contract. I presume that is understood.

Q. The amount that is important is how much per record or roll.

A. You mean the sales price of the record?

Q. I mean the royalty.

A. The statute, the law, is two cents, and there have been instances where manufacturers of records—I don't think that applies to the roll—sell a very cheap record that is on the market, and the publishers in their endeavor to get revenue in because of this situation I have described earlier in the day, in order to make it possible for them to sell quantities of records if it is possible, they have given them a lower rate.

Q. Lower than two cents?

A. That is right.

Q. The American Society of Composers, Authors and Publishers, of which you are a member, have nothing to do with those royalties that are paid on copyrighted musical compositions in reference to rolls and records; that becomes a matter of arrangement between yourself and the manufacturer of those rolls and records?

[fol. 1160] A. Yes, rolls and records.

Q. Rolls and records, are those part of the other performance rights that you refer to?

Mr. Finkelstein: Objected to as assuming a state of facts not shown on the record.

A. I don't understand the question to begin with.

Q. Do you understand the term that is usually termed "small performance rights"?

A. Yes.

Q. What does that take in?

A. To my understanding it takes in a single song, not dramatic.

Q. Would you say that it did or did not take in the rolls and records?

A. I have never given it any thought.

Q. At any event ASCAP has nothing to do with that?

A. No.

Q. That is something that you have between yourself and the manufacturer, that ASCAP has nothing to do with?

A. No; they don't claim it, either.

Q. As far as your firm is concerned, you are not in the publication of dramatic works, operettas and things of that sort?

A. As I mentioned before, we had two musical comedies [fol. 1161] around 1919; nothing since.

Q. Then I presume that you are typical of a publisher who was largely engaged in the sale and publication of copyrighted vocal and instrumental musical compositions?

A. That is right.

Q. Mr. Von Tilzer, could you tell me the total number of such compositions sold by your firm, let us say, in 1934, 1935, 1936 and 1937, each year? I asked you to get those figures.

A. I have a pretty fair idea. You gave us very little time. When I said it would be O. K. with me I forgot we had a lot to take in. (Paper produced.)

Mr. Finkelstein: The witness has handed you what appears to be a list showing the approximate sale on copies of songs published during the years 1934, 1935, 1936 and 1937 (handing paper to counsel). Do you wish to offer that in evidence?

Mr. Hotz: I see no reason why we should not.

Q. While the counsel are looking over the exhibit preparatory to your answering the last question, I want to ask you, as a comparative matter generally without being too specific, about how extensive a business in the matter of copyrighted vocal and instrumental compositions you do

[fol. 1162] by way of numbers as compared with a concern such as Irving Berlin, Harms, Witmark, for example.

Mr. Finkelstein: I object to that on the ground that no foundation has been laid, incompetent, irrelevant and immaterial; you have not qualified the witness.

A. I should say that we do not compare at this time.

Q. They are much larger than you?

A. At this time.

Q. You would have some knowledge of that volume because of the fact that you are a member of ASCAP board of directors, are you not?

A. Yes.

Q. And through that source there is discussion and some determination as to the amount paid the publisher from ASCAP based upon the size and volume of its sales?

Mr. Finkelstein: I object to the question; it assumes a state of facts not in evidence; trying to put words into the witness's mouth.

Mr. Hotz: This is cross-examination.

A. I would say that such knowledge I would have would been general knowledge, not specific, because it is not the habit of publishers in our business to discuss their intimate arrangements. That is why I say generally that we do [fol. 1163] not compare, frankly. I don't think there is any importance about our size today and the size of these folks you mention.

Q. In getting up this list of approximate sale on copies of songs published during the years 1934, 1935, 1936 and 1937, would that cover all your sheet music or not?

A. No. It covers the bulk of the sheet music. The titles we have on here, and we had no time to compare it, would be titles that we sold two or three copies now and then; the sale was so small on those we had to do some digging.

Q. So that on this list here you have prepared of the songs published in 1934, giving 115,941 copies sold, there would be some in addition to that that are not on here?

A. We have that in the next year. In 1935 there was an additional sale.

Q. In addition to the titles on numbers set forth on this list that I am going to ask you about, would you say there were additional numbers that are not included of sheet music sold?

A. If I may say that they are negligible I would say yes. They are so small they didn't enter in. Can I add that these are numbers of the type that I am speaking about that might sell three or four copies a year.

Mr. Finkelstein: Can you tell us how many of those there [fol. 1164] are?

The Witness: There might be fifty or sixty.

Mr. Hotz: I don't care to press that any further. Mark that first as an exhibit.

Mr. Finkelstein: No objection.

(The paper just offered in evidence was marked Defendants' Exhibit No. 1, of this date.)

Q. This exhibit that has been marked Defendants' Exhibit No. 1, shows for the sales of songs in 1934, 115,941; in 1935, 101,568; in 1936, 36,189, and in 1937, 3,863; is that right?

A. That is right.

Q. Who is your principal jobber?

A. There are several of them. There is no principal one.

Q. Give us the name and address of some of your jobbers?

A. Local or out of town?

Q. Chicago, for example.

A. Lyon & Healey.

Q. Do you have any in Cleveland?

A. No jobbers in Cleveland.

Q. Any in Denver, Colorado?

A. Charles Wills Music Company.

[fol. 1165] Q. Any in Kansas City?

A. J. W. Jenkins Music Company.

Q. Any in St. Louis?

A. St. Louis Music Supply.

Q. Any jobbers in the City of Omaha?

A. No.

Q. Or the State of Nebraska?

A. No.

Q. The music in the State of Nebraska is sold by whom?

A. Hospe in Omaha, Hospe Music Company.

Q. Patten?

A. Yes, Patten, and Muller & Muller. I don't know whether McCrory still handles sheet music. Prentice, they did have a music department. I think Newberry or McClellan or Kresge, of the five-and-ten, they have music.

Q. Numerous questions have been asked different witnesses from time to time in connection with television. There is no development in connection with television so far that gives you any basis for figuring anything?

Mr. Finkelstein: Objected to; no foundation laid.

Q. So far as income and outlet for sales in your business?

A. I have no knowledge.

[fol. 1166] Q. Are you the member of any of the committees of the American Society of Composers, Authors and Publishers?

A. I am a member of the membership committee.

Q. What are some of the functions of the membership committee?

A. We receive information in connection with an applicant and we decide as a body whether they pass the qualifications for membership.

Q. After they do pass qualifications for membership then you also sit as a member of the committee that classifies them in the group?

A. That is a different group entirely.

Q. That is the classification committee?

A. Yes. That is purely the entrance committee.

Q. As to whether or not they shall get in there?

A. Yes.

Q. What are some of the qualifications for membership?

A. That he is a writer regularly engaged in the business of writing songs, that is his business, and that he writes songs that are of the type that are usable in performance today. If he qualifies on those two points, he is eligible to the Society.

Q. Do you know how many composer and writer members there are in ASCAP?

[fol. 1167] A. Off hand I don't know. I would have to be pretty good to carry all these details.

Q. How many numbers is one of the composers or writers required to have created before you will accept him in membership?

A. I believe it is six published numbers, regularly published numbers.

Q. What do you mean by regularly published?

A. Brought out in regular saleable copies, songs that have been active. Anybody can write a song; it is no trick at all to write a song.

Q. Then you determine whether or not that has any commercial value?

A. Commercial and performance value.

Q. Before a member is elected for membership or admitted to membership, does it make any difference who publishes his music?

A. I am not sure that I can answer that question. Do you mean whether he is a member of ASCAP?

Q. Publisher member.

A. I am not sure on that point.

Q. Are all of the publishers that deal in copyrighted musical compositions members of this Society?

A. You mean publishers? You mean publishers who pub-
[fol. 1168] lish numbers that have performance value? We have publishers in existence who are publishers of instruction books and piano pieces, that never have any value from the standpoint of performance. I should say there are publishers other than those we have.

Q. When the composer comes in to get his piece of music published, the practice and custom among the publishers you are familiar with through your association with ASCAP is that the copyrights become owned by the publisher, do they not?

A. Yes.

Q. That is your custom in the business?

A. That is right.

Q. And the composer or the author is paid a certain royalty which is based on the percentage of the sales value of his production when it is sold to the trade; that is usually three cents, I think?

A. Not necessarily. It depends on the sales price, in our contracts.

Q. How do you arrive at the percentage of royalty that is paid to the composer or author; by arrangement and discussion with the composer?

A. No, we have one set of royalties in that uniform contract and we proceed accordingly.

[fol. 1169] Q. What are those royalties, as you know them?

A. If you have that specimen contract there, Mr. Frohlich, it is on there.

Q. How high do they run? The highest that you know of?

A. The highest I know of, I should say as high as six cents.

Q. And as low as?

A. As low as three.

Q. They will vary between three and six cents for all practical purposes?

A. That is right.

Q. Which the composer or author gets from the sales price of the copyrighted musical compositions that are handled by your firm?

A. Of the wholesale price.

Q. It is not a percentage, is it; it is not a fixed percentage, is it, this three cents up to six cents?

A. That is right.

Q. In connection with the operation of the American Society of Composers, Authors and Publishers, one-half of the income of that Society, the net income, the distributable income, is divided one-half to the publisher members and the other one-half to the composer and author members, is that right?

A. That is correct.

[fol. 1170] Q. And at the present time your income from the American Society of Composers, Authors and Publishers averages about $24,000 a year?

A. Approximately; I couldn't give you the exact figure.

Q. What do you do in the case where you have an author or composer who is not a member of the Society and yet you publish, have contracts and publish his music and have taken over the copyright of his productions?

A. It just so happens that the songs I publish, not because of any reason but they happen to be the ones submitted to me, are songs written by members of the Society.

Q. There are instances, I presume, where a party is not a member of the Society for some reason, either not admitted to membership, whose musical compositions you publish, are there not—for example, Mr. Walker; do you know Mr. Walker?

A. Ray Walker?

Q. Yes.

A. You are going back now to the dark days of 1915, 1916, 1917, around that time. It is my impression that Mr. Walker at one time was a member of the Society and allowed himself to drop out of it.

Q. He is no longer a member?

A. I don't believe he is now.

[fol. 1171] Q. Do you know any of the particulars and facts surrounding his non-membership?

A. I don't know. I know the Society took extreme measures at that time to get in touch with members who were delinquent through a number of years; they went through registered letters and through every possible precaution to allow the boys to stay in. Anybody who got out at that time got out because they lost interest themselves.

Q. Do you recollect whether you sold any of Mr. Walker's compositions and paid him royalties after he was a non-member of the Society?

A. I wouldn't be able to tell that offhand; that is quite some time ago.

Q. What part did burlesque play in the popularization of music which you had for sale?

A. At the time that burlesque was very prominent, which was many years ago and in fact before the time that the Society was formed, that was one of the main means. Burlesque has come and gone for all practical purposes; vaudeville has come and gone; radio is supreme.

Q. Burlesque for many, many years was the advertising source through which popular music became known to the public?

A. I wouldn't say that; I would say one of the very active [fol. 1172] ways. One active way was trying out a song and going to affairs and going to dance halls, with megaphones and slides.

Q. Many of those things have gone out?

A. All of them have gone out.

Q. Out of use and desire so far as the public are concerned?

A. Many,—and it is because of radio, simply and solely because of radio.

Q. Burlesque went out before radio.

A. Yes.

Q. There are a number of things that come in the life of a business that affect sales and pass out and then another thing comes along.

Q. Yes, but there is a practical reason behind it. First of all if your get a song and if you don't wish your song to die unknown, if you want to sell it, you must show it to the public. In the song-plugging days and the days of the dance hall——

Q. Let us have the definition of "song plugging."

A. I start out by saying that in order to determine whether you have a song or not you must bring it before

your public. In those days, the days of burlesque, the method used was very satisfactory, because once you made your impression it hung on; and following along that line [fol. 1173] your song had a chance to sell a lot of copies, because they could only hear it by going to Burlesque or going to dance halls where they heard the boys with the megaphone, where the cost of exploitation was very little, and usually by the size and extent of the sales the sales were large, so the publisher could afford to go out and work very hard because when he got through his income was more than ample.

Q. So far as publishing houses, there is competition between them on the sale of their merchandise of musical compositions; they try to sell as many as they can in competition with other publishing houses; they try to make their music as popular as is possible?

A. You mean as far as popularizing our songs, yes; but by any other methods, that wouldn't mean a thing. If you have a song that is popular you sell your song.

Q. The thing is to make it popular?

A. That is what it used to be. Today it doesn't make any difference, because no matter how good your song is your sale is limited and your cost of production is so great that it seems impossible.

Q. In connection with the public performance rights of copyrighted vocal and instrumental musical compositions, in that regard the entire authority and right to fix the fees and licenses paid by users within the State of Nebraska [fol. 1174] and elsewhere is vested in ASCAP?

Mr. Finkelstein: I object to the question; the contract speaks for itself.

A. I should say that is right.

Q. And the distribution of the proceeds is in the hands of ASCAP, that is, the distributable proceeds that they collect?

A. They are a collection agency.

Q. They fix and determine, that is, that organization fix and determine the rate of distribution to the respective members?

A. Yes, I guess you could say that.

Q. For the respective members. Certainly they don't distribute it to anybody that is not a member?

A. That is right.

Q. Do you continue to pay Mr. Walker any rights on his music?

A. We would if his songs were selling. But it happens that his songs were novelty songs.

Q. Did you pay him anything after he ceased to be a member of the Society?

A. I can't recall that, but I have a vague recollection and feeling that because of the short life of the songs of his type the songs have ceased to sell.

[fol. 1175] Q. Do you know as a member of the committee on membership whether or not Walker has made application, more than one application, for reinstatement in the Society?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. His application has been in. Whether he did it more than once I can't say.

Q. But it has not been accepted?

Mr. Finkelstein: Same objection.

A. We have not passed on it.

Q. Why not?

Mr. Finkelstein: Same objection.

A. His songs today are not active. The songs that he published, that he wrote and were published in those days are not active today.

Q. Have you entered into contracts recently with Mr. Walker for the renewal of any of his copyrights that are about to expire, have you done that?

Mr. Finkelstein: Same objection.

A. Yes.

Q. Do you recall which ones?

A. Not off hand. One song that I recall is "Poor Pauline."

Q. Weren't some of his songs for which you had the copyright and the publisher's right, "The Girls Are Wearing [fol. 1176] Cotton Now"?

A. Yes, that is one of the songs; I remember that; nothing ever happened with that song.

Q. "I Can't Give Her Up"?

A. That is another.

Q. "The Girl I've Got Has Got It On Them All"?
A. I think so.
Q. "Southern Hospitality"?
A. Yes.
Q. "Your Mother Has Gone Away To Join The Army"?
A. Yes.
Q. "She Used To Be The Slowest Girl In Town"?
A. Yes, that is the only song that did mean anything from the day it was published.
Q. "Poor Pauline"?
A. That was another one.
Q. "The Price I Paid For You"?
A. Yes.
Q. "Knit, Knit, Sister Sue"?
A. Yes.
Q. Just what is the form of getting renewals, just how do you go about getting them, copyright renewals; must you do that by agreement with the composer?

Mr. Finkelstein: I object to the question; no founda- [fol. 1177] tion laid. Why don't you specify what type of instance you have in mind?
Mr. Hotz: The witness knows his own business.
Mr. Finkelstein: We have been dealing with cases where there are contracts. If there are contracts the contracts speak for themselves.
Mr. Hotz: The goes without saying.

A. I would rather not discuss that question, because there seems to be a great difference of opinion. I would rather not go into that. Our catalogue is valuable.
Q. Including Ray Walker's compositions?
A. I like Ray Walker very much; I wouldn't say anything disparaging about him. His are not the only songs we publish. Albert Von Tilzer and others make up a great part of our catalogue. I rather regret that we happen to be leaning on that one question,—because we have others.
Q. You have others that come into the same status that he has, that are not members of the Society and have copyrighted musical compositions that you publish?
A. Not at all.
Q. Would you say in your knowledge of the members of the American Society of Composers, Authors and Publishers that there are members of the Society that are there and pay their dues, that have standing so far as their musical

[fol. 1178] compositions are concerned, that were comparable with Mr. Walker?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. I might say this: You are talking to a publisher, not a writer. A writer would know more than I would; a writer has to do with writers, whereas a publisher does not—I may use the word—mingle with the writer's business.

Q. Wouldn't you say that Mr. Walker's works were more valuable than many of the writers that are in the eighty-dollar class with the American Society of Composers, Authors and Publishers?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. I don't know who the writers are in the eighty-dollar class, or I might be able to answer your question more intelligently. I don't have occasion to come in contact with the machinery that classifies the writers.

Q. When you stated in response to the questions that were put to you by Mr. Frolich about the expenses that you would be put to in the State of Nebraska in reference to copyrighted vocal and instrumental musical compositions that were in use in that State, you no doubt had in mind that you would have to maintain an organization for pro-[fol. 1179] tection against infringement of the musical compositions that you own and control through copyright, in that State; isn't that right?

A. I had in mind?

Q. Yes.

A. I don't mean it in that way, frankly, because I also stated, if you remember, that if I were put to that need I would probably be out of business because I couldn't afford to do it.

Q. You have never studied the Nebraska act, or perhaps never even read it over?

A. I am not familiar with it.

Q. What would you say as a publisher, about the comparative merits, so far as the public are concerned, of the style and type of popular music that is now presented for publication throughout the United States, for instance during the past five or six years, and that which it was previously,—how does it compare in value?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial; not within the issues; hypothetical and assuming a state of facts not in the record; entirely speculative; not shown to be within the knowledge of the witness.

A. I should say that it would be very hard to make com-
[fol. 1180] parisons. However, in my estimation, the music we have is just as valuable for its period as the music was at that period that you spoke of.

Q. That would be your conclusion?

A. Yes.

Q. We had a witness here on the stand this morning that gives information to show that Victor Herbert's music, for example, so far as numbers of copies were concerned, was keeping up quite well. That is, in 1935, 1936 and 1937, in fact in 1937 it showed some increase. That would indicate, would it not, that that music,—while standard, I realize,—has become standard,—has commercial sales value that is quite constant.

Mr. Finkelstein: What is the question?

A. I should say that when you compare the sales of Victor Herbert numbers and you are referring to their original sales, you will find that they are quite small in comparison. I don't know what you are trying to arrive at.

Q. Was Victor Herbert's music considered popular music the first time when it first came out?

A. Popular from the standpoint of usage.

Q. It became standard then because the public adopted it and accepted it?

A. That is not true.

[fol. 1181] Q. That is not more true of Victor Herbert than of any other composer?

A. Only that it happened that he was one man who wrote more of that type of numbers. You might make the same comparison between Abraham Lincoln and some other President who was a capable man but not so great a man as Abraham Lincoln.

Q. I am going to take from the list of the present composers and authors, members of the Society, one Monty Siegel. Do you know Monty Siegel?

A. I am not familiar with his work.

Q. Do you know him at all?

A. I know him; I have met him; I have seen him around.

Q. Do you know him as well as you know Ray Walker?

A. No.

Q. Would you say that Mr. Siegel's ability as a song writer and producer of musical compositions was equal to Mr. Walker's?

Mr. Finkelstein: I object to the question on the ground that no foundation has been laid. The witness testified already that he has no basis on which to determine the respective merits and qualifications of the writers.

Mr. Hotz: The witness is on the membership committee [fol. 1182] of the American Society of Composers, Authors and Publishers.

A. I don't see how that has any bearing on the case.

Mr. Hotz: I move to strike out the answer; strike out the argument of counsel, too. Read the question.

Q. (The preceding question was read by the stenographer.)

Mr. Finkelstein: I renew my objection.

A. I don't think I am capable of answering that question.

Q. You are a member of the board of directors of the American Society of Composers, Authors and Publishers and you are on the membership committee, are you not?

A. If my recollection serves me right, Mr. Siegel was admitted before I became a member of that membership committee. I am quite sure of that.

Q. That was true of Mr. Walker, wasn't it?

A. That was true of Mr. Walker, but as it happens I have never published any of Mr. Siegel's works, have I?

Q. No. I think you said Mr. Walker had an application for reinstatement in the Society pending?

A. That is right.

Mr. Hotz: That is all.

[fol. 1183] Re-direct examination.

By Mr. Frohlich:

Q. Mr. Von Tilzer, what about the average price at which you sell wholesale your copies of sheet music?

A. That would have been easy to answer two years ago when we were active on popular tunes more than we are

now. I should say about 20 22, average between 20 and 22.

Q. Average wholesale?

A. Yes. Those are standard numbers.

Q. Taking your whole catalogue by and large, taking all your numbers, I want you to give me an average price at which you sell them to large wholesalers?

A. I would say 22.

Q. If you add to that 22 cents per copy for each of your compositions that you sold in the State of Nebraska a price or addition to that for each and every use that may be made of that composition, including television and including public performance for profit, could you as a practical business matter sell any of your compositions and songs to any jobber or dealer in or for the State of Nebraska?

Mr. Nye: Objected to as calling for a conclusion, no foundation, assuming facts not warranted by the record.

[fol. 1184] A. It would be utterly impossible to interest a merchant if we were to add on these additional amounts you mention.

Q. Would you have any market in the State of Nebraska for your productions under the conditions I have outlined?

Mr. Nye: Same objection.

A. Absolutely not.

Q. As a matter of fact, isn't a good deal of your music purchased by young people who take it home to play on the piano?

A. Mostly.

Q. Most of the sheet music is purchased for the home?

A. Yes, that is right.

Q. You were asked something by Mr. Hotz on whether or not there was competition in obtaining publicity or plugging for popularity for your musical compositions. As a matter of fact, to your own knowledge and your experience and background, is there any such thing as competition between any two songs in the country?

Mr. Nye: Objected to as improper re-direct examination; immaterial.

A. I thought I did answer that when I said there is no competition between songs, because the publisher owns his own songs.

Q. If a user wants to play "Yes, We Have No Bananas," [fol. 1185] is he going to buy any other composition in place of that if he can get "Yes, We Have No Bananas"?

Mr. Nye: Objected to as speculative.

A. I don't believe so.

Mr. Frohlich: That is all.

Recross-examination.

By Mr. Hotz:

Q. You have a sales manager, haven't you?

A. Sales manager?

Q. Yes, for your music?

A. If we were doing any business that called for it. Mr. Lang is the nearest we have and he is a very good one, too, but we haven't any business.

By Mr. Nye:

Q. Mr. Von Tilzer, when you have a song on which you are pushing the sale, you try to sell it to various users, do you not, in preference to someone else's song?

A. We submit our songs—when you say "user" I want to be sure I understand you rightly. Are you referring to artists who sing in various places of amusement?

Q. Artists, radio studios, orchestras.

A. We submit our material as any other salesmen do in any other line.

Q. Submit it in competition with other popular songs [fol. 1186] of that day?

A. You might call it that.

Q. I didn't mean that you knocked other music, but you try to convince persons that your song has more merit than some other song or all other songs generally?

A. I wouldn't put it that way. We have a song which we know lots of people should use; we know that. We present the song. They either take it and accept it, or reject it. People have different ways of showing that. You have your Park Avenue method and you have your Baxter Street method where they try to force things on you. It happens we like to submit things.

Q. One of the best arguments you can make for your song is that there is a plugging campaign to creat- a demand for the song?

A. No; the best argument is that they like the song; we don't force it on them, because you lose out in the end.

Mr. Nye: That is all.

[fol. 1187] DEPOSITION OF EDGAR LESLIE

[fol. 1188] EDGAR LESLIE, called as a witness on behalf of the plaintiffs, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. What is your full name and address?
A. Edgar Leslie, 59 West 46th Street, New York City.
Q. What is your occupation, Mr. Leslie?
A. Song writer.
Q. You write the words, lyrics, or the music?
A. Generally I write the words.
Q. Have you occasionally written any music?
A. On very few occasions.
Q. How many years have you been engaged in that profession?
A. Thirty.
Q. In those thirty years have you written and had published many compositions?
A. I should say so.
Q. You usually write your composition in collaboration with a composer who composes music to your lyrics, is that right?
A. Yes.
Q. If you have a lead sheet of the manuscript of your [fol. 1189] composition, you take it to a publisher and arrange with him for publication?
A. Yes.
Q. Have you dealt with many publishers through these years?
A. A number of them.
Q. Give us the names of publishers who have published some of your compositions?
A. Watterson, Berlin & Snyder, Leo Feist, Jerome H. Remick, Witmark & Sons, Harms, Inc., J. Morris Music

Company, Donaldson, Douglas & Gumble, Crawford Music Company, Silver, Brown & Henderson, Harry Von Tilzer; that is some of them; there are others.

Q. You are a member of the American Society of Composers, Authors and Publishers?

A. I am.

Q. When did you first join that Society?

A. At its inception, 1914.

Q. Have you been a member continuously since that time?

A. I have.

Q. Have you a contract made in 1935 between yourself and the Society?

A. I have.

[fol. 1190] Mr. Frohlich: I assume it is stipulated that that contract is identical with the contracts in evidence with the other members?

Mr. Nye: Yes.

Q. Now, Mr. Leslie, did you write songs occasionally that became known as hit numbers?

A. I should say so.

Q. How would you define, in your own language, a hit number?

A. Well, a song that is generally played and sung and included on most programs throughout the country, songs that reach a pinnacle point in the matter of sales through the medium of sheet music jobbers.

Q. Will you give us the names of numbers, compositions that were hit numbers prior to 1922?

A. Yes.

Q. Can you give us the names of some of those numbers?

A. The first one was "Yiddisha Cowboy," "Lonesome," "Good Luck, Mary," "You Have To Get Out And Under His Automobile," "Sometimes I Love You," "When Grown-Up Ladies Act Like Babies," "For Me And My Gal," "Oh, What A Pal Was Mary." There are others I just can't call to mind.

Q. Did any of those numbers whose names you have just given——

[fol. 1191] A. Pardon me. "California And You," you can include that in that list.

Q. These are hit numbers prior to 1922, is that right?

A. Yes.

Q. Did any of those numbers sell more than a million copies?

A. Many of them.

Q. Let us be specific.

A. "Get Out And Get Under His Automobile."

Q. How many copies did that sell?

A. Over a million copies.

Q. What others?

A. "California And You" sold over a million; "Lonesome" sold over a million; "For Me And My Gal" sold over a million and a half copies; "Oh, What A Pal Was Mary" sold over a million and a half copies; "Sometimes I Love You" sold over a million copies; and maybe one or two others that I can't recall to mind.

Q. Can you give us the names of some of your hit songs within the last ten years?

A. Yes, since 1927 or 1928?

Q. Yes.

A. "Among My Souvenirs," "Romance," "Me And The Man In The Moon," "In A Little Japanese Tea Room," [fol. 1192] "On Treasure Island," "A Little Bit Independent," "Moon Over Miami," "It Looks Like Rain In Cherry Blossom Lane," "Robins And Roses," and a current song called "At A Perfume Counter On The Rue de la Paix."

Q. For all these songs you have just mentioned you wrote the lyrics, didn't you?

A. I did.

Q. Of any of the compositions that you have mentioned which were published and became hits within the last ten years, did any of them sell as high as one million copies?

A. One song sold about a million and a half copies, about ten years ago.

Q. Among these other songs did any song attain that sale?

A. No.

Q. Was "In A Little Japanese Tea Room" one of your songs?

A. It was.

Q. Do you know when that was published?

A. Either 1935, I think, or 1936.

Q. Can you refresh your recollection from this slip of paper as to these songs and the copies that were sold (handing paper to the witness)?

A. They are approximately the amounts that were given [fol. 1193] me on my royalty statements.

Q. Will you please read off the figures for those six or seven songs?

A. In 1935 "Little Japanese" sold 315,000; "Treasure Island," 1935, sold 350,000; "Little Bit Independent," 1935, sold 220,000; "Moon Over Miami," 1936, sold 190,000; "It Looks Like Rain In Cherry Blossom Lane," last year, 245,000 copies.

Q. Let us go back. Were these songs you have just mentioned successful popular songs?

A. Each of the five songs I have just mentioned attained the No. 1 position on the Lucky Strike Hit Parade, and they also attained, from the information I have received from jobbers, the No. 1 spot in the matter of sales during their life.

Q. Will you please explain what this Lucky Strike Hit Parade is?

A. It is a weekly resume of the ten most popular songs in the market in the country, based on calculations they make on investigations they make themselves.

Q. Going back to songs other than these five, but which were published since 1928, did any of those songs, aside from "Among My Souvenirs," reach a million copies in sales?

[fol. 1194] A. No, sir.

Q. What was the highest reached by any of them?

A. I think a song called "Me And The Man In The Moon" sold about 375, or 400,000 copies.

Q. Do you recall any songs other than these five songs read from this list, since 1935 that sold any greater number of copies?

A. Greater amount?

Q. Yes.

A. No, those were the five major songs.

Q. Going back to the period prior to 1922 and particularly to the songs that you mentioned as outstanding hits that sold more than a million copies, you had on those songs contractual arrangements with your publishers with regard to mechanical reproduction rights on those songs?

A. Yes, I did.

Q. In every contract you make with a publisher there is a provision for the payment to you of a percentage of moneys that come in from mechanical reproductions?

A. Yes.

Q. That is a general provision in all such contracts?

A. Yes.

Q. You know that from your general experience as a song writer?

[fol. 1195] A. Yes.

Q. What mechanical royalties did you receive on those songs that you mentioned, prior to 1922; give us an approximate figure of what you received quarterly or annually on those compositions.

A. I have had songs that sold in excess of one million and I received a proportionate amount.

Q. Did any of those you mentioned sell in excess of one million records?

A. Yes, practically all; some in excess of two million records. I can average all those songs as having sold at least one million records.

Q. Let us take the period subsequent to 1922 and let us take the songs you mentioned as your outstanding hits. How many records were manufactured and sold out of those compositions?

A. That is what I am talking about.

Q. That was prior to 1922.

A. Oh, yes. There was a general decline over the years, a gradual decline in sales.

Q. Is that a general decline?

A. Yes; almost nothing at present.

Q. What revenue did you receive in 1937 from that source, mechanical reproduction, piano rolls and records on all [fol. 1196] of your compositions?

A. A negligible amount. I can get you a statement.

Q. Can you give us an approximate figure?

A. It didn't amount to anything; it was a two or three or $400 item.

Q. Have any of the compositions published by you been renewed, has the original copyright period expired on them, the twenty-eight-year period?

A. I have recaptured all those songs myself. I have recopyrighted them in my own name.

Q. Is it a fact that the renewal rights have accrued on some of your compositions?

A. Yes.

Q. About how many compositions did you compose, would you say, in the last thirty years, roughly?

A. Between five hundred and a thousand, I would say.

Q. I show you a list of compositions, called "List of compositions by Edgar Leslie," and ask you whether that is a complete list of your compositions?

A. I wouldn't say it was a complete list of all the compositions or songs I have written.

Q. Is it a partial list?

A. It is a partial list.

Q. Is each and every song mentioned in that list one of [fol. 1197] your songs?

A. So far as I can recollect I would say yes.

Mr. Frolich: I offer it in evidence.

(The paper just offered in evidence was marked plaintiffs' Exhibit No. 29, of this date.)

Mr. Nye: Do you mind if I ask him one question?

Mr. Frolich: Go ahead.

Mr. Nye: These figures opposite each name of the song represents the year in which it was written?

The Witness: The year in which it was copyrighted.

Mr. Nye: That is all. No objection.

Mr. Frohlich: I don't want to leave the impression that I just gave you a partial list of the songs of the witness. If counsel desire I can obtain a complete list of Mr. Leslie's works.

Mr. Nye: We don't care for that. May I ask counsel where that list would be obtained?

Mr. Frohlich: We would have to have it obtained.

[fol. 1198] Mr. Nye: From where? From the Copyright Office in Washington?

Mr. Frohlich: From the Copyright Office in Washington.

Mr. Nye: Was this particular list prepared by the Copyright Office?

Mr. Frohlich: From records in the Copyright Office.

Mr. Nye: You do have records of all the music that you ever copyrighted, don't you?

The Witness: I don't think I have. I haven't any copies of my songs.

Mr. Bennett: But you have contracts with publishers, have you not?

The Witness: Some of them.

Q. Now, Mr. Leslie, did I understand you to testify that some of these compositions composed by you came up for renewal from time to time in the past few years?

A. Yes.

Q. In each and every instance when the original copyright period expired did you apply for renewal on that particular composition?

A. I did.

Q. And then after you obtained the renewal of the com-
[fol. 1199] position did you make some arrangement or agreement with a publisher for the continued publication of the composition for the balance of the 28 years of the renewal?

A. I have retained those for myself.

Q. You have retained the copyright yourself?

A. Yes.

Q. Are you publising these renewals in your own name?

A. None of them has been good enough to publish as yet, none of my songs.

Q. When your hit songs come up for renewal do you propose to renew them?

A. In conjunction with the composer, yes.

Q. Will you try to exploit the publication of the hit songs for the period of the renewal?

Mr. Nye: Objected to as calling for speculation.

A. Yes.

Q. Are the renewal rights in your numbers, particularly your popular hit numbers, of any value to you; have they a financial value?

Mr. Nye: Objected to as calling for speculation.

A. They may have.

Q. Let us take one of your outstanding numbers, "Among
[fol. 1200] My Souvenirs".

A. That should have plenty of value.

Q. Has that more or less a perennial value?

A. Yes, it is more or less enduring.

Q. What would you expect to demand in the way of advance royalties for the renewal period of that copyright?

Mr. Nye: Objected to; no foundation for knowledge; referring to a state of facts not warranted by the evidence; it is speculative.

A. I would ask a substantial sum, $1,000 or $1,500.

Q. Advance royalties, with an understanding that you obtain royalties as the song continued to be published?

A. Yes.

Q. When these songs were taken by manufacturers of rolls and records, they were so taken under some contractual relation with the publisher of each of these publications, weren't they? You had no say in the matter, did you?

A. In the matter of what?

Q. Of giving to any particular manufacturer the making of the rolls and records?

A. I gave that to the publishers.

Q. And your publisher made that contract with the manufacturer?

A. Yes.

[fol. 1201] Q. And whatever money he received he split with you?

A. Yes.

Q. On some sort of basis?

A. Yes.

Q. Did your publisher give to any manufacturer of any of your compositions in the form of rolls or records the right at any time to determine and fix the price to be charged for public performance for profit of the particular song and affix that price on the record or roll?

Mr. Nye: Objected to; no foundation for knowledge; calling for a conclusion.

A. No.

Q. Would you in the future be willing to grant to any manufacturer of piano rolls or records the right to fix the price for the public performance for profit of that particular record?

Mr. Nye: Objected to as calling for speculation.

A. No.

Q. So far as you are concerned, do you want to give that right to anybody at all?

Mr. Nye: Same objection.

A. No.

Q. Would you give the right to your publisher?

[fol. 1202] Mr. Nye: Same objection.

A. No.

Q. Do you wish to retain for yourself the right to determine and fix the price to be charged for the public performance for profit of your compositions?

Mr. Nye: Same objection.

A. Yes.

Q. Let me read to you a paragraph of the Nebraska statute that is in controversy here (reading Section 2, subparagraph "(A)" of Legislative Bill No. 478). Now, Mr. Leslie, could you, if you were not a member of any combination and if you were acting independently, and assuming that there are upwards of 367 establishments or places of entertainment in the State of Nebraska that use music, could you determine and fix the price to be charged for the use or rendition of your copyrighted musical compositions within the State of Nebraska for all uses and purposes including public performance for profit?

Mr. Nye: Objected to as assuming facts not warranted by the record; calling for speculation.

A. I could not do that.

Q. Have you at the present time any representative or agent or employee in the State of Nebraska?

[fol. 1203] A. No.

Q. If you were to try to determine and fix the price to be charged for the public performance for profit of each of you- compositions within that State, how would you go about it?

Mr. Nye: Objected to as calling for speculation; no foundation as to knowledge.

A. I would canvass the State and the use they make of music and the importance it has to their operation.

Q. Would you have to take notice of the size of the establishment, the audience reached——

Mr. Nye: I object to the line of questioning as extremely leading and also calling for speculation.

A. Yes.

Q. Would you have to take into consideration the nature of the particular establishment at which the music is being used?

Mr. Nye: Same objection.

A. It is too many for me to be bothered.

Q. Assuming that you would be able to obtain the information with respect to each of the various establishments in the State of Nebraska, would you say that the data so obtained would be constant, or would it fluctuate from [fol. 1204] week to week?

Mr. Nye: Objected to as speculative.

A. It would fluctuate from day to day.

Q. In other words, the hotel may play a composition one night with a ten-piece orchestra and the next night with a piano?

Mr. Nye: Objected to as leading and calling for speculation.

A. That is right.

Q. And the prices that you fix for that use would have to be determined upon those elements?

A. It involves too many details for me to bother with

Q. Are you financially able to retain and employ some representative in the State of Nebraska to obtain that information for you?

Mr. Nye: I object to the question; no reasonable foundation for the witness's knowledge; calling for speculation.

A. No.

Q. Would you be required to retain some representative in the State of Nebraska to detect infringements?

Mr. Nye: Same objection.

A. I would.

Q. Would that require you to incur the payment of travel-[fol. 1205] ing expenses and hotel bills?

Mr. Nye: Same objection.

A. Yes.

Q. Would it involve the payment of salaries?

Mr. Nye: Same objection; leading.

A. Yes.

Q. Would the representative so employed have to be a man skilled in music?

Mr. Nye: Same objection.

A. I should say so; I would want such a man.

Q. Would you have to employ a lawyer to prosecute infringement suits in that State?

Mr. Nye: Objected to as leading; also calling for speculation.

A. Yes.

Q. Suppose you tell us in your own words how you would go about determining and fixing the price to be charged for the public performance for profit, for example, on each of your compositions, in the State of Nebraska.

Mr. Nye: Objected to as calling for speculation.

Q. What would be the proper thing for you to do?

Mr. Nye: Objected to; no foundation for the knowledge of the witness.

[fol. 1206] A. I would have to ascertain what sort of use he was going to make of my work, and determine or try to determine how valuable my contribution to his program would be, what it was earning for him; I would charge relatively.

Q. Would it be possible for you to fix a price to be printed on the sheet of music for all of the use that can be made of that composition in the State of Nebraska?

Mr. Nye: Objected to as calling for speculation.

A. I don't see how I could do that; I don't think it would be practical.

Q. Have you any information in your possession today with respect to television?

A. I believe that there is a possibility in the near future.

Mr. Nye: I move to strike out the answer as not responsive.

Q. Could you determine and fix the price on your compositions with respect to the television use in the State of Nebraska?

Mr. Nye: Objected to as speculative.

A. I could not.

Q. Have you any information or data that would help you to determine and fix such a price?

A. None.

[fol. 1207] Q. Are you in a position to know today what the value of the use of television will be ten years hence?

Mr. Nye: Same objection.

A. No.

Q. If you were acting alone and independently of any group or association similar to ASCAP, would you be willing to determine upon the publication of your compositions, once and for all, the prices for all forms of use for the balance of the copyright period in the State of Nebraska?

Mr. Nye: Objected to as calling for conclusion, speculation; and for the further reason that it assumes facts not warranted by the record.

A. No.

Q. Do you desire to retain for yourself, if you are alone and not acting in conjunction with any combination, would you desire to retain for yourself the right to fix the time when you begin to exercise the right of public performance for profit?

Mr. Nye: Objected to; assumes facts not warranted by the record.

A. Will you repeat that, please? (The pending question was read by the stenographer.) Yes, I would.

[fol. 1208] Q. Do you desire to retain for yourself the right to determine when your right to public performance for profit is to be deemed commercially valuable to you?

Mr. Nye: Same objection.

A. Yes.

Q. Have any of your compositions been performed over the radio?

A. Yes.

Q. Have you heard them so performed?

A. Yes.

Q. Have you heard your compositions so performed over the National hook-ups of the National Broadcasting Company and the Columbia Broadcasting System?

A. Yes, I have.

Q. Are your compositions being performed presently in the State of Nebraska?

A. I don't know.

Q. Have you been in that State?

A. I have not.

Q. Prior to 1914 did you ever obtain any compensation from any source whatever for the public performance for profit of any of your copyrighted musical compositions?

A. No, sir.

Q. When for the first time did you obtain any such com- [fol. 1209] pensation, and from whom?

A. The American Society, in 1921.

Q. What compensation did you receive from the American Society in 1935?

A. I received a quarterly dividend check covering my proportion of the revenue.

Q. What did that amount to in dollars and cents?

A. I think a hundred and some odd dollars; I am not certain.

Q. What was the total income you receive- from the Society for the year 1935?

A. I thought you said 1921; if you did it is a mistake. For 1935, I don't know, around $14,000, I guess.

Q. What did you receive from the Society in 1936?

A. An increase of perhaps a thousand dollars; and last year $17,000.

Q. Is that your main source of income today, from your compositions?

A. It is.

Q. And without that source of income could you live and exist on the moneys that you receive from the sale of sheet music and mechanicals of your compositions?

A. Not as well as I have been accustomed to live.

Q. Could you pursue your occupation as a song writer [fol. 1210] if you did not receive the money from the American Society?

A. I would have to pursue it, I guess, because I can't do anything else, but it wouldn't be very lucrative.

Q. Have you ever brought suits yourself for infringement of your musical works?

A. No.

Q. Have you experience in bringing suits for infringement; have you any experience along that line?

A. No.

Q. Would you know how to go about it?

A. I imagine I would have to hire a lawyer to prosecute the infringement for me.

Mr. Nye: I move to strike out the answer as not responsive; merely the conclusion of the witness.

Q. Would you know how to protect your rights if it were not for the American Society?

Mr. Nye: Objected to as calling for a conclusion, the witness having already answered the question.

A. No, I couldn't very well intelligently do it.

Q. Have you got the financial means to do it?

Mr. Nye: Objected to; calls for a conclusion and assumes facts not within the knowledge of the witness.

[fol. 1211] A. It would be too discouraging a proposition for me to enter into.

Mr. Nye: I move to strike out the answer as not responsive.

Q. What did you receive from the sale of sheet music and the manufacture and sale of rolls and records of your compositions in the year 1937?

A. Perhaps in excess of $500 and less than a thousand.

Q. What did you receive in 1936?

A. I sold more songs in that year; perhaps I received a little bit more money, but the average per song was about the same.

Q. Did you receive over a thousand dollars from that source?

A. I should say so. It is difficult to recall to memory those figures.

Q. What did you receive from the sale of sheet music and mechanicals from all sources on the average each year prior to 1922?

A. I received as high as $35,000 a year. I recall some half year periods when I received 18 or 20 or $21,000.

Q. Is that diminution in the receipts from the sale of sheet music and mechanical royalties today general throughout the business, if you know?

[fol. 1212] A. I should think so; I know nothing to the contrary.

Q. You get around pretty much among the members of your profession?

A. Very, very much.

Q. You know a great many of them personally?

A. I do.

Q. You know a great many of the publishers personally?
A. Very well.
Q. Would you say from your experience and your background that this diminution from the receipts from sheet music and mechanicals is true with respect to other writers and publishers?

Mr. Nye: Objected to; no proper foundation; not the best evidence.

A. I would say yes, for this reason, that these writers often times compare statements, we talk shop, we look at one another's statements from publishers. A gradual decline has manifested itself in all statements during that period.
Q. You have testified that you have written five hit numbers since 1935?
A. I think that is incontestably true.
Q. How long a period were these respective compositions popular?
[fol. 1213] A. I should say from the time of publication.
Q. From the time of publication until such time as their popularity ceased; that was how long?
A. Four or five months, four months.
Q. Four months; five months at the outside?
A. Yes.
Q. Let us take "In A Little Japanese Tea Room".
A. Yes, it is as dead as Caesar.
Q. How long did it flourish?
A. I should say about four months.
Q. Was it played extensively over the radio?
A. Yes.
Q. Is that same true with respect to "On Treasure Island"?
A. It is true of each of those five songs I have mentioned.
Q. Going back to the period prior to 1922 and taking the songs that you mentioned earlier as being your outstanding hit songs, how long were those songs popular?
A. Well, they had a record sale of sheet music which extended over, I should say, eighteen months.
Q. Is that an average period for a hit song?
A. Yes; sometimes two years.
Q. Do you know of any song, of your own or anybody else's, in the last ten years that has been popular for a

[fol. 1214] period of eighteen months? Would you be in a position to know?

A. I don't know of any. I think I would receive information about it.

Q. Are you familiar with the current popular tunes?

A. I am.

Q. You keep pretty close watch on all these songs, don't you; it is part of your business?

A. Yes, I do.

Q. If there is a song popular as long as a year and a half, you would be likely to know about it?

A. Very much so.

Q. You know of no such song today?

A. No.

Q. And that has been true, has it, for the past ten years?

A. Yes.

Q. What in your opinion is the condition due to?

Mr. Nye: Objected to as calling for a conclusion..

A. Constant use by radio, keeping people way from pianos, discouraging the purchase of piano rolls and records.

Mr. Frohlich: You may examine.

[fol. 1215] Cross-examination.

By Mr. Nye:

Q. Mr. Leslie, you stated that during the last ten years there was no musical composition that you knew of that lasted a year or eighteen months as a popular number?

A. Not songs that we accept as popular.

Q. Yes. As matter of fact your song "Among My Souvenirs" was brought out about ten years ago?

A. That is right.

Q. Or probably eight or nine years ago; which was it?

A. I think it was in 1927. I thought it was 1928, but they told me 1927..

Q. That was popular and that song lasted for considerably more than a year?

A. It is occasionally used, but not in a sense that we accept popularity, that everybody sings a song.

Q. That song is fast becoming what we call a standard number?

A. It has to that extent but not from a revenue standpoint in the form of music sales, sheet music sales or record sales.

Q. This song of yours, "Moon Over Miami," was another outstanding hit, wasn't it?

A. Yes.

[fol. 1216] Q. How long was that popular?

A. It was accepted as popular.

Q. How long ago did that come out?

A. Around Christmas time about 1935 or the early part of 1936.

Q. That song remained popular longer than four months?

A. Well, they used it as an emblem of identity of folks coming out of Miami.

Q. It remained a popular number as you define it far longer than most?

A. No, I shouldn't say so; it didn't sell.

Q. How many copies were sold?

A. Less than 200,000; the least of all those songs.

Q. You sold "It Looks Like Rain In Cherry Blossom Lane", 245,000 copies?

A. Yes.

Q. That was in 1937?

A. Yes.

Q. How much did you get a copy on that?

A. A cent and a half.

Q. And yet you say that during 1937 you received only $500 to $1,000 from the sale of music?

A. No, from mechanical royalties, records and piano rolls.

Q. Then your answer to Mr. Frohlich's question should [fol. 1217] be limited to mechanicals only?

A. If you will repeat the question I think you will find that he asked me that.

Q. Now, then, what was your income from sheet music during 1937?

A. I can't tell you that.

Q. You have a pretty fair idea, haven't you?

A. Let me see; seven or $8,000. I could get those statements and give you the exact figures.

Q. We don't care for the exact amount. That was based on a cent and a half per copy?

A. That is right.

Q. In 1936 you said you had more than you did in 1937. How much did you receive in 1936 for sheet music?

A. I can approximate that if I can look at the list of songs. (Paper handed to the witness.) I would say about $10,000; I think that covers it.

Q. That was at a cent and a half a copy also?

A. Yes; half of three cents, and the mechanical revenue was based on fifty per cent.

Q. In 1935 how much did you receive from sheet music?

A. About seven or $8,000. Oh, no, more than that; about $10,000.

Q. Now, you had more hits in 1935, which caused that [fol. 1218] increase over 1937?

A. In 1935? Yes. I think I started on a cycle of better songs then.

Q. As a matter of fact, the song "Among My Souvenirs" was the most outstanding thing you have done in the last ten years, isn't it?

A. I consider it so, that and the song called "Romance" which has practically taken the same sort of position as "Among My Souvenirs".

Q. And "Romance" sold upwards of a million copies?

A. No, only a couple of hundred thousand copies.

Q. When was that written?

A. 1929-1930.

Q. That was written about the same time as "Among My Souvenirs"?

A. About two years later.

Q. And the fact that "Among My Souvenirs" is such an outstanding piece of music artistically had a great deal to do with the number of copies of the song that were sold at the time it came out, didn't it?

A. No, it was just a song. There seemed to be a purchasing power at that time that does not exist today. It didn't sell any more than other popular songs during that period.

[fol. 1219] Q. You don't think that the artistic value of the song, aside from its value as a popular piece of music, had anything to do with the sale of the copies?

A. That is speculation. There may be an intangible something that cannot be placed in words.

Q. There is an intangible something about every song that is written?

A. Yes.

Q. And that intangible something, is something that reaches into the mind and soul of the public and creates a desire for it?

A. There are no ways of determining it.

Q. You are a member of the board of directors of the ASCAP association?

A. I am.

Q. What committees are you on with that association?

A. I don't know if I am on any committee. My health has not been so good during the past six or seven years as to permit me to give personal services.

Q. You are acquainted with the methods used by ASCAP in determining the license fees that shall be charged to users?

A. Yes, I am acquainted with them.

Q. Those are determined by the board of directors and/or [fol. 1220] some committee appointed by the board of directors?

A. A committee appointed; they make recommendations and they are discussed pro and con in the board room, and sent back for further action.

Q. Has any individual member of the Society, aside from the board of directors, anything whatever to do with fixing these license fees that are charged to the user?

A. No; the power is vested in the directorate.

Q. The individual publisher or song writer has nothing to do with that when he enters into his contracts?

A. No.

Q. Not afterwards?

A. No.

Q. The board of directors through its membership committee also pass upon all applications for membership to the association?

A. Recommendations are made for the board to ratify.

Q. And the board either ratifies or declines to ratify?

A. Yes.

Q. Those questions are not submitted to the membership of the Association at any of its meetings, are they?

A. To pass upon the qualifications?

Q. No.

A. No; that information is determined by the membership committee, as I understand it.

[fol. 1221] Q. And the general membership of the Society at their general meetings have nothing whatever to do with that?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. Never.

Q. And the general membership of the Society at the general or regular meetings of the Society have nothing whatever to do with the election of the board of directors, do they?

Mr. Finkelstein: Same objection.

A. No.

Q. As a matter of fact, all of the business of the association is conducted by the board of directors, all of the rules of the association are made by the board of directors?

Mr. Finkelstein: Same objection.

A. What does he mean by "all the rules"; I think amendments to the by-laws can be made through submission by the member and upon revision by the board is submitted to the general membership.

Q. At least the board has to ratify them before they become effective?

Mr. Finkelstein: Same objection; the articles of associa-
[fol. 1222] tion are the best evidence.

A. I would say so.

Q. You are not familiar with the practices of the association in determining license fees, are you, and things of that kind, for users?

A. I have heard it discussed; I haven't any intimate knowledge.

Q. You have no intimate knowledge of those particular subjects?

A. Of which?

Q. That is, of the business and management of fixing the license fees of users, dance halls, hotels, radio stations and so on?

A. No.

Q. Those things are left to the business management and officers of the association?

A. The business management and a committee appointed to go over it and discuss it. I was at one time designated to serve on the rate committee. One time we did meet with the user, but at that period I got sick and had to absent myself from the discussion. But the members of the board in addition to the management fix the rates or fix the policy of making the rates.

Q. But you don't pretend to have any personal intimate [fol. 1223] knowledge of that particular subject?

A. No.

Q. You don't pretend to be an expert on that subject in any wise?

A. No.

Q. So that the answers that you have given to all of the questions asked by Mr. Frohlich pertaining to the practices which might or might not be necessary in Nebraska were prompted more by lack of knowledge of the subject than by your intimate knowledge of the subject?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial; assuming a state of facts not in existence.

A. If you will find out any particular fact that I am not supposed to be acquainted with, I will admit it. For instance, what?

Q. Let me ask you this. Mr. Frohlich asked you a good many questions about what you might or might not have to do in the State of Nebraska relative to the employment of attorneys and business agents and music experts who were detectives in the event the law as he interpreted it to you in those questions was in force in Nebraska. Now, then, pertaining to those questions your answers were prompted more by a lack of knowledge on the subject than by your [fol. 1224] expert knowledge on the subject?

A. I know this, that if——

Q. Just wait a minute. Let me ask you to do this. Can you answer that yes or no?

Mr. Finkelstein: He can't answer it yes or no.

A. I was going to tell you that. I couldn't answer that yes or no. I would have to qualify.

Q. Let me ask you this. At least your answers on those subjects were not prompted by any expert knowledge that you have of the situation, isn't that true, yes or no?

Mr. Finkelstein: That calls for a conclusion, and whether or not this witness is an expert is a question of law and not a question on which this witness is competent to testify.

A. I wouldn't say.

Q. At least you don't have any intimate knowledge of that subject? Yes or no?

A. I have intimate knowledge of knowing how to go about abating an infringement; I know that much.

Q. Based on your personal experience?

A. Based on my knowledge, my experience, as a member of ASCAP; based upon——

[fol. 1225] Q. Based upon what they do?

Mr. Finkelstein: Let him answer.

Q. Your experience along that line has been with ASCAP?

A. Covering infr ments?

Q. Yes. That is yc only experience?

A. Yes, that is my only experience.

Q. Prior to the time you joined ASCAP you had no experience along that line?

A. No.

Q. How long have you been a member of the board of directors of ASCAP?

A. I served around eight years.

Q. The only time that you ever met with any users in order to discuss the fixing of prices for licenses to be charged users was the one occasion when you became sick and had to leave?

A. I have talked with many establishments I have visited in the last ten years as to the rates ASCAP charged, and general information about ASCAP, with hotel men, cabarets.

Q. At any time you didn't pretend to enter into any technical discussion as to the manner in which the rates were determined by AS AP?

A. I always did figure that the rates should be charged [fol. 1226] in accordance with the importance of their operations and the use they made of our works.

Q. And outside of the general discussion of the subject, you didn't enter into a technical discussion of how the rate was fixed by the rate committee?

A. No.

Q. And you never have attempted to study that feature of the business?

A. I have studied it since I have become a member of ASCAP and I have acquainted myself with it.

Q. That is, with the technical phases taken into consideration?

A. I have listened to discussions and I think all rate is

generally based upon the importance of our contribution to the user's operation as a whole.

Q. In these discussions with users that you have had within the past ten years, have you discussed with any of them the value of the use of your own particular copyrights, have you?

A. I don't remember.

Q. You have never sat down with any one of the users and tried to analyze for yourself and himself the value of any one of your particular compositions?

A. No.

[fol. 1227] Q. You have never attempted to do that with your publisher or publishers?

A. I have had general conversations with publishers but I can't recall any single instance.

Q. You have never sat down with anyone else who from business experience is supposed to be expert in the matter of fixing an application of public performance rights, and discussed the value of your public performance rights with him?

A. Not as an individual, but performance rights in general, yes, I have discussed it with Mr. Frohlich, Mr. Paine, Mr. Mills and members of ASCAP.

Q. These performance rights of the entire ASCAP catalogue?

A. Not necessarily; performance rights of the songs in general.

Q. But you have never attempted to ascertain from any of these experts the value of the public performance rights of your own particular works, have you?

A. As an individual, no.

Mr. Nye: I think that is all.

Re-direct examination.

By Mr. Frohlich:

Q. Mr. Leslie, has any user of music in any talk with [fol. 1228] you ever asked you or suggested to you that you give him a license of your own compositions alone?

A. No, never.

Q. Would a single song of yours be of value to any user?

A. I don't know; I just can't say; it all depends on the circumstances under which it was used.

Q. Isn't it a fact that all users of music have to have many songs, musical compositions, to make up a varied and balanced program?

Mr. Nye: I object to the question; no sufficient foundation for knowledge.

A. Yes. They say, variety is the spice of life.

Q. You have been around in cabarets and night clubs for many years in New York?

A. Yes.

Q. You have been in hotels where music was performed?

A. Yes.

Q. You have heard music over the radio daily?

A. Yes.

Q. In any of the performances given by any of these users I have mentioned, isn't it a fact that there were a number, in fact many compositions played?

A. Yes.

[fol. 1229] Q. Is there any user that you know of that could get along on one composition for a day or an evening, or any one person's compositions?

A. I don't know of any.

Q. The user would have to have a lot of numbers, wouldn't he?

A. I would say so. If I were a used I would like to have a lot of numbers.

Mr. Frohlich: That is all.

By Mr. Nye:

Q. You have never been in the entertainment business yourself, have you?

A. No.

Q. The professional copies are given away by your publishers?

A. For use by professionals, for professional purposes, that is what you mean?

Q. Yes.

A. We receive nothing for that.

Q. Those copies are not in the sum total of your publications?

A. No.

Q. You do get paid on these orchestrations of your numbers?

[fols. 1230-1239] A. I get paid on the printed orchestrations of my songs.

Q. Most of those are given away?

A. No, very few are given away; they have cut that down to almost nothing.

Mr. Nye: That is all.

Mr. Frohlich: That is all.

(Depositions closed.)

[fol. 1240] IN UNITED STATES DISTRICT COURT

[Title omitted]

STATE OF CALIFORNIA,
County of Los Angeles,
Southern District of California, Central Division, ss:

Depositions of Jerome Kern and Sigmund Romberg, the witnesses produced and examined at the office of Philip Cohen, Esq., Room 1217, 707 South Hill Street, City of Los Angeles, County of Los Angeles, State of California, before William J. Stahly, a Notary Public in and for the County of Los Angeles, State of California, residing in said County and State, this 15th day of June, 1938, at 10:00 o'clock in the forenoon of that day, the undersigned William J. Stahly, Notary Public, having held the said hearing at said time and place, pursuant to the notice of taking depositions, [fol.1241] and stipulation dated March 28, 1938, and stipulation dated April 23, 1938 and stipulation dated May 11, 1938 and stipulation dated May 28, 1938, in the above entitled action pending and at issue therein between Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, et al., complainants, versus Harry R. Swanson, as Secretary of State of Nebraska, et al., defendants; complainants appearing and being represented by Louis D. Frohlich, Attorney at Law, and the defendants neither appearing at the said hearing nor being represented by counsel.

The said Jerome Kern and Sigmund Romberg, being first duly sworn by the undersigned, William J. Stahly, Notary Public in and for the said County and State, to

testify to the truth, the whole truth and nothing but the truth, being thereupon examined, testified as follows:

DEPOSITION OF JEROME KERN.

Direct examination.

By L. D. Frohlich, of Counsel for Plaintiffs.

Examination of Jerome Kern.

By Mr. Frohlich:

Q. What is your full name and address, Mr. Kern?

A. Jerome David Kern.

Q. And you reside where?

A. 917 North Whittier Drive, Beverly Hills, California.

Q. What is your occupation?

[fol. 1242] A. I am a composer of music.

Q. How many years have you been engaged in that occupation?

A. Since 1903. That is 35 years.

Q. Have you specialized in the composition of any particular type of music?

A. Yes.

Q. And what type is that?

A. Musical comedy and light opera.

Q. I show you a list of compositions and ask you to look at this list and tell us whether it fairly sets forth the compositions that have been composed by you during the past 35 years?

A. Well, this is a list arranged alphabetically and as nearly as I can see at a glance it approximates an accurate list my published works.

Q. I will offer that in evidence as complainants' Exhibit 1.

(List referred to was received by the Notary Public, marked Complainants' Exhibit 1, and the same is attached to and made a part of this deposition.)

Q. Now, Mr. Kern, in composing these compositions did you from time to time have collaborators who wrote the words or lyrics of these compositions?

A. Oh, yes.

Q. And after these compositions were written and com-

[fol. 1243] posed by you and your collaborators did you

have these compositions published by music publishers from time to time?

A. Yes. You mean c-ronologically? I have not immediately after.

Q. At some time?

A. Usually they are copyrighted and published after they were in a play. In other words material on a shelf is rarely published.

Q. In composing your music of these compositions that appear in plaintiff's exhibit 1 did you have in mind that these compositions would first be performed on the stage before they were published?

A. Almost invariably.

Q. And was it the practice with respect to your compositions to have them performed on the stage before they were actually published?

A. Yes.

Q. And until these compositions of yours that appear in complainants' Exhibit No. 1 were actually published was there any copyright taken out on these compositions, if you know?

A. Almost without exception no copyright.

Q. And when for the first time was copyright taken out on these compositions of yours?

[fol. 1244] A. Almost immediately after a production, if the importance of the number merited production at all.

Q. Let's take some of these comic opera, light operas or dramatic-musical works to which you wrote the music, did they contain individual compositions?

A. Yes.

Q. And in addition to that individual musical composition did these works also contain various ensembles, opening choruses,——

A. Yes, and dance and incidental music.

Q. What was the important music and the music having the greatest commercial value in these theatrical-musical compositions?

A. The theme songs, the love songs, the comedy songs, and so forth.

Q. And these songs that you have named were they songs that were eventually published by your publishers and sold to the public?

A. Yes. In other words they became sort of a trade mark of the particular operetta and identified with it.

Q. Did many of your compositions so published attain financial success?

A. Yes, many of them.

Q. Did your publisher sell many thousands of copies [fol. 1245] of your musical compositions over the years?

A. In the early days many thousands of copies.

Q. Which publishing firm for the most part published your musical compositions over the years?

A. T. B. Harms Musical Company.

Q. Is that a large music publishing firm?

A. It is a large and important musical publisher.

Q. And did this publishing firm pay you royalties on the individual compositions which you composed?

A. Every copy that they sold they paid a royalty on.

Q. What was the usual royalty you received per copy of sheet music?

A. Three cents a copy for the music.

Q. And your collaborator who wrote the lyrics would also receive something on that musical composition?

A. The same amount. Always split fifty-fifty.

Q. Did you have any individual contract with T. B. Harms on the compositions in composing each one?

A. No.

Q. Did you have any contract?

A. No. Very close association with some people who were friends.

Q. Is it your testimony that there was no contract?

[fol. 1246] A. There was, through the years, an all understanding.

Q. Now, under the arrangement or understanding that you had with T. B. Harms, did you give them performing rights in your compositions enumerated in Exhibit 1?

A. No.

Q. Did you ever give to any publisher in the United States or elsewhere the performing rights of any of your compositions?

A. No.

Q. Did you reserve those performing rights to yourself?

A. Entirely to myself and collaborator.

Q. Of course when I speak of you, I speak of you and your collaborator?

A. Yes.

Q. How many types of performing rights are there?

A. Grand right or stage right, as we call it, and the small or non-dramatic performing right.

Q. Now, how do you define the grand or stage right?

A. That is the right leased or sold to a manager, a producing manager, for the right to use the composition in a play performed by human beings on the stage.

Q. And how do you define non-dramatic performing [fol. 1247] right or small right *or small right?*

A. The small right is the right to use in public for profit whether vocally or instrumentally, the musical composition for purposes of entertainment.

Q. Were the performing rights of your musical compositions, both non-dramatic and stage rights of value to you?

A. Yes, they are my first source of livelihood.

Q. Did you receive any royalty from the producers of plays or of dramatical musical works in which your musical composition were performed on the stage?

A. Yes, either in cash payment or in percentage of the box office intake; and as my importance and standing increased, naturally the terms were better.

Q. And were these sums you received from performing rights on the stage substantial over the years?

A. Yes.

Q. Can you tell us how much you received from the stage rights of all of your musical compositions on an average each year during this period?

A. Well, I would say that a successful musical play with a run in the metropolis and subsequents road runs yielded around $50,000.00.

Q. For the entire run of the production?

A. For the run of the production.

[fol. 1248] Q. Can you mention a few of the more successful plays for which you wrote the music?

A. Yes.

Q. Will you give us that list, Mr. Kern?

A. Sally, Sonny, Showboat, The Cat and the Fiddle, Music in the Air, Sweet Adeline, Stepping Stones, Very Good Eddie, Leave it to Jane, Oh Lady Lady, Good Morning, Dearie, and many others.

Q. From time to time as your publisher published the compositions that are set forth in Exhibit No. 1, did your publisher grant to manufacturers of mechanical records the right to manufacture records and piano rolls of your musical compositions?

A. Frequently.

Q. And in granting these rights were you consulted?

A. Yes.

Q. Were you a party to the contract with the manufacturers of records and rolls?

A. No.

Q. Who made the contracts, just the publisher?

A. The publisher and the manufacturer. Well, I had a participating interest.

Q. And when the publisher received any royalties by way of the manufacturer of these records and rolls, did he pay you a percentage of the royalties from time to time?

[fol. 1249] A. Yes. I got half of all the publisher received.

Q. Were your compositions played in the State of Nebraska from time to time, if you know?

A. Yes.

Q. On what do you base your knowledge that your compositions were played in that state?

A. Because a great many of my shows toured the country and were routed through almost every large city, including Omaha and other cities in the state of Nebraska, and millions of records were sold in the state of Nebraska, and were of course played in that state. I have composed a great many songs that have been used in motion pictures, and these motion pictures have been played in all the cities or towns in the State of Nebraska where there are motion picture theaters.

Q. Mr. Kern, in looking over complainants exhibit No. 1, I notice under the column "renewed," various compositions with dates and the names of publishers. Would you explain for the record what that column indicates?

A. It indicates that after the life of the copyright, namely 28 years, the copyright is renewed by the staff of the publisher, for convenience only, in the name of the author and the composer.

Q. Have these various compositions that appear on the column "renewed" been renewed for your account and ben-

[fol. 1250] efit?

A. Yes.

Q. And do the renewals belong to you?

A. Yes.

Q. Have these renewals of the compositions a commercial value to you?

A. Yes.

Q. And will all of your compositions be renewed from time to time as the original date of copyright expires?

A. Yes.

Q. And when these compositions are renewed do you continue to receive royalties from the publishers of the composition?

A. Yes.

Q. And do you and will you continue to receive compensation by way of royalties from musical productions of these compositions?

A. Yes. There have been many instances where songs that have been dormant have been re-issued by the record people. Several are on the market now, remakes of old compositions, and they receive the same treatment. They are renewed and receive the same treatment as new compositions.

Q. How many compositions of yours have been renewed?

A. Approximately 48 to date.

[fol. 1251] Q. What value do you place upon the renewal of these 48 compositions?

A. I consider them worth for the next 28 years, $1,000 a composition.

Q. And would the sum of $1,000.00 a composition as the value be true with respect to your other compositions which will be renewed from time to time?

A. I would consider that an absolute minimum. I think $1,000.00 is too li tle. I wouldn't sell a motion picture concern a copyright for $1,00-.00. I would ask for renewal rights.

Q. Mr. Kern, are you a member of the American Society of Composers, Authors and Publishers?

A. I am.

Q. What is that Society?

A. That is a society formed for the protection of copyright owners, of authors, composers and publishers, and the owners or proprietors of copyrights.

Q. And what is the function of that society?

A. It licenses non-dramatic performing rights of the compositions of its members and collects license fees for these licenses, for the license to publicly perform for profit those compositions.

Q. When was that society formed?

A. 1914.

[fol. 1252] Q. Were you one of the founders?

A. I was one of the original members.

Q. You were one of the original members?
A. Yes.
Q. When did you join that society, about?
A. 1914.
Q. And have you been a member continuously since 1914?
A. Yes.
Q. And have you executed contracts from time to time with the American Society of Composers, Authors, and Publishers?
A. Yes.
Q. I show you this contract dated September 18, 1935, and ask you whether you recognize the signatures on the contract?
A. That is my signature.
Q. And do you recognize the signature of the person who signed for the American Society of Composers, Author's and Publishers?
A. Yes.
Q. And whose signature is it?
A. Joseph Young.
Q. And he is an officer of the Society of Composers, Authors and publishers?
[fol. 1253] Yes.
Q. I will offer this in evidence.

(Contract referred to, was received by the Notary Public, marked complainants Exhibit No. 2, and the same returned to Mr. Frohlich).

Q. I show you, Mr. Kern, what purports to be a photostatic copy of complainants exhibit No. 2, and ask you if that is a true and correct copy of complainants exhibit No. 2?
[fol. 1253] A. Yes.
Q. I will offer that in evidence and as complainants exhibit No. 3.

(Photostatic copy of complainants exhibit No. 2, was received by the Notary Public, marked complainants Exhibit No. 3, and the same is attached to and made a part of this deposition).

Q. Were you a member of the Board of Directors of that society?
A. Yes.
Q. When were you such member, approximately?

A. I have been a member of the Board of Directors for about ten years.

Q. Do you receive royalties from the American Society of Composers, Authors, and Publishers from time to time?

[fol. 1254] A. Yes.

Q. What royalties did you receive from the Society for the year 1936?

A. $14,576.16.

Q. What royalties did you receive in 1937?

A. $17,480.65.

Q. Does the American Society of Composers, Authors and Publishers employ local representatives throughout the United States?

A. Yes.

Q. Does it employ counsel?

A. Yes.

Q. Now, if you were acting independently of the American Society of Composers, Authors and Publishers or any other group or combination, would you be able to determine and fix the price to be charged for the use or rendition of your copyrighted musical compositions within the state of Nebraska?

A. No.

Q. Would you be able at the time of the publication and sale of your musical compositions within the state of Nebraska to tell the amount of monies that would be a reasonable charge for the performing rights of your compositions within that state?

A. No.

[fol. 1255] Q. Would you, in order to determine and fix a price to be charged for the performing rights of your compositions in the State of Nebraska, be required to obtain information and data with reference to use of your musical compositions within that state?

A. Certainly.

Q. And in order to acquire such information and data would you be able to do that yourself?

A. No.

Q. Would you be compelled, in order to acquire such information and data, to employ investigators and representatives in the state of Nebraska?

A. In great numbers.

Q. Would it be necessary for you to acquire information and data with respect to the users of musical compositions

in the State of Nebraska to determine the nature of various establishments in that State?

A. Certainly.

Q. Would you be required to obtain information and data with reference to the nature of the use of your compositions by these establishments in that state?

A. Yes.

Q. Would the employment of agents and representatives in the State of Nebraska entail expense to you?

[fol. 1256] A. Expense in actual money and more important, in time. I would have time for little else.

Q. What do you estimate it would cost you to employ a man or a number of men to go around in the state of Nebraska to ascertain information with respect to the establishments that use your musical compositions in that state?

A. It would cost me anywhere from five to ten thousand dollars a year. I would have to have a man, skilled in music, and who would want at least fifty or seventy-five dollars a week, and I would have to pay his hotel bills, traveling expenses, and I would have to employ a number of such men, and I would have to have an office in the state of Nebraska. All of that I would estimate would cost me anywhere from five to ten thousand dollars or more a year.

Q. In order for you to protect yourself with respect to infringement in the State of Nebraska would you be compelled to employ investigators to listen to radio establishments in that state?

A. Yes, and dance halls.

Q. Would you be compelled to employ investigators to go around to dance halls, cabaret, motion picture theaters, hotels, and other places of amusement and entertainment in that state?

A. Yes.

[fol. 1257] Q. Would such investigators entail expense to you?

A. Certainly.

Q. What would you estimate that to be?

A. Another five or ten thousand dollars.

Q. Would you have to employ a lawyer in the state of Nebraska in infringement suits for your musical compositions have been infringed in that state?

A. Yes.

Q. What would you estimate a lawyer would cost you for that purpose?

A. Another five thousand dollars a year.

Q. Are you financially able to bear such an expense to protect your musical compositions in the state of Nebraska?

A. No. The cost of such representation would be much more than my receipts.

Q. Is the American Society of Composers, Authors and Publishers doing this service for you?

A. Yes.

Q. And would you be able to continue your present livelihood as a composer without the aid of the American Society of Composers, Authors and Publishers?

A. Certainly not.

Q. Would you be able, acting alone and independently [fol. 1258] today, to fix a price on each and everyone of your musical compositions within the state of Nebraska for the purpose of television?

A. Not a fair price.

Q. And why?

A. Because television today is in the experimental stage and we do not know how extensive it may become or how important the use of it will be. It may affect other uses and may destroy the value of other uses, and until television becomes an accepted fact, no one today in my profession is able to judge with any degree of accuracy what a fair price for the public performance for profit would be on my compositions.

Q. Are you willing to permit the manufacturers of mechanical records and musical roles of your compositions to fix a price on their records and roles for certain performance for profit of your compositions?

A. No.

Q. Have these manufacturers of records and roles any contractual right as far as you know to license users in the state of Nebraska to publicly perform for profit such records and roles and collect fees therefrom?

A. No.

Q. Are you willing to give them such right?

A. No.

[fol. 1259] Q. Are you able in any way to compel such manufacturers of records and role- to collect royalties for the public performance for profit of your compositions and pay you a share thereof?

A. No.

Q. Are your musical compositions frequently performed by radio broadcasters outside the state of Nebraska?

A. Yes, very often.

Q. Are your musical compositions performed by radio outside the State of Nebraska on National hook-ups?

A. Frequently.

Q. And in these hookups are there radio stations within the state of Nebraska that re-perform your musical compositions so performed outside the state of Nebraska?

A. Yes.

Q. Are you able to control the re-performance or re-broadcast of your compositions outside the state of Nebraska to be re-performed and re-broadcasted within the state of Nebraska?

A. No.

Q. Are you able to control the performance of your compositions on motion pictures in which your compositions appear within the state of Nebraska?

A. No.

Q. Please state how your musical compositions are turned [fol. 1260] over to producers of motion pictures?

A. I contract with producers of motion pictures to write musical compositions that appear in their pictures. This form of contract is known as synchronization. The compositions are synchronized with the action of the picture and are re-produced when the picture is shown on the screen. The producers of the motion picture distribute their pictures throughout the United States and foreign countries, and these pictures so distributed by them appear upon the screen of the exhibitors within the state of Nebraska. I have no control over the manner of distribution. That is purely within the control of the motion picture producers and distributers.

Q. Is it desirable from your viewpoint as a composer of production music to affix to the sheet music of the compositions sold within the State of Nebraska a price for the public performance for profit of your compositions at the time the compositions are sold within the state of Nebraska?

A. No.

Q. Is it desirable from a commercial point of your compositions to withhold the public performance for profit of your compositions from time to time even though the actual sheet music is sold and published?

A. Yes.

[fol. 1261] Q. Has that been the practice throughout the years with your musical compositions?

A. Yes.

Q. Please explain the reason for this?

A. My compositions have been, as I testified before, written for stage productions. While production is running both in big cities and on tour, it is desirable to prevent others from performing these compositions, because such performance would be in competition with the particular stage production, and would destroy the commercial value of such production. Therefore, I have invariably restricted the public performance of my compositions until these compositions and the plays in which they appeared have run their course. That is true with all production writers. To permit these compositions to be performed indiscriminately for profit would jeopardize the commercial value of the compositions and the stage productions in which they were performed and for which they were written. For that reason I cannot and will not determine and fix a price to be charged for the public performance for profit of my compositions at the time of the publication of these compositions. Many a composition is published that has no value at all from a view point of sheet music sales. Its chief and most often its only value is for the stage production performance or the grand right. These compositions are [fol. 1262] always restricted by me and by my publisher.

Q. Under the Nebraska statute you lose that valuable right?

A. Absolutely.

Q. Has the broadcasting of your compositions upon the radio affected the sale of the sheet music of your compositions, if you know?

A. Yes.

Q. Are you familiar with the music publishing business generally?

A. Yes.

Q. Do you know whether it was the usual thing for a popular musical composition prior to the advent of radio to sell a million copies?

A. Yes, frequently.

Q. Have there been any sales of musical compositions to the extent of million copies or more since 1922?

A. Not that I know of.

Q. What does radio do to the popularity of a musical composition?

A. Radio performances of a popular composition are over-done. Frequently the same song is played by many stations throughout the country two or three times a night. For that reason a musical composition, no matter how popular or its merit loses its popularity and vogue after a period of five, six or seven weeks. That adversely affects the [fol. 1263] sale of sheet music and other rights with respect to the composition. Radio just simply over-popularizes and kills music today, making it a nuisance rather than an entertainment.

Q. What value do you place on your contract, complainants exhibit 2 and 3?

A. Considering the income that I have derived from the Society during the years and considering that — have the right to renew my contract with the Society each five years, and considering the protection which the Society gives me, I consider my contract with the Society worth at least $250,000.00.

Q. Are you willing to have your contract with the Society declared invalid and void?

A. No.

Q. Have you any agent or representative within the state of Nebraska at the present time?

A. No.

Q. Do you transact business within the state of Nebraska at the present time?

A. No.

Q. Are you domiciled within the state of Nebraska?

A. No.

Q. Are you a citizen of the United States?

A. Yes.

[fol. 1264] Q. Before you domiciled in the state of California what was your domicile?

A. New York state.

Q. Now, prior to the time that you joined up with the American Society, Composers, Authors and Publishers were your musical compositions performed publicly for profit in the United States?

A. Yes.

Q. Did you receive any revenue from such publication?

A. No.

Q. Did any user anywhere in the United States ever come to you with the request to perform publicly for profit your musical compositions?

A. No.

Examination closed.

(S.) Jerome D. Kearn.

Subscribed and sworn to before me this 18th day of June, 1938.

(S.) William J. Stahly, Notary Public in and for the County of Los Angeles, State of California.

[fol. 1265] DEPOSITION OF SIGMUND ROMBERG

6/15/1938.

SIGMUND ROMBERG, having been first duly sworn under oath by the Notary Public to testify the truth, the whole truth, and nothing but the truth relative to the above entitled action, testified as follows:

Direct examination by L. D. Frohlich, of Counsel for Complainants.

Examination of Sigmund Romberg.

By Mr. Frohlich:

Q. Mr. Romberg, what is your full name?

A. Sigmund Romberg.

Q. Where do you reside?

A. 1023 North Roxbury Drive, Beverly Hills, California.

Q. Are you a citizen of the United States?

A. Yes.

Q. Where was your domicile prior to coming to California?

A. New York City.

Q. What is your occupation?

A. Musical composer.

Q. And how many years have you been such a composer?

[fol. 1266] A. Since 1910.

Q. Is that your only means of livelihood?

A. Yes.

Q. Have you specialized in the composition of any particular type of music?

A. Yes, stage productions and moving pictures.

Q. Will you give us a list of some of the better known stage productions of which you composed the music?

A. Maytime, Soldier Boy, The Magic Melody, Blossom Time, Student Prince, My Maryland, The Desert Song, New Moon, Forbidden Melody, Mayfair.

Q. Give us the names of some of the motion pictures for which you wrote the music.

A. Viennese Nights, Children of Dreams, The Night is Young, The Girl of the Golden West.

Q. I show you a list of musical compositions purported to have been composed by you and ask you if that is a true and accurate list of your compositions?

A. It is.

Q. I will offer that in evidence as Complainants Exhibit 4.

(The list referred to was received by the Notary Public and marked Complainant's Exhibit 4, and the same is attached to and made a part of this deposition.)

Q. How many renewals of your compositions have there been?

[fol. 1267] A. Only one so far.

Q. What is the name of that renewal?

A. Memories.

Q. Was that the renewal of the composition Memories?

A. Yes.

Q. Now, from time to time will your compositions be ripe for renewal?

A. Yes.

Q. And do you intend and propose to renew these compositions?

A. Yes.

Q. Have these compositions value for you with respect to renewal periods?

A. Naturally.

Q. And will you continue to receive royalties and emoluments from the renewal of your compositions?

A. Yes.

Q. What do you value each of your compositions with respect to renewal rights?

A. At least $1000 a renewal.

Q. Were your compositions published from time to time by various publishers?

A. Yes.

Q. And did you in your contracts with these publishers [fol. 1268] ever give any of the publishers the right to publicly perform for profit your compositions?

A. The publishers?

Q. Yes.

A. No, I did not.

Q. Did you reserve that right yourself?

A. Yes.

Q. Did you also reserve yourself the stage right for these compositions?

A. Yes.

Q. As a matter of fact a great many of your compositions were played on the stage a long time before they were finally released, isn't that so?

A. That is right.

Q. And was it a customary thing when you wrote the music for a dramatical-musical work to restrict *and* and reserve the public performance for profit of such composition during the run of the particular play?

A. Yes.

Q. And what was that due to?

A. Well, so that the musical material in the show should remain fresh and interesting, and I didn't want any composition between outsiders and the people who had spent money, thousands of dollars, in producing these shows. It was a form of protection.

[fol. 1269] Q. Assuming you were compelled to act independently and not in combination with other composers, could you, under the Nebraska statute, reserve this right of public performance for profit and the stage right if you were compelled to determine and fix the price to be charged for the use or rendition of that musical composition in the state of Nebraska?

A. No, I couldn't. I would be utterly helpless.

Q. From time to time have you received royalties from publishers for sheet music?

A. Yes.

Q. What was the usual royalty?

A. Three cents on each copy for sheet music.

Q. What did your collaborator receive?

A. He received about the same.

Q. If there were two collaborators?

A. They split up between them.

Q. Did you also receive from your publishers from time to time royalties from the reproduction of your compositions for records and musical rolls?

A. Yes.

Q. How were these records and music rolls manufactured?

A. They were manufactured under an arrangement with the publisher and he received usually the two cents per roll [fol. 1270] or record which the copyright law fixes as the compulsory price, and I received usually one half of what the publisher received.

Q. Did you at any time make a special contract with any manufacturer of rolls or records for the manufacture of such rolls and records?

A. No. That was always done by my publisher.

Q. Have you the right to go to any manufacturer of music rolls and records and compel him to fix a price for the public performance of profit of such rolls or records within the state of Nebraska?

A. No.

Q. Would you want to give any manufacturer of music rolls and records of your compositions the right to collect royalties in the state of Nebraska for the public performance for profit of your compositions?

A. No.

Q. Have you any control over the distribution of the rolls and records manufactured by these manufacturers of your compositions in the past?

A. No.

Q. Have you any control over the method of distribution of any of the motion pictures in which your compositions appear?

A. No.

Q. Have your compositions been played in the state of [fol. 1271] Nebraska over the years?

A. Yes, many times.

Q. Did the plays for which you wrote the music tour the state of Nebraska?

A. Yes.

Q. Have musical rolls and records of your compositions been sold within the state of Nebraska, if you know?

A. Yes.

Q. And have sheet music of your compositions been sold within the state of Nebraska?

A. Yes.

Q. Have you any control at the present time over any of the sheet music that has been sold in the state of Nebraska of your compositions?

A. No.

Q. Are you able to determine and fix a price at the present time for the public performance for profit of your compositions in the state of Nebraska?

A. No.

Q. Have you any information or data with respect to the establishments where music is used in the state of Nebraska at the present time?

A. No.

Q. What would you have to do in order to acquire such [fol. 1272] data and information?

A. I would have to employ an agent or representative within that state, or maybe a number of such agents and representatives. I would have to pay salaries of $50, $75 or $100 a week to such agents. I would have to employ an investigator to go around and see that my compositions are not infringed. I would have to employ a lawyer, and from my past experience of people experienced in music and the salaries they demand I am sure that would involve an expense of over $10,000.

Q. Are you able financially to bear that expense?

A. No.

Q. Is the Society doing this service for you at the present time?

A. Yes.

Q. Would you be able to receive any monies for the public performance for profit for your compositions in the state of Nebraska if it were not for the Society?

A. No.

Q. If you were required to act independently and not in combination with anyone could you at the present time affix to the sheet music of your compositions sold in the state of Nebraska any price for the television rights of your compositions?

[fol. 1273] A. No.

Q. Have you any information presently that would assist you to fix a fair price for such television use in the state of Nebraska?

A. No.

Q. Is there any way in which you could acquire such information?

A. No.

Q. If you were compelled to act alone and independent to fix the price for public performance for profit in the state of Nebraska would that interfere with the production of the stage plays for which you write music?

A. Yes.

Q. Would it jeopardize the commercial value of these stage plays?

A. Yes.

Q. Would it jeopardize the investment of the producers of these stage plays?

A. Yes.

Q. Would it result in competition between the producers of these stage plays and users of the musical compositions within the state of Nebraska?

A. Yes.

Q. Is it desirable, from a commercial standpoint, with [fol. 1274] respect to your musical compositions, to defer the public performance for profit of many of your compositions?

A. Yes.

Q. Is that due to the nature of the business?

A. Yes.

Q. And does the Nebraska statute prevent you from exercising that right?

A. Yes.

Q. Mr. Romberg, are you a member of the American Society of Composers, Authors and Publishers?

A. Yes.

Q. And when did you join that Society?

A. 1917.

Q. And have you been a continuous member since that day?

A. Yes.

Q. Have you presently a contract in force with that Society?

A. Yes.

Q. I show you this document, dated September 16th, 1935,

and ask you whether you recognize the signatures on the document?

A. Yes.

Q. Is that your signature?

A. Yes.

Q. Is that the signature of Joseph Young, secretary of [fol. 1275] the Society?

A. Yes. I am familiar with it.

Q. I will offer this in evidence.

(Document entitled Agreement between Sigmund Romberg and American Society of Composers, Authors and Publishers, was received by the Notary Public, marked Complainant's Exhibit No. 5, and returned to Mr. Frohlich.)

Q. I show you what purports to be a photostatic copy of Plaintiff's Exhibit No. 5 and ask if this is a true and accurate copy of this exhibit?

A. Yes.

Q. I will offer this in evidence as Complainant's Exhibit 6.

(Photostatic copy of Complainant's Exhibit 5, namely Agreement between Sigmund Romberg and American Society of Composers, Authors and Publishers, was received by the Notary Public, marked Complainant's Exhibit No. 6, and the same is attached to and made a part of this deposition.)

Q. Were you at one time a member of the board of directors of the American Society of Composers, Authors and Publishers?

A. Yes.

Q. Can you tell us what revenue you received from the Society in the year 1936?

[fol. 1276] A. $14,576.16.

Q. What royalties did you receive from the Society in 1937?

A. $17,480.65.

Q. You consider the contract, Plaintiff's Exhibit 5 and 6 of value to you?

A. Yes.

Q. And what do you value this contract at?

A. At least $250,000.

Q. Are you willing to have this contract declared invalid?

A. No.

Q. Prior to 1917 did you receive any compensation for the public performance for profit of any of your compositions?

A. No.

Q. Did ever any user of music in the United States ever come to you prior to 1914 and request you to license him to publicly present for profit any of your compositions?

A. No.

Q. Is the Society doing something for you which you are unable to do for yourself?

A. Yes.

Q. And do you want the Society to continue to function [fol. 1277] in that manner for you?

A. Yes.

Q. You have spent practically the greater part of your life in the musical profession, haven't you?

A. Yes.

Q. And you are familiar with the profession?

A. Yes.

Q. And the problems of the members of the profession?

A. Yes.

Q. Do you know if any composer in the United States ever received any compensation for the public performance for profit of his compositions prior to the time the Society was formed?

A. As far as I know, and with my familiarity with the profession I do not know of a single composer in the United States who ever received any monies for public performance for profit of his compositions before the Society began to function.

Q. Are your musical compositions performed on radio broadcasts outside the state of Nebraska?

A. Yes.

Q. And are your musical compositions frequently re-broadcast by radio broadcasting stations within the state of Nebraska?

[fol. 1278] A. Yes.

Q. Is that done by means of the hook-up?

A. Yes.

Q. Are you able to control the re-broadcast of these compositions within the state of Nebraska that have originally been broadcast outside the state of Nebraska?

A. No.

Q. What is the usual price charged by your publisher for the sheet music of your compositions?

A. 22 cents per copy.

Q. Has that been the average charge over the period of years over which you have been composing music?

A. Yes.

Q. These copies of sheet music are purchased by members of the public from time to time, isn't that right?

A. Yes.

Q. Now, what class of the public is the greatest purchaser of sheet music of your compositions?

A. Singers, public schools, private performers, amatuer performers.

Q. If you were compelled to affix to the copy of sheet music the sales price for all purposes including public performance for profit would that adversely or otherwise effect the sale of sheet music of your compositions?

[fol. 1279] A. Yes.

Q. How would it effect it?

A. If I were compelled to follow this Nebraska statute and place on the copy of sheet music a price for all users so that the purchaser would have to pay all of that price when he purchased the sheet music, there isn't a single purchaser in the state of Nebraska who would buy a copy of my music, because he couldn't afford it; and the result is that the sale of my music would so fall off and diminish at once practically to the vanishing point within the state of Nebraska.

Q. Are you domiciled in Nebraska?

A. No.

Q. Were you ever domiciled there?

A. No.

Q. Have you any agent or representative in that state?

A. No.

Q. Do you transact business in that state?

A. No.

Examination closed.

(S.) Sigmund Romberg.

Subscribed and sworn to before me this 18th day of June, 1938. William J. Stahly, Notary Public in and for the County of Los Angeles, State of California.

[fol. 1280] STATE OF CALIFORNIA

County of Los Angeles, Southern District of California, Central Division, ss:

I, William J. Stahly, a Notary Public in and for the County of Los Angeles, State of California, residing in the city of Los Angeles, County of Los Angeles, State of California, do hereby swear:

That Jerome Kern and Sigmund Romberg, the witnesses produced pursuant to the notice of taking depositions and the stipulations dated March 28th, 1938, April 23rd, 1938, May 11th, 1938 and May 28th, 1938, personally appeared before me on the 15th day of June, 1938, at 10:00 o'clock in the forenoon of that day, the undersigned Notary Public being neither of counsel nor kin to either party, having held the said hearing at the said time and place, at the office of Philip Cohen, Esq., Room 1217, 707 South Hill Street, City of Los Angeles, County of Los Angeles, State of California, and being by me duly sworn to tell the truth, the whole truth, and nothing but the truth, and being by me duly cautioned to testify to the whole truth and nothing but the truth, the said witnesses thereupon answered to the several questions propounded to them by Louis D. Frohlich, of counsel for [fol. 1281] the Complainants, as shown in the foregoing depositions, and there being no appearances on behalf of the defendants, and a telegram having been received dated June 13th, 1938, which is hereunto annexed, which telegram stated, "Nebraska Attorney General will not appear for depositions June fifteenth," and which was signed by Barlow Nye, Administrative Assistant Attorney General, of the State of Nebraska, and the said witnesses having deposed to all the matters contained therein as shown thereby; and the Complainants' Exhibit No. 3 having been examined and compared by me with Complainants' Exhibit No. 2, and having been found to be a true and accurate copy of Exhibit No. 2; Exhibit No. 6 having been examined and compared by me with Complainants' Exhibit No. 5, and having been found to be a true and accurate copy of Exhibit No. 5;

I further swear that when said depositions were completed and transcribed they were carefully read by the said Jerome Kern and Sigmund Romberg, the witnesses aforesaid, and were corrected by them in each and every particular they desired, and they were then subscribed by the said witnesses;

I further swear that I am a shorthand reporter, and that said depositions were taken down by me in shorthand at the time and place hereinabove named, and were thereafter tran-
[fol. 1282] scribed into typewriting under my supervision;

I hereby swear that the foregoing 41, comprise a full, true, correct and impartial transcript of my shorthand notes of said depositions.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office this 18th day of June, 1938.

(S.) William J. Stahly, Notary Public in and for the County of Los Angeles, State of California.

[fols. 1283-1284]

SR74 10- CH Lincoln Nebr 13 1145A

1938 Jun 13 AM 10 46.

L D Frohlich, care Philip Cohen, Suite 1217, 12222 Foreman Bldg., 707 South Hill St.

Nebraska Attorney General will not appear for depositions June fifteenth.

Barlow Nye Administrative Assistant Attorney General.

[fols. 1285-1294] In United States District Court

[Title omitted]

Stipulation

Whereas, notice was heretofore given for the taking of the depositions of Sigmund Romberg and others in the City of Los Angeles, State of California on behalf of the complainants in the above entitled case, and

Whereas, said notice stated that said depositions would be taken before Don Lake, and

Whereas, it has now so eventuated that said depositions cannot be taken before the said Don Lake,

Therefore it is stipulated, by and between the parties to the above entitled action that said depositions may be taken before William J. Stahly in place of taking the same before the above mentioned Don Lake. Notice and former

stipulations with reference to the taking of said depositions to be hereby changed in no other manner whatsoever.

Dated at Omaha, Nebraska, this 11th day of May, 1938.

L. J. TePoel, Attorney for Complainants. Richard C. Hunter, Atty. Gen.; Barlow Nye (Adm. Asst. Atty. Gen.; Wm. J. Hotz, Sp. Asst. Atty. Gen., Attorney for Defendants.

[fol. 1295]. In United States District Court

Appellants' Condensed Statement of Exhibits

Plaintiffs' Trial Exhibits

Pl. Ex. 2 (O. R. 12) (R. V. II 2): Certified copy of Chapter 609, General Associations Law of the State of New York. (Section 12.)

Pl. Ex. 3 (O. R. 13) (R. V. II 2, 8): Articles of Association of ASCAP (Same as Exhibit "D", p. 8 hereof.)

Pl. Ex. 4 (O. R. 13) (R. V. II 2, 18): 1939 list of members of ASCAP, showing 123 publisher members and 1100 composers and author members; also showing branch offices and representatives by name and address in each state in the Union and foreign representatives in Japan, Hawaii, Argentina, Cuba and Puerto Rico. The Informative Notice: "The purpose of the within listing, which is issued periodically and sent to all licensees of ASCAP, is to enable all concerned to readily ascertain if the performing rights in a certain composition are embraced under the ASCAP license, and to give fair notice that as to the works copyrighted in the U. S. A. by our members, or the members of foreign affiliated societies listed on the front cover, non-dramatic public performances thereof for profit may not lawfully be presented except under license of this Society."

"The public performance for profit of a copyrighted musical composition, is illegal unless a license is held from the owner of the copyright. The person, firm or corporation operating any establishment where an infringing performance occurs, is the party liable under the Law. As to its members, and the members of foreign affiliated societies, ASCAP is the agency through which their non-dra-

matic public performance rights in the United States are licensed."

There are 20 foreign affiliated societies named and listed on the Exhibit.

Pl. Ex. 5 (O. R. 13) (R. V. II 2, 18): Same as Exhibit 4 excepting dated 11-29-37 with some changes and additions to the list of members.

Pl. Ex. 6 (O. R. 26) (R. V. II 3): Decree of Judge Wright of the Superior Court, State of Washington. Rejected by the Court.

Pl. Ex. 7 (O. R. 27) (R. V. II 3): Laws of Montana 1937, Chapter 90, pertaining to ASCAP. Rejected by the Court.

Pl. Ex. 8 (O. R. 27) (R. V. II 3): Laws of Montana 1939, Chapter 123, repealing Chapter 90 of the Laws of 1937, in re ASCAP. Rejected by the Court.

Pl. Ex. 9 (O. R. 27) (R. V. II 3): Florida Statutes similar to Nebraska, being No. 101, Chapter 17807, Florida Session Laws of 1937. Rejected by the Court.

[fol. 1296] Pl. Ex. 10 (O. R. 27) (R. V. II 3): Florida Statutes of 1939, No. 658, Chapter 19653, repealing parts of the Act of 1937. Rejected by the Court.

Pl. Ex. 11 (O. R. 27) (R. V. II 3): Laws of the State of Washington 1937, Chapter 218, relating to ASCAP. Rejected by the Court.

Pl. Ex. 12 (O. R. 27) (R. V. II 3): Laws of Tennessee, Senate Bill No. 1029, Chapter 212, Public Acts of 1937, re ASCAP. Rejected by the Court.

Pl. Ex. 13 (O. R. 28) (R. V. II 3): Withdrawn.

Pl. Ex. 14 (O. R. 28) (R. V. II 4, 13): Agreement between Gene Buck as a composer member and ASCAP, dated 6-25-35. (This Exhibit is Exhibit "C", p. 6 hereof.)

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[fol. 1297] Pl. Ex. 19 (O. R. 44) (R. V. II 5): Was declines in shows, a sheet taken from the Motion Picture Herald, dated November 17, 1934, giving statistical information from 19-22-34. Rejected by the Court.

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[fol. 1298] Pl. Ex. 23 (O. R. 107) (R. V. II 15): Letter from Federal Trade Commission to Sidney S. Cohen, President of the Motion Picture Theatre Owners of America, New York, dated 2-2-23, stating that the Federal Trade Commission could not aid the Motion Picture Theatre Owners of America in reference to their ASCAP contract. Rejected by the Court.

Pl. Ex. 24 (O. R. 114) (R. V. II 15): Map dated January 1, 1939, issued by the National Broadcasting Company, showing the network from Bangor, Maine; to Miami, Florida; New Orleans; Corpus Christi; Los Angeles; San Francisco; Seattle; and throughout all the principal cities of the United States; giving the station call numbers of Omaha and Lincoln, Nebraska. Rejected by the Court.

Pl. Ex. 25 (O. R. 114) (R. V. II 15): Same map of Mutual Broadcasting System. Rejected by the Court.

Pl. Ex. 26 (O. R. 114) (R. V. II 15): Same map of Columbia Broadcasting System. Rejected by the Court.

Pl. Ex. 27 (O. R. 117) (R. V. II 15): Compositions transmitted by National Broadcasting Company to station WOW at Omaha, Nebraska, over the network during the week of June 28, 1937, to July 4, 1937. This Exhibit shows the title of the piece that was played and the copyright owner. There were about 390 pieces listed on the schedule and the copyright owners were the publishing houses, being the publisher members of ASCAP in practically all instances. Rejected by the Court.

Pl. Ex. 28 (O. R. 120) (R. V. II 15): Page from the United States Department of Commerce, Census Bureau, radio broadcasting for 1935, showing the ten Nebraska radio stations received net revenue from the sale of time on the air $510,000.00, which was 97% of their total revenue; that $220,000.00 of the total was from local accounts, and $290,000.00 national, regional, net work and spot accounts.

* * * * * * *

Pl. Ex. 30 (O. R. 126) (R. V. II 15): Statement of basic statistics of radio and other commercial equipment in the [fols. 1299-1300] U. S., Department of Commerce, May 15, 1938, document No. 471, p. 15. Rejected by the Court.

Pl. Ex. 31 (O. R. 126) (R. V. II 15): Circular letter issued by ASCAP itself to its own representatives calling their attention to anti-ASCAP legislation, ordinances, etc., in Ala., Alaska, Ark., Colo., Conn., Del., Fla., Ga., Ill., Ind., Ia., Kan., La., Mich., Minn., Mo., Mont., Neb., N. M., N. Y., N. D., Ohio, Okla., Ore., Pa., Tenn., Tex., Vt., and Wash. Of the bills, Fla., Mont., Wash., Tenn., Neb., and Wis., became laws. The others were not enacted or are still pending. Exhibit was dated August 16, 1939. Rejected by the Court.

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Pl. Ex. 34 (O. R. 133) (R. V. II 16): Sheet from magazine "Exhibitors Trade Review," Vol. 10, August 13, 1921, showing the list of music publishers who were then not members of ASCAP. Rejected by the Court.

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Pl. Ex. 37 (O. R. 211) (R. V. II 23, 24): Alphabetical gummed sticker list of music publishing houses throughout the U. S., to be used in conjunction with compiling the card index system. Exhibit No. 32. Typical sticker: ABC Music Publishing Company, Inc., (ASCAP), 799 7th Avenue, New York, New York; AG Publishing Company, Haskill, Oklahoma. See Mills' Testimony.

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[fol. 1301] Pl. Ex. 45 (O. R. 383) (R. V. II 48): Contract dated December 2, 1936, between NBC (red network) and WOW. The contract is entitled: "Network Affiliation and Program Service." The contract contains the following statement: "In order that your station may continue to serve the public interest, convenience and necessity by broadcasting programs of a quality and character generally beyond the reach of individual stations, NBC will, at its own expense, extend its program transmission lines to your control board at your main studios and offer your station network programs of wide variety, including musical, educational, religious, sports, public affairs, international and special events programs."

"The network station rate for your station, on which its compensation will be figured as provided above, will be $320.00 per full evening hour. This rate will apply between 6:00 P. M. and 11:00 P. M. local time at your sta-

tion. Rates for other hours and for shorter periods will be as follows:" Then follows different rates for different hours of the day and Sundays differing from week days.

"You will submit to NBC daily in writing reports for all network programs broadcast by your station, upon forms provided by us for that purpose."

"You (WOW) agree to maintain for your station such licenses, including performing right licenses, as now are, [fol. 1302] or hereafter may be, necessary for your station to broadcast the programs which we furnish to you hereunder."

Pl. Ex. 46 (O. R. 393) (R. V. II 51 and 57): Is a report of the National Association of Broadcasters, dated August 18, 1937, and published for all radio stations. It contains a list of 5,500 compositions for use by Ahn & Simrock, Berlin, Germany, and other music publishing houses in Germany, Poland and New York. The Exhibit contains 177 pages containing an index to publishers where the compositions may be found and containing about 5,500 pieces of music owned and controlled by the Society of European Stage Authors and Composers, Inc., known as SESAC.

Pl. Ex. 47 (O. R. 421) (R. V. II 58): Is page 143 of Radio Advertising, September, 1939; gives the advertising rates of WOW; shows week-day rates 1 hour $320.00, 5 minutes $65.00, 25 words $25.00, on chain breaks, these between programs, with lessor rates for hours other than from 6:00 P. M., to 11:00 P. M. The General Manager is shown as John J. Gillin, Jr. The station refuses to advertise for alcoholic beverages.

Pl. Ex. 48 (O. R. 430) (R. V. II 58): Is page 16 of the same magazine as Exhibit 47 and contains the advertising rates of the National Broadcasting Company, Inc., and shows the same rate as WOW charges for the same time and as shown by Exhibit 47.

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Pl. Ex. 50 (O. R. 443) (R. V. II 59): Advertisement of WOW: was withdrawn.

The foregoing Exhibits were introduced by the plaintiffs at the time of the trial, but do not include the plaintiffs' Exhibits attached to the 11 depositions taken by plaintiffs and offered in evidence. These are hereinafter set forth.

Also, plaintiffs' Exhibits attached to the interrogatories are hereinafter set forth.

DEFENDANTS' TRIAL EXHIBITS

The following Exhibits were introduced by the defendants:

Dft. Ex. 51 (O. R. 467) (R. V. II 63). The following is a letter from Eppley Hotels Company, dated May 31, 1939:

"Mr. John C. Wooden,
"General Counsel for Iowa,
"American Society of Composers,
"Authors & Publishers,
"601 Des Moines Bldg.,
"Des Moines, Iowa.

"Re: Ruby Room, Chieftain Hotel.

"Dear Sir:

"In reply to your letter of May 19th, we wish to state [fols. 1303-1304] that it is not the intention of our hotel to violate the copyright laws of the United States. We do not own the musicians nor do we designate the music which they shall play. The choice of the music is up to the musicians whom we employ. However, we have instructed our musicians to play no music upon which there are copyrights, and it seems that under the circumstances, in order that there could be no liability against us, that you would consent to furnishing us with a list of the music upon which you claim to own the copyrights in order that we too might be protected as well as yourselves. That is asking very little. Certainly an organization that is in this line of business must have or should have at least a book or catalogue in which there in indexed specifically the pieces of music on which you claim to have copyrights.

"You can readily see how innocent we are in a matter where all or practically all the musicians play by ear. They seldom bring the sheet music on the premises. They might in one or two instances, but it is seldom done. Furthermore, most of the musicians have their own variations, and fre-

quently a substantial part of the music we are told is of their own creation.

"Consequently, if you are not willing to cooperate with us in the matter of furnishing us with a bona fide list of the music which you claim to own copyrights upon, then how can you expect us to desist from having played on our premises your music?

"We use very little musical talent on the premises, and most assuredly we will not sanction or tolerate any violation of the copyright law and have no intention of injuring you in any legal rights that you may have in any way. We only ask for your complete cooperation to avoid damages to anyone.

"Yours very truly,

"Eppley Hotels Company

"EH/av

"E. M. Hedlin, Comptroller."

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[fol. 1305] Dft. Ex. 55 (O. R. 490) (R. V. II 67): Consists of the following telegrams:

"LD2069CC950 2/162- 1935 Dec 30 PM 8 34

Performing rights of which are exclusively claimed by others stop to illustrate published reports that the Society can no longer license small performing rights in the works of George M Cohan Victor Herbert and some others are absolutely without foundation stop the Society has the right to grant licenses in respect of these works and will protect all its licensees broadcasting the same stop while we of course have no objection to your taking any other licenses which you may desire to take we feel it only fair to tell you that your fee to the Society will not be reduced and the formula will not be altered except that the license will be limited to works in Societys repertory as of January first Nineteen Thirty six and furthermore to advise you that with respect to any composition the licensing rights of which are exclusively vested in us we will not recognize any license which you may obtain from others—

"American Society of Composers Authors and Publishers by Gene Buck President."

"LD2069CC950 303 DL 2 Extra 1/141—New York NY 30
635P

1935 Dec 30 PM 8 34

Radio Station WOW Woodmen of the World Life Ins Assn. DLR Soon as Possible Omaha Nebr—This Is to Notify You That the American Society of Composers Authors and Publishers Is Prepared to Extend Your Present License Agreement With it upon the Same Terms and Con- [fol. 1306] ditions for Five Additional Years from January First Nineteen Thirty Six Except That the Rights Granted by the Society Shall be Limited to Compositions of the Membership as Constituted on January First Nineteen Thirty Six Stop The Society Challenges the Claims Made by Others to Ownership in the Small Performing Rights of Various Compositions Published by Them But Written and Composed by Members of the Society Stop The Society Controls the Performing Rights of Many of Such Compositions and Within a Very Short Time Will Publish a List Thereof Stop As Our Examination of Individual Contracts Progresses we Are Confident That Our Repertory Will be Increased in Respect of Many Compositions the——"

"OM4 131 NL-RN New York NY Jan 10 1936 Jan 11 AM 8 52
Radio Station WOW, Woodmen of the World Life Assurance Assn——

"On Dec 30th 1935 the ASCAP Offered to Extend Your Present License Agreement upon the Same Terms and Conditions for *Five Additional Years from Jan 1 1936* Except That the Rights Granted by the Society to You Shall be Limited to Compositions of the Membership as Constituted on Jan 1 1936 to This Wire the Society Has Received no Answer and Unless we Hear from You by Jan 15th That You Accept Such Offer the Society Will Deem You to be an Infringer in Respect of the Performances and Broadcasting of Any of its Works and You Shall be Held to Strict Accountability on Account of All Performances of its Works Beginning Jan 1 1936——

"American Society of Composers Authors and Publishers."

"Straight Message Omaha, Nebraska
January 15, 1936

"Gene Buck, President
American Society of Composers, Authors and Publishers
30 Rockefeller Plaza
New York City, N. Y.

In Accordance With Your Telegram January Tenth we Ask That Present Contract be Continued.

"Radio Station WOW, Woodmen of the World, by WM Ruess, Personnel Director.

"WR:cb
"Chg WOW
"CC/Bookkeeping Dept
"4:05 PM"

Dft. Ex. 56 (O. R. 492) (R. V. II 67): Certificate of the Clerk of the United States District Court for the District of Nebraska and the various deputies in the different divisions in the State, showing the number of cases entitled, Gene Buck, as President of ASCAP, et al., v. different defendants in the State of Nebraska for infringement. The Exhibit shows 1 suit was instituted in 1925; 9 in 1926; 7 in 1927; 7 in 1928; 11 in 1929; 11 in 1930; 2 in 1931; 3 in 1932; 9 in 1933; 11 in 1934; 10 in 1935; 11 in 1936; 1 in 1937; 3 in 1938; 1 in 1939 pending. These suits were all settled for [fol. 1307] the disputed license fee and a new license or, in a few instances, the defendants went out of business. In all of the cases, Gene Buck was President suing for ASCAP or Irving Berlin, Inc. or J. H. Remick & Co., or Leo Feist, Inc. All other publisher members of ASCAP were the plaintiffs with Buck and ASCAP. The total number of infringement suits brought at different points throughout the State of Nebraska during this period aggregated approximately 100.

Dft. Ex. 57 (O.R. 493) (R.V. II 67): Printed countershowing made by the defendants consisting of affidavits taken throughout the State of Nebraska from users of music and used in resisting the application for the temporary injunction and to support the defendants' motion to dismiss. This was rejected by the Court and as no appeal was prosecuted from the order granting the temporary injunction, the same is not included in this record.

* * * * * * *

[fol. 1308] Dft. Ex. 65 (O.R. 503) (R.V. II 68): Number of radios in Nebraska homes. "Figures prepared by joint committee on radio research of AAAA and reported in broadcasting magazine 1939 year book gave 352,000 homes in Nebraska. Radio homes 284,100 out of 352,000 in Nebraska. Latter figure indicates at least one radio in home. No data on additional radios in home or car radios. Howard O. Peterson WOW."

[fol. 1309] PLAINTIFFS' DEPOSITION EXHIBITS

The following exhibits were introduced by the plaintiff and attached to the depositions of Sigmund Spaeth, Abraham Schwartz, Walter S. Fischer, Irving Caesar, Edwin H. Morris, Ella Herbert Bartlett, Will Von Tilzer, Edgar Leslie and George W. Meyer. These depositions were taken in New York on 5-23, 24 and 25, 1938. Also, the depositions of Jerome Kern and Sigmund Romberg were taken in Los Angeles on June 14, 1938, with exhibits attached. (O. Dep. R. Pages 1 to 560) (R.V. II 69 to 124).

Pl. Dep. Ex. 1 p. 29 (Spaeth), R. Vol. II, p. 70: Agreement between Sigmund Spaeth and ASCAP dated 6-28-35, automatically renewable after December 31, 1940, is the same as Ex. "C." p. 6 of this volume.

Pl. Dep. Ex. 2 p. 91 (Schwartz), R. Vol. II, p. 75: Agreement between Irving Berlin, Inc., and ASCAP dated 12-19-35, automatically renewable after December 31, 1940, is the same as Ex. B, p. 3 of this volume.

Pl. Dep. Ex. 3 p. 93 (Schwartz), R. Vol. II, p. 75: Standard uniform popular songwriter's contract between Irving Berlin, Inc., and three song writers, dated September 27, 1934, and contains the following pertinent paragraphs:

"Witnesseth:

"1. The Writer (s) hereby sells, assigns, transfers and delivers to the Publisher, its successors and assigns, a certain heretofore unpublished original musical composition, written and/or composed by the above named Writer(s) now entitled

"The Object Of My Affection

"including the title, words and music thereof, and the right to secure copyright therein throughout the entire

world, and so have and so hold the said copyright and all rights of whatsoever nature thereunder existing.

"2. In all respects this contract shall be subject to any existing agreements between all of the parties hereto and the American Society of Composers, Authors and Publishers.

"3. The Writer(s) hereby warrants that the said composition is his sole, exclusive and original work, and that he has full right and power to make the within agreement, and that there exists no adverse claim to or in the said composition, except as aforesaid in Clause 2 hereof.

"4. In consideration of this agreement, the Publisher agrees to pay the Writer(s) as follows:

"(a) An advance of $1.00 in hand paid, receipt of which is hereby acknowledged, which sum shall be deductible from any payments hereafter becoming due the Writer(s) under this agreement.

"(b) In respect of regular piano copies sold and paid for at wholesale in the United States of America, royalties 3 cents per copy.

[fol. 1310] "(c) A royalty of 33⅓% of all net sums received by the Publisher in respect of regular piano copies and/or orchestrations hereof sold and paid for in any foreign country.

"(d) A royalty of two cents per copy of orchestrations thereof in any form sold and paid for in the United States of America.

"(e) The sum of $1.00 as and when the said composition is published in any folio or composite work in the United States of America, and $1.00 when and if published in such form in any foreign country, regardless of the number of copies published, provided however, that the said composition shall in no case be published in such form until four months after publication thereof in regular piano copies.

"(f) Folios and/or composite works as referred to in the next preceding paragraph shall be deemed to include any publication of a collection of at least ten or more works contained within the same volume and/or binding.

"(g) For purposes of royalty statements, if a composition is printed and published in the United States of America, as to copies and rights sold in the Dominion of Canada, revenue herefrom shall be considered as of domestic origin. If however, the composition is printed by a party

other than the Publisher in the Dominion of Canada, revenue from sales of copies and rights in Canada shall be considered as originated in a foreign country.

"(h) As to 'professional material'—not sold or resold, no royalty shall be payable.

"(i) An amount equal to 33-1/3% of all receipts of the Publisher in respect of any licenses issued authorizing the manufacture of the parts of instruments serving to mechanically reproduce the said composition, or to use the said composition in synchronization with sound motion pictures, or to reproduce it upon so-called 'electrical transcriptions' for broadcasting purposes; and of any and all receipts of the Publisher from any other source or right now known or which may hereafter come into existence.

"5. It is understood and agreed by and between all of the parties hereto that all sums hereunder payable jointly to the Writer(s) shall be divided amongst them respectively as follows:

"Name:	"Share:
"Truman Tomlin	"One-third
"Coy Poe	"One-third
"Jimmy Grier	"One-third"

[fol. 1311] Pl. Dep. Ex. 4, p. 124 (Schwartz), R. Vol. II, p. 78: Agreement between Irving Berlin, Inc. and RKO Radio Pictures, Inc., dated September 1, 1933. The contract covers the right of RKO to use certain musical compositions of Irving Berlin, Inc. in connection with synchronized motion pictures and, in turn, Irving Berlin, Inc. acquires the copyrights of musical compositions written for and used in connection with such synchronized motion pictures of RKO. The price that Irving Berlin, Inc. as the publisher pays to the RKO is as follows: Royalties on all music furnished by RKO to the publisher, if published by the publisher: 6 cents a copy for each regular pianoforte copy of production music, 3 cents a copy for popular music appearing in a picture for which a special musical score has been written, 50 per cent of the amount shown on the statement submitted to the publisher from foreign publishers, 50 per cent of all gross sums received by the publisher for mechanical rights in production, and 33⅓ per cent of all gross sums received for mechanical rights in popular music.

"50 per cent of all gross sums received by the publisher for performing rights in foreign countries, or for any other rights of any kind or nature in and to such music throughout the world, except moneys received by the publisher from the American Society of Composers, Authors and Publishers" (ASCAP).

The RKO pays the royalties to the writers or composers of all the above mentioned music.

"Nothing in this agreement contained shall in any way be deemed as conveying to the corporation" (RKO) "Any small performing rights anywhere in the world as defined by the American Society of Composers, Authors and Publishers with respect to any of the compositions affected hereby."

Pl. Dep. Ex. 5 and 5A, p. 127 (Schwartz), R. Vol. II, p. 78: These are extensive printed catalogs of the copyrighted musical works of Irving Berlin, Inc. of New York. The catalogs state "For license to publicly perform for profit, apply to ASCAP." These catalogs contain approximately ten thousand pieces of music, the copyrights of which are all owned by Irving Berlin, Inc., and the public performance rights are all vested in ASCAP.

Pl. Dep. Ex. 6, p. 175 (Fischer), R. Vol. II, p. 83: Agreement between Carl Fischer, Inc. and ASCAP dated 4-12-35. This agreement is identical in form with Exhibit "B" on p. 3 of this volume.

Pl. Dep. Ex. 7A to 7M, p. 175 (Fischer), R. Vol. II, p. 83: Contains thirteen printed catalogs of music that is for sale for all purposes by Carl Fischer, Inc., one of the appellees, and upon which the public performance rights are vested in ASCAP by virtue of their contract, Ex. 6 above, with ASCAP.

Pl. Dep. Ex. 8, p. 179 (Fischer), R. Vol. II, p. 83: A typical contract between a composer, Richard Hageman, and Carl Fischer, Inc., a publisher member, dated November 17, 1936. This contract is the same as Ex. "C" on p. 6 hereof.

Pl. Dep. Ex. 9A, p. 181 (Fischer), R. Vol. II, p. 83: This exhibit, dated December 7, 1935, is between George Hamilton Green, a composer, and Carl Fischer, Inc., a publisher member, and one of the appellees herein. It is the same in

form as the previous exhibit and is set forth in full as Exhibit "C" in Vol. III, p. 6, hereof.

[fol. 1312] Pl. Dep. Ex. 9B, p. 181 (Fischer), R. Vol. II, p. 83: This is an authenticated copy of a typical assignment of a copyright from a composer to Carl Fischer, Inc., of eight popular tunes, vesting in the publisher for $1.00 and other valuable consideration all rights in the copyrights of the composer.

Pl. Dep. Ex. 10A, p. 184 (Fischer), R. Vol. II, p. 84: This exhibit is a-typical agreement, dated September 5, 1930, between Jascha Heifetz and Carl Fischer, Inc., giving to the publisher the exclusive rights to the productions therein mentioned. The exhibit is the same as Ex. 8 and Ex. 9A hereinbefore, and is the same in terms as Ex. "C" on page 6 hereof.

Pl. Dep. Ex. 10B, p. 184 (Fischer), R. Vol. II, p. 84: This is a memorandum of an agreement dated the 16th day of May, 1933, between Union Mucicale Espanola of Spain and Carl Fischer, Inc., wherein Carl Fischer, Inc., grants to the Spanish company the sole and exclusive license to publish and sell throughout Europe copies of the musical work entitled, "Sevilla," this being a transcription by Jascha Heifetz for violin and piano. Fischer, Inc., receives 50 per cent of all royalties received in foreign countries on the production.

Pl. Dep. Ex. 11A, p. 185 (Fischer), R. Vol. II, p. 84: Authenticated copy of the assignment of the Southern Music Company, Inc., to Robert MacGimsey of all their interest in "Shadrach" dated January 23, 1937.

Pl. Dep. Ex. 11B, p. 186 (Fischer), R. Vol. II, p. 84: This is a contract for the royalty payments to Robert MacGimsey for "Shadrach" which gives to him 50 per cent of all of the mechanical royalties from recordings, 33-1/3 per cent of all other mechanical royalties, and 3¢ per copy of all sheet music, and 33-1/3 per cent of all miscellaneous royalties.

Pl. Dep. Ex. 12, p. 191 (Fischer), R. Vol. II, p. 84: Agreement between RCA Mfg. Co. and Carl Fischer, Inc., dated May 6, 1938, covering "Two Guitars". The agreement contains the following clause:

"This agreement is entered into with the understanding and agreement that nothing herein contained shall be deemed to free the talking machine record manufactured pursuant to this license from further contribution to the copyright in the event of its being used for public performance for profit."

* * * * * * *

Pl. Dep. Ex. 14, p. 248, (Caesar), R. Vol. II. p. 90: Agreement between Irving Caesar and ASCAP, dated July 18, 1935, granting to ASCAP all the public performance rights to the Irving Caesar compositions. This agreement is identical in form with Exhibit No. "B" on page 3 of this volume.

Pl. Dep. Ex. 15, p. 296 (Morris), R. Vol. II, p. 94: A contract between Harms, Inc., as publisher, dated February 21, 1927, and Lew Fields, and Vincent Youmans as composers. It gives to the composer 2 cents a copy on each piece of sheet [fol. 1313] music sold from the musical production "Hit the Deck."

Pl. Dep. Ex. 16, p. 296 (Morris), R. Vol. II, p. 94: An agreement dated the 8th day of February, 1923, between George Gershwin as the composer, and Harms, Inc., as the publisher, giving to the publisher throughout the civilized world all rights of all compositions written by Gershwin, and pay him therefore 10 cents per copy for piano selections, and 15 cents per copy for theatrical representations, and 50 per cent of the American royalty rate for regular pianoforte copies sold in countries outside of the United States and Canada, and 25 per cent of the royalties received from mechanical reproduction.

Pl. Dep. Ex. 17, p. 296 (Morris), R. Vol. II, p. 94: An agreement made January 21, 1933, between Cole Porter, a composer, and Harms, Inc., giving to the publisher the same rights and privileges and royalties set forth in the previous exhibit No. 16.

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[fol. 1314] Pl. Dep. Ex. 21 A, B, C, D and E (Bartlett), R. Vol. II, p. 100: These five exhibits are dated 1898, 1905, 1906, 1903, and 1919, respectively, between Victor Herbert and M. Witmark & Sons, wherein, with the exception of the last exhibit which is between Victor Herbert and T. B.

Harms & Francis, Day & Hunter, all New York corporations, publishers' rights are arranged for in taking over the copyrights on the "Fortune Teller", "M'lle. Modiste," "The Red Mill", "Babes in the Woods", and "Little Miss Wise" (to be changed), and granting to Victor Herbert 12¢ upon each and every copy of the piano and vocal score, and an amount equal to 10 per cent of the retail price of any separate number or song or any combination of two or more numbers or songs when printed together with the words thereof; an amount equal to 15 per cent of the retail price thereof on each and every copy of any arrangement or selection of the whole or any part of the music of said comic opera for piano or any solo instrument with or without accompaniment; the sum of $150.00 in full satisfaction for royalties upon all band or orchestral parts of the music of said comic opera, or any arrangements of the whole or of any part of the music, thereof, exclusive of pieces given for advertisement. A restriction exists against the music dealer selling not to exceed 1500 copies under any circumstances; also, the contracts do not cover the dramatic composition or presentation upon stage, theatre, or elsewhere. All of said contracts are similar excepting that they vary slightly in the amounts to be paid to the composer.

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[fol. 1315] Def. Dep. Ex. 1, p. 450 (Von Tilzer) R. Vol. II, p. 109: William Von Tilzer, president of Broadway Music Corporation, presented a statement of the total number of songs published by the Broadway Music Corporation in 1934, being 115,941; in 1935, 101,568; and in 1936, 36,183; and in 1937, 3,863. These songs so published were for sheet music sales. The highest number of sales was "Be Still, My Heart", 68,122 copies sold in 1934.

Pl. Dep. Ex. 28, p. 417 (Von Tilzer), R. Vol. II, p. 105: A typical contract between a composer, Charles McCarron, and Broadway Music Corp., dated January 15, 1917. It gives to the composer in exchange for the assignment of the copyright on composition, "When The Sun Goes Down In Dixie and the Moon Begins to Rise", ⅔ of a cent upon each and every printed pianoforte copy sold in the United States and Canada, and ¼ of all sums received by the assignee for mechanical reproductions of the same.

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Pl. Dep. Ex. 31, p. 530 (Kern), R. Vol. II, p. 118: Kern contract with ASCAP, the same as the Buck contract, Exhibit "C", R. Vol. III 6.

* * * * * * *

Pl. Dep. Ex. 33, p. 553 (Romberg), R. Vol. III, p. 123: Contract between Romberg and ASCAP, the same as the Buck contract Exhibit "C". R. V. III 6.

(Signed) William J. Hotz, Attorney for Appellants, 1530-5 City Nat'l. Omaha.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 1316]

Statement Re Plaintiffs' Exhibit 1

This exhibit contains a list of more than 190 copyrighted compositions, of which the lyrics or words were written by Gene Buck. Such compositions were copyrighted at various dates between 1912 and 1931. Most of them were used in the Ziegfeld Follies of various years. Specimen compositions giving the collaborator, the publisher, the date of copyright and the show, if any, in which they appeared, are the following:

Composition	Collaborator/s	Publisher	Copyright Date	Show
Chu Chin Chow	Dave Stamper	Harms, Inc.	6/6/17	Ziegfeld Follies of 1917
Daddy Has a Sweetheart and Mother Is Her Name	Dave Stamper	Wm. H. Penn, Gene Buck & Dave Stamper (Marks Music)	10/7/12	
Florida, The Moon and You	Rudolf Friml	Harms, Inc.	6/30/26	Ziegfeld's Palm Beach Girl
Garden Of My Dreams	Dave Stamper & Louis A. Hirsch	Harms, Inc.	6/21/18	Ziegfeld Follies of 1918
Hello Frisco	Louis A. Hirsch	M. Witmark & Sons	6/21/15	Ziegfeld Follies of 1915
In Khorassan	Victor Herbert	Harms, Inc.	6/27/31	Ziegfeld Follies of 1921
Just Because You're You	Jerome Kern	T. B. Harms, Inc.	6/25/17	Ziegfeld Follies of 1917
Legend Of The Golden Tree	Victor Herbert	Harms, Inc.	6/27/21	Ziegfeld Follies of 1921
Love Boat	Victor Herbert	Harms, Inc.	6/26/20	Ziegfeld Follies of 1920
Maid of Gold	Rudolf Friml	Harms, Inc.	12/4/23	Ziegfeld Follies of 1923
My Man	James Hanley	Harms, Inc.	3/31/20	Girls of 1920
'Neath The South Sea Moon	Dave Stamper & Louis A. Hirsch	Harms, Inc.	6/20/22	Ziegfeld Follies of 1922
No Foolin'	James F. Hanley	Harms, Inc.	2/3/26	Palm Beach Nights
Princess Of My Dreams	Victor Herbert	Harms, Inc.	6/27/21	Ziegfeld Follies of 1921
Rose Of My Heart	Albert Sermay	Harms, Inc.	7/3/24	Ziegfeld Follies of 1924
Settle Down In A Little Town	Werner Janssen	Harms, Inc.	3/28/25	Ziegfeld Follies of 1924–25
Tulip Time	Dave Stamper	Harms, Inc.	6/21/19	Ziegfeld Follies of 1919
Underneath The Japanese Moon	Gus W. Haenschen	Harms, Inc.	7/16/14	Ziegfeld Follies of 1914
When The Lights Are Low	Jerome Kern	Harms, Inc.	6/21/16	Ziegfeld Follies of 1916
[fol. 1317]				
Where Is My Wandering Boy Tonight	Dave Stamper	Shapiro, Bernstein & Co.	2/11/14	
Can't You Hear Your Country Calling	Victor Herbert	T. B. Harms & F. D. & H.	6/12/17	Ziegfeld Follies of 1917

[fol. 1318] PLAINTIFFS' TRIAL EXHIBIT 15

England.

Agreement Between the Performing Right Society Limited and American Society of Composers, Authors and Publishers

January 6th, 1933

[fol. 1319] Agreement made the sixth day of ~~January~~, April 1933, between

The Performing Right Society Limited, of Chatham House, 13 George Street, London, England, hereinafter designated as "PRS", and

American Society of Composers, Authors and Publishers, of 1501 Broadway, New York, N. Y., United States of America, hereinafter designated as "ASCAP", as follows:

I

PRS hereby grants to ASCAP the exclusive right to license in the United States of America, Alaska, Porto Rico, Philippine Islands, Virgin Islands, Hawaii, and its Colonies and Possessions, the non-dramatic public performance for profit, of musical works the performing rights of which are now or may during the term hereof be vested in or controlled by PRS. Symphonic and similar concert works are, however, expressly excluded, and it is understood that PRS or its members concerned are at liberty to collect independently fees for the performance of such works in the beforementioned territory.

[fol. 1320] II

ASCAP hereby grants to PRS the exclusive right to license in Great Britain, Northern Ireland, self-governing British Dominions (exclusive of Canada, Newfoundland, Australia and New Zealand) and Colonies, Dependencies, Protectorates and mandated territories, the non-dramatic public performances of musical works the performing rights of which are now or may during the term hereof be vested in or controlled by ASCAP.

III

The terms "public performance for profit" and "public performance" hereinbefore used, shall be construed to mean vocal, instrumental and/or mechanical performances and

representations in any manner or by any method whatsoever, including performance by radio broadcasting stations, by telephony and/or "Wired Wireless"; and/or reproductions of non-dramatic performances by means of devices for reproducing sound recorded in synchronization or timed relation with motion pictures, provided however, that in the case of dramatico-musical works, musical plays, operas, operettas, musical comedies and works of a similar character, such performances shall be limited to the separate numbers, fragments or arrangements, melodies or selections forming a part or parts thereof, and shall not include [fol. 1321] the right of public performance of such works in their entirety or of any part thereof as stage plays, or as a part of stage plays, all of which rights, including all other rights not in this agreement expressly enumerated, are hereby reserved and retained to their members by ASCAP and PRS respectively, and by the respective composers, authors and publishers of such musical works.

IV

Each of the parties hereto agrees to require of and collect from its licensees, for the public performance of the musical works referred to in Clauses I and II hereof, payment therefor upon the same basis and in the same manner as is now in force and effect between each Society and its respective licensees with respect to the musical works referred to in Clauses I and II hereof, and that each Society will account for and pay over to the other such monies in respect of the public performance of such musical works as is hereinafter provided.

V

Each of the parties hereto shall account to the other for each calendar year during the term hereof on or before each 30th September succeeding the close thereof.

[fol. 1322]

VI

A. The net sum allocable by PRS in respect of the musical wo-ks referred to in Clause II hereof shall be ascertained in accordance with the present practice of PRS or any modification thereof which may be made from time to time, and shall be divided and paid in the following manner:

B. One-half of the sum in respect of each work shall be the share of the writers thereof, (composers and authors).

Such share shall be divided between the writers, and the shares of such writers as are members of ASCAP shall be paid by PRS to ASCAP in accordance with the present practice of PRS. The remaining half of the sum in respect of each work shall be the share of the publisher thereof and shall be paid to the publisher member of PRS who represents in Great Britain the American publisher of the work. In the case of ASCAP publisher-members who are not so represented the share shall be paid to ASCAP for credit of such ASCAP publishers. The payments by PRS under this agreement shall be accompanied by a list of the works performed according to the returns received from PRS licensees, showing the amount allocated in respect of each work, and shall be subject to deduction therefrom of such [fol. 1323] amount as may be assessed against them on account of taxes payable to the Government.

VII

A. ASCAP agrees during the term hereof to use its best endeavors to gather daily data covering completely the musical programs as rendered by the two principal broadcasting networks in the U. S. A. (National Broadcasting Company and Columbia Broadcasting System respectively, or their successors), together with similar data regarding the musical programs rendered by a selected number of independent broadcasting stations not affiliated with either of said networks but located in various sections throughout the entire country.

B. From such program data, as rendered by the said networks and stations, ASCAP undertakes to prepare annually and furnish to PRS a summary which shall show the total number of broadcast performances of works identifiable in such programs as from the entire repertoire of PRS.

C. Identifiable copyrighted works listed on the programs gathered in accordance with paragraph A hereof shall be given one point credit for each performance. Points in respect of works (other than those referred to in sub-paragraph E hereof) shall be credited to the respective ac- [fol. 1324] counts of:

1. The repertoire of ASCAP.

2. The repertoire of each foreign performing right Society with which ASCAP may have reciprocal relations, or act for it as agent.

3. The repertoire of each foreign country with which ASCAP may have no relationship.

4. Works not identifiable with any of the above mentioned repertoires.

5. Works of United States origin copyrights of which are owned by non-members of ASCAP.

Points in respect of works referred to in Paragraph E hereof shall be divided equally between the repertoires of ASCAP and PRS.

D. From the total number of points so credited under headings one (1.) and two (2.) above there shall be computed the proportion thereof contributed by the repertoire of PRS, and the amount due to PRS from ASCAP each year during the term hereof shall be exactly in proportion as the number of its points in relation to the total number of points credited under headings one (1.) and two (2.) above bears to the distributable net revenue of ASCAP during the same period.

E. Where a member of PRS has assigned the United States copyright in a work to a publisher member of ASCAP without any reservation of an interest in performing rights no credit shall be entered to the account of the publisher member of PRS in respect of performances thereof but in [fol. 1325] such case and under all circumstances the share of one half for writer members of PRS (composers, authors and arrangers) in respect of such works, when identifiable, shall be paid to PRS for credit of such writer members. If however the assignment of copyright is subject to the reservation by the member of PRS of any interest in the performing rights in the work, in such event ASCAP shall credit performances thereof to the PRS repertoire exclusively and PRS shall after making its final analysis of the summary and data to be furnished by ASCAP under subparagraphs A and B hereof, remit to ASCAP for the account of its publisher member such share in the fees credited to each such work as shall be due to him, accompanied by a detailed statement of all such items.

F. PRS undertakes within sixty days from the execution of this agreement to furnish to ASCAP a complete list, and subsequently during the term hereof to make thereto such additions as may be from time to time necessary, showing

the title, name of composer and/or author and publisher of each work the United States copyright of which has been by a member of PRS assigned to a member of ASCAP subject to the reservation of an interest in the performing rights in the work.

[fol. 1326] G. If at any time during the term of this agreement ASCAP shall be unable to secure such daily data as is described in Paragraph A hereof, it shall promptly notify PRS to that effect whereupon at its option PRS may terminate this agreement at the termination of the then current year, and at its option for such year shall be paid either in accordance with the formula provided in sub-paragraphs C and D hereof to the extent that such data has been obtained, or the sum of $25,000.00 in full settlement.

H. On or before the 30th day of September following the close of each year of the term hereof ASCAP shall furnish to PRS the statements provided for in sub-paragraph B hereof, accompanied by remittance of such amount as shall under the formula (provided in sub-paragraphs C and D hereof) be shown as due to PRS after deducting therefrom only such amount as may be assessed against it on account of taxes payable to the Federal, State or Municipal Government.

I. Supplemental to and in support of the data prepared in accordance with sub-paragraphs A, B and C hereof, and the statements in accordance with sub-paragraph H to be furnished by ASCAP to PRS, there shall also be despatched at the same time all the original programs from which the [fol. 1327] data contained in the statements was compiled. PRS shall be entitled to retain possession of such original programs for a period of not less than sixty days from the receipt thereof, and upon request of ASCAP shall then forward the same complete as received, carrying charges prepaid, as may be directed by ASCAP.

J. Inasmuch as ASCAP will receive such original programs in strict confidence from the sources, and will covenant that no disclosure of the contents thereof shall be made to any copyright owner whose works are not embraced under the licenses issued by ASCAP, it is of the essence of this agreement, and PRS agrees, that it will not divulge or expose the contents of such original programs to any but its members and then permit only a personal inspection,

and that under no circumstances will it permit any copies thereof or of any of the particulars thereof to be made and removed from its files and premises.

VIII

Each of the parties hereto grants to the other the rights and licenses set forth in Clauses I and II hereof, subject always, however, to any right of the author, composer or publisher of any musical work to remove any musical work from the repertory of such respective party and/or to revoke, modify or limit any performing right which he or [fol. 1328] it may have granted to such party, to the extent to which any such composer, author or publisher may have the right so to do, and in the event of any such removal, revocation, modification or limitation each of the parties hereto shall give to the other immediate notice thereof.

IX

This contract is declared to be personal with respect to each of the parties hereto and neither party shall assign the same or any rights therein granted or arising therefrom, without the written consent of the other party first had and obtained, except insofar as each party shall have the right to issue licenses for the giving of public performances of the musical works contained in the repertoire of the other party. Nor shall this contract be deemed to be assignable by operation of law, devolution or legal proceedings.

X

Each of the parties hereto hereby irrevocably during the term of this contract authorizes, empowers and vests in the other party the right, in the name of the grantor or in the name of the grantee, or in the name of the owner of the copyright or copyrights of any musical work coming within the purview of this agreement to institute and prosecute [fol. 1329] actions to retain and recover damages for the infringement or violation of the rights granted to the grantee under this contract, and to release, compromise or refer to arbitration, in the grantee's discretion, any and all actions in the same manner and to the same extent and to all intents and purposes as the grantor and/or the owners of the copyright of such musical work might or could do. And each of the parties hereto hereby makes,

constitutes and appoints the other party its true and lawful attorney irrevocably during the term of this agreement, in the name of the grantor or in the name of the grantee, or in the name of the owner of the copyright or copyrights of any musical work to do all acts, take all proceedings and execute, acknowledge and deliver any and all instruments and documents that may be necessary, proper or expedient and recover damages, under the copyright of such musical works or otherwise, for the infringement or other violation of the rights hereby granted in such works, and to release, compromise and refer to arbitration any such proceedings or actions or to make any other dispositions of differences in relation to the premises.

[fol. 1330]

XI

Each party hereto shall supply the other as far as possible with any particulars relating to the musical works in their respective repertoires which may be necessary in their mutual interests.

XII

Each of the parties hereto agrees, during the term hereof, to execute, acknowledge and deliver to the other party such assurances, powers of attorney or other authorities or instruments as may be deemed necessary or expedient by such party to enable it to exercise and enforce in its own name, or otherwise, all the rights, remedies and privileges granted to it under this contract.

XIII

Each of the parties hereto agrees that it will not accept into membership any composer, author or publisher, who is a member of the other Society at the time when this agreement is made or who shall become a member of the other Society during the term hereof, and who has granted as to ASCAP his rights also for the territory named in Clause II hereof, and as to PRS the territory named in Clause I hereof, unless the other Society shall consent thereto in writing. That it will not represent in any manner, during [fol. 1331] the term hereof, any other organization or Society resident in the said territories respectively having purposes or objects similar to those of either of the parties hereto.

XIV

Each of the parties hereto shall have the right to appoint in writing a representative, to take up in its behalf and examine into, during customary business hours, any matter arising in respect of the relations covered by this agreement.

XV

This agreement shall be effective as of the 1st January, 1933, and shall continue indefinitely thereafter subject to the right of either party by written notice served upon the other before 30th September of any year to terminate the agreement as at the end of the then current year. In the event of any such termination by either party hereto, the parties shall account each to the other in full and according to the terms hereof covering all operations for that year.

[fol. 1332] In Witness Whereof the parties hereto have caused these presents to be signed by their respective duly authorized officers and their respective seals hereunto affixed the day and year first above written.

American Society of Composers, Authors and Publishers, by Gene Buck, President.

Attest: Joseph Young, Secretary. The Performing Right Society Limited, by Louis A. Boosey, John Abbott, Directors, by [Signature Illegible], Secretary. (Seal.)

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COLUMBUS 5-7464

PLAINTIFF'S EXHIBIT NO. 16

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

THIRTY ROCKEFELLER PLAZA
NEW YORK CITY

January 20, 1936

Huse Publishing Company
Radio Station W.J.A.G.
Norfolk, Nebraska

Gentlemen:

It is mutually agreed that the certain license agreement between us, dated October 8, 1932, effective October 1, 1932, is hereby extended on the same terms and conditions as therein contained, from the date of its present expiration, up to and including December 31, 1940; except that Article 7 of such license is hereby amended so as to read:

"7. In case there shall be a substantial diminution in the quantity of musical numbers, the performing rights of which are licensed under this agreement, then the Licensee shall have the right to terminate this license upon three days' notice by registered mail, addressed to the Society, and this right shall be the sole and exclusive remedy.

The Society reserves the right, at any time, and from time to time, to withdraw from the operation of this license, any musical number or numbers. Upon any such withdrawal the Licensee may immediately terminate this license by giving written notice of its election so to do to the Society.

In the event of any such termination of this License, pursuant to Articles 5 and/or 7 hereof, the Society shall refund to the Licensee pro rata license fees, if any, paid for a period beyond the date of such termination."

Very truly yours,
AMERICAN SOCIETY OF COMPOSERS
AUTHORS AND PUBLISHERS
By Herman Finkelstein

ACCEPTED:
HUSE PUBLISHING COMPANY
By _____ Title Pres.
Dated Jan 30 1936

1333

814A

OPERATOR'S BROADCASTING LICENSE FOR NEWSPAPER-OWNED STATION

No.: 7
Call: W.J.A.G.

MEMORANDUM OF AGREEMENT

between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, (hereinafter styled "SOCIETY"), and

HUSE PUBLISHING COMPANY

(hereinafter styled "LICENSEE"), conducting a radio broadcasting station 51% or more owned and operated by a daily newspaper, as follows:

1. SOCIETY grants to LICENSEE, and LICENSEE accepts for a period of three (3) years from October 1, 1932, a license to publicly perform by broadcasting from Radio Station W. J. A. G. located at Norfolk, Nebraska

non-dramatic renditions of the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, or of which SOCIETY shall have the right to license such performing rights.

2. The within license does not extend to or include the public performance by broadcasting or otherwise of any rendition or performance of any opera, operetta, musical comedy, play or like production, as such, in whole or in part.

3. Nothing herein contained shall be construed as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions coming within the purview of the within license performed pursuant hereto, or as authorizing any receiver of any such broadcast rendition to publicly perform or reproduce the same for profit by any means, method or process whatsoever.

4. The within license is limited to the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, or of which SOCIETY shall have the right to license the performing rights hereinbefore granted, in programs rendered at or from said radio station, or at or from any other place duly licensed by SOCIETY to perform such works (unless the performance originates at a place or from a source which SOCIETY does not customarily license), from which place rendition of such works is transmitted to said radio station for the purpose of being broadcast from there.

It is understood, however, that LICENSEE shall be guilty of a breach under this Article (No. 4) only in the event that it continues to broadcast a program rendered at such places other than the said station after LICENSEE shall have received notice from SOCIETY that such other places are not licensed by SOCIETY to perform.

5. The within license is granted upon the express condition:

(a) That should the power input as at present authorized by the Federal Radio Commission for the said station (1,000 watts) be changed during the term hereof, the basic fee as provided in the first paragraph of Article No. 8 hereof shall be adjusted.

(b) That in event the license of said station from the Federal Radio Commission is terminated, cancelled, revoked or suspended, or in the event that radio broadcasting is supported from other sources or operated by other than private interests, than as now prevails, LICENSEE shall promptly notify SOCIETY thereof, and either SOCIETY or LICENSEE may then terminate this agreement; and in such event, LICENSEE shall be under no further liability to SOCIETY for the payment of any license fee hereunder; provided, however, that if the license of said station to broadcast is suspended for a period less than the term of the within license, then in such event LICENSEE shall be relieved from payment of the license fee hereunder only during such period of suspension.

6. LICENSEE agrees upon request to furnish to SOCIETY during the term of the within license a list of all musical compositions (or, at the option of LICENSEE, a list of all musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY or of which SOCIETY shall have the right to license the performing rights hereinbefore granted) broadcast from or through the said station, showing the title of each composition and the composer and/or author thereof; provided that LICENSEE shall not be obligated under this Article No. 6 to furnish such a list covering a period or periods in the aggregate during any one calendar year in excess of three months. The lists so furnished by LICENSEE to SOCIETY shall be strictly confidential and SOCIETY covenants that it will make no disclosure thereof or of the contents thereof.

7. SOCIETY agrees during the term hereof to maintain for the service of LICENSEE substantially its present catalogue of compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY. SOCIETY reserves the right, however, at any time and from time to time to withdraw from its repertory and from operation of the within license any musical composition or compositions; and upon any such withdrawal, LICENSEE may immediately cancel the within agreement by giving written notice to SOCIETY of its election so to do.

In the event of any such cancellation by LICENSEE, or in the event of a termination of this agreement and the within license pursuant to the provisions of Article No. 5 hereof, or otherwise, SOCIETY shall refund to LICENSEE pro rata license fees, if any, paid for a period beyond the date of such cancellation or termination.

36.48

8. Under the terms and conditions hereinabove set forth, LICENSEE agrees to pay to SOCIETY, as compensation for the within license, the sum of FOUR HUNDRED and THIRTY-SEVEN and 50/100 Dollars ($ 437.50) per annum, payable in equal monthly installments on or before the 10th of each month during the term hereof, plus, during each year of the term hereof, a sum equal to three percent (3%) of the gross amount of receipts of Licensee from the sale of broadcasting facilities for programs in which music copyrighted or composed by members of Society is rendered, until such receipts shall have reached the total sum of ($21,875.00) TWENTY-ONE THOUSAND EIGHT HUNDRED SEVENTY-FIVE & 00/100 Dollars; and five percent (5%) of all such receipts in excess of the foregoing amount.

It is, however, understood and agreed that in no event shall the total aggregate sum payable by Licensee to Society during any single year of the term hereof be less than ONE THOUSAND SEVEN HUNDRED and FIFTY and 00/100 ($1,750.) Dollars, and the deficit, if any, of such total aggregate sum in respect of any single year to the last stated amount shall be paid within thirty days of the receipt by Licensee from Society of a bill covering such deficit.

(Continued Over)

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(Continued)

Provided, however, that gross receipts of the Licensee in respect of all commercial ("spot") announcements either interpolated between or preceding or following programs containing music copyrighted or composed by members of Society shall be subject to percentage payments as aforesaid. Public service announcements such as time announcements, weather and market reports, etc., shall be exempt from such percentage payments, as shall also be broadcasts of political conventions, civic gatherings, parades, public functions and sports events, such as football and baseball games, as to music played thereat by bands attendant at such events. Nor shall any percentages be payable to Society in respect of service charges connected with the transmission of a non-commercial program from a remote control point to the studio of Licensee.

LICENSEE shall render monthly statements to SOCIETY on or before the 10th of each month covering the period of the preceding calendar month on forms supplied gratis by SOCIETY, and shall include in such statement all gross receipts, without exception, during the said month from the sale of the broadcasting facilities ("time on the air") of the said station for programs whereof any music copyrighted or composed by members of SOCIETY shall have been included. Which said statement shall be rendered under oath and accompanied by the remittance due SOCIETY under the terms hereof. Any such statement may also include a deduction by or credit to the LICENSEE for any amount reported by it as received during a prior month from the sale of its broadcasting facilities but which it has been compelled to refund as a "time discount." In the event that any such item shall be collected after it has been credited or deducted as aforesaid, it shall then be included again in the net receipts of LICENSEE on the monthly statement next succeeding the date of the actual collection.

9. SOCIETY shall have the right, by its duly authorized representative, at any time during customary business hours, to examine the books and records of account of LICENSEE only to such extent as may be necessary to verify any such monthly statement of accounting as may be rendered pursuant hereto; provided that such examination does not interfere with the usual conduct of business by LICENSEE.

It is understood and agreed that SOCIETY shall consider all data and information coming to its attention as a result of any such examination of books and records as completely and entirely confidential.

10. Upon any breach or default of any terms herein contained, SOCIETY may give LICENSEE ten (10) days notice in writing to repair or correct such breach or default and in the event that such breach or default has not been repaired or corrected within said ten (10) days, SOCIETY may then forthwith cancel said license.

11. SOCIETY agrees to indemnify, save and hold LICENSEE harmless, and defend LICENSEE from and against any claim, demands or suits that may be made or brought against the LICENSEE with respect to renditions given during the term hereof in accordance with this license of musical compositions contained in SOCIETY'S repertoire heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY.

In the event of the service upon LICENSEE of any notice, process, paper or pleading, under which a claim, demand or action is made or begun against LICENSEE on account of any such matter as is hereinabove referred to, LICENSEE shall forthwith give SOCIETY written notice thereof and simultaneously therewith deliver to SOCIETY any such notice, process, paper or pleading, or a copy thereof, and SOCIETY shall have sole and complete charge of the defense of any action or proceeding in which any such notice, process, paper or pleading is served. LICENSEE, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for SOCIETY shall cooperate. LICENSEE shall cooperate with SOCIETY in every way in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of SOCIETY, that may be required in order properly to defend and resist any such action or proceeding, and properly to prosecute any appeals taken therein.

In the event of the service upon LICENSEE of any notice, process, paper or pleading, under which a claim, demand or action is made, or begun against LICENSEE on account of the rendition of any musical composition contained in the SOCIETY'S repertory but NOT heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, SOCIETY agrees at the request of LICENSEE to cooperate with and assist LICENSEE in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein.

12. In the event of any change in the ownership or control of the said station whereby it becomes less than 51% directly owned and controlled by the LICENSEE, SOCIETY may, at its option, cancel and terminate this license upon 30 days' written notice.

13. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered United States mail addressed to such other party at its main office for the transaction of business.

IN WITNESS WHEREOF, this agreement has been duly subscribed by SOCIETY and LICENSEE this 8th day of October, 193 2.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

By Eugene W. Leahy

HUSE PUBLISHING COMPANY
Licensee.

By

10/31/32

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[fols. 1336–1337]

PLAINTIFFS' EXHIBIT 17

September 6, 1939

Gross Revenue
State of Nebraska

Jan. 1, 1928 to June 30, 1939

Year	General	Radio	Motion Pictures	Restaurants	Hotels	Dance Halls	Miscellaneous	Total
1928.....	$11,202.50	$6,274.44						$17,476.94
1929.....	10,568.15	8,888.74						19,456.89
1930.....	12,618.31	10,920.45						23,538.76
1931.....	13,422.12	11,871.85						25,923.97
1932.....	10,869.95	9,446.44						20,316.39
1933.....	.....	16,538.20	$8,049.84	$218.00	$257.00	$3,070.74	$435.00	28,568.78
1934.....	.....	19,769.09	9,137.72	1,421.75	427.09	2,972.09	612.50	34,340.24
1935.....	.....	34,165.32	10,362.16	1,869.41	704.00	3,134.50	951.20	51,186.59
1936.....	.....	37,233.93	11,116.17	1,420.57	720.00	2,809.00	698.81	53,998.48
1937.....	.....	43,712.70	8,004.01	643.34	540.00	1,361.74	212.85	54,474.64
1938.....	.....	48,712.69	12,701.20	1,841.30	985.00	3,220.92	1,328.43	68,789.54
1/1/39–6/30/39..	.....	29,080.20	5,791.72	1,023.50	365.00	1,260.33	489.53	38,010.28
	$58,681.03	$276,614.05	$65,162.82	$8,437.87	$3,998.09	$17,829.32	$4,728.32	$435,451.50

[fol. 1338]

PLAINTIFFS' EXHIBIT 18

Disbursements—State of Nebraska

Year	General Expense	Commissions	Legal Expense	Total
1932	$3,448.32	$4,422.37	.....	$7,870.69
1933	3,412.00	4,590.97	.....	8,002.97
1934	4,085.40	5,144.20	$273.93	9,503.53
1935	5,504.64	5,684.40	246.91	11,435.95
1936	6,075.76	5,467.83	346.82	11,890.41
1937	7,707.23	3,556.46	115.34	11,379.03
	$30,233.35	$28,866.23	$983.00	$60,082.58

[fol. 1339]

PLAINTIFFS' EXHIBIT No. 20

G. M. Harman

Songs and Total Copies Sold

Title	Copies Sold	Publication Date	Publisher
After the Ball	2,000,000	1892	Chas. K. Harris
Babes in the Woods	1,500,000	1916	Harms, Inc.
Bambalina	1,500,000	1923	Harms, Inc.
Beautiful Ohio	1,000,000	1918	Shapiro Bernstein
Because I Love You	1,000,000	1926	Berlin
Best Things in Life Are Free	1,000,000	1927	DeSylva, Brown & Henderson
Bicycle Built For Two	2,000,000		Free in United States
Black Botton	1,000,000	1926	Harms, Inc.
Blue Room	1,500,000	1926	Harms, Inc.
Blue Skies	1,000,000	1927	Berlin
Bye Bye Blackbird	1,000,000	1926	Remick
Charleston	1,500,000	1923	Harms, Inc.
Cherie, I Love You	1,000,000	1926	Harms, Inc.
Collegiate	1,000,000	1925	Shapiro Bernstein
Come Along, My Mandy	1,000,000	1910	Harms, Inc.
Crinoline Days	1,000,000	1922	Berlin
Cup of Coffee, a Sandwich and You	1,000,000	1925	Harms, Inc.
Deep in My Heart	1,000,000	1924	Harms, Inc.
Down By the Old Mill Stream	2,500,000	1910	Forster Music Pub.
The Girl Friend	1,500,000	1926	Harms, Inc.
Give My Regards to Broadway	1,000,000	1909	F. B. Haviland Pub. Co.
Hallelujah	1,000,000	1927	Harms, Inc.
Has Anybody Here Seen Kelly	1,000,000	1909	T. B. Harms Co.
I Might Be Your Once In a While	1,500,000	1919	Harms, Inc.
I Want To Be Happy	1,000,000	1924	Harms, Inc.
If You Were the Only Girl in the World	1,500,000	1916	B. Feldman & Co.
I'm Always Chasing Rainbows	1,500,000	1918	Robbins
I'm Forever Blowing Bubbles	1,000,000	1919	Remick
Indian Love Song	1,000,000	1924	Harms, Inc.
Irene	1,000,000	1919	Feist
It Ain't Gonna Rain No More	1,500,000	1923	Forster Music Pub.
I've Got a Feeling I'm Falling	1,000,000	1929	Santly Bros., Inc.
Japanese Sandman	1,500,000	1920	Remick
Just a Cottage Small	1,000,000	1925	Harms, Inc.
Just Like a Melody	1,000,000	1928	Donaldson, Douglas & Gumble
Just a Love Nest	2,000,000	1920	Victoria Pub. Co.
Just a Memory	1,000,000	1927	Harms, Inc.

[fol. 1340]

Title	Copies Sold	Publication Date	Publisher
Katinka	1,000,000	1915	G. Schirmer, Inc.
Keep the Home Fires Burning	3,000,000	1915	Chappell & Co.
Kiss in the Dark	1,500,000	1922	M. Witmark & Sons
K-K-K-Katie	1,500,000	1918	Feist
Last Long Mile	1,500,000	1917	T. B. Harms Co.
Learn to Smile	1,000,000	1921	Victoria Pub. Co.
Left All Alone Again Blues	1,000,000	1920	T. B. Harms Co.
Let Me Call You Sweetheart	1,000,000	1910	Paull-Pioneer
Let's Do It, Let's Fall in Love	1,500,000	1928	Harms, Inc.
Limehouse Blues	1,500,000	1922	Chappell-Harms
Little Gray Home in the West	2,000,000	1911	Chappell & Co.
Look for the Silver Lining	1,000,000	1920	T. B. Harms Co.
Love Sends a Little Gift of Roses	1,000,000	1919	T. B. Harms Co.
Lover, Come Back To Me	1,000,000	1928	Harms, Inc.
Lucky Day	1,000,000	1926	Harms, Inc.
Madelon	2,000,000	1919	Remick
Maine Stein Song	1,000,000	1930	Carl Fischer Inc.
Mammy	1,500,000	1929	Berlin
Marcheta	2,500,000	1913	John Franklin Music Co.
Margie	1,500,000	1920	W. B. & S.-Mills Music
Memory Lane	1,000,000	1924	Harms, Inc.
Moonlight and Roses	1,500,000	1925	Villa Moret
My Blue Heaven	1,500,000	1927	Feist
My Heart Stood Still	1,000,000	1927	Harms, Inc.
Neath the South Sea Moon	1,000,000	1922	Harms, Inc.
No Foolin'	1,000,000	1926	Harms, Inc.
Oh, How I Hate to Get Up in the Morning	1,500,000	1918	Berlin
Oh, How I Miss You Tonight	1,000,000	1915	Berlin
Old Man River	1,000,000	1927	T. B. Harms Co.
Old Pal of Mine	1,000,000	1918	G. Ricordi & Co.
An Old-Fashioned Wife	1,000,000	1917	Harms, Inc.
Over There	2,000,000	1917	Feist
Pack Up Your Troubles	2,500,000	1915	Harms, Inc.
Poor Butterfly	2,000,000	1916	Harms, Inc.
A Pretty Girl Is Like a Melody	1,500,000	1919	Berlin
Put On Your Old Gray Bonnet	1,000,000	1909	Remick
Ramona	2,000,000	1927	Feist
Red Hot Mamma	1,000,000	1924	Rainbow Music Corp.
Remember	1,000,000	1925	Berlin
Rio Rita	1,500,000	1926	Feist
Rose Marie	1,750,000	1924	Harms, Inc.

[fol. 1341]

St. Louis Blues	2,500,000	1914	Handy Bros.
Sheik of Araby	1,500,000	1921	W. B. & S.-Mills Music
Shine On Harvest Moon	1,500,000	1908	Remick
Sidewalks of New York	2,000,000	1894	Paull-Pioneer
Smiles	2,000,000	1917	Remick
Some of These Days	1,500,000	1910	Will Rossiter
The Song Is Ended	1,500,000	1927	Berlin
Sonny Boy	1,500,000	1928	DeSylva, Brown & Henderson
Sweet Adeline	2,500,000	1903	Witmark
Sweet Rosie O'Grady	1,750,000	1896	Mills Music
Tea for Two	1,500,000	1924	Harms, Inc.
Tell Me Little Gypsy	1,500,000	1920	Berlin
There's a Long, Long Trail	3,000,000	1913	Witmark
Till the Clouds Roll By	1,500,000	1917	Harms, Inc.

Title	Copies Sold	Publication Date	Publisher
Till We Meet Again	1,500,000	1918	Remick
Tipperary	2,000,000	1912	B. Feldman & Co. (Chappell-Harms)
Valencia	2,000,000	1926	Harms, Inc.
Waltz Me Around Again, Willie	1,500,000	1906	Marks
What'll I Do	1,500,000	1924	Berlin
When Day Is Done	1,500,000	1902	Feist
When You Were Sweet Sixteen	2,000,000	1896	Shapiro Bernstein
Whispering	1,500,000	1920	Sherman, Clay
Who	1,750,000	1925	T. B. Harms Co.
Wildflower	1,500,000	1923	Harms, Inc.

Love Will Find A Way

1) by Burke & Dubin/pub. Witmark 1929 (Theme Song of "In the Headlines")
2) by Fraser-Simpson & Graham/pub. Ascherberg, Hopwood & Crew/pub. Leo Feist Inc. 1927 (from opera "The Maid of the Mountains")
3) by Robyn & Blossom/pub. Witmark 1903 (from "Yankee Consul")
4) by Sissle & Blake/pub. Witmark 1921 (from "Shuffle Along")
5) by Harry Von Tilzer & W. van Brunt/pub. Harry Von Tilzer 1917

Because of You

1) by Broones & John/pub. Chappell & Co. 1933 (from "Give Me a Ring")
2) by Caryll & Beresford/pub. Will Rossiter 1918
3) by Jurmann & Dubin/pub. Harms 1931 (from "Her Majesty Love")
4) by Woodman & Flammer/pub. G. Schirmer Inc. 1916
5) by Florito & Hirsch/pub. Feist 1925

many others with same title.

(Here follows 1 photolithograph, side folio 1342)

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PLAINTIFF'S EXHIBIT NO. 21

SCHEDULE OF NUMBER OF LICENSES IN EFFECT

CLASSIFIED AS TO STATES FROM DEC. 31, 1928 TO JUNE 30, 1940

STATES	1928	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940
ALABAMA	27	32	57	76	107	121	146	148	147	130	133	154	186	208	220	229	231	227
ALASKA						7	6	6	10	9	12	5	11	12	12	11	7	7
ARIZONA	14	13	13	30	48	50	58	58	54	66	53	66	63	76	82	89	103	132
ARKANSAS	85	15	15	84	110	116	136	147	133	107	90	100	123	155	159	172	186	193
CALIFORNIA	540	638	696	714	809	901	1012	981	1004	1089	1081	1084	1615	2034	2326	2043	2180	2181
COLORADO	111	116	146	134	236	243	263	246	233	209	199	234	271	297	318	384	363	316
CONNECTICUT	91	136	155	156	212	212	159	156	194	202	194	165	150	229	372	413	375	382
CUBA											44	44	44	44	44	44	50	50
DELAWARE	10	15	24	23	29	25	37	41	40	44	37	37	41	47	58	59	62	60
DIST. COLUMBIA	30	61	63	102	96	97	66	65	65	66	77	65	90	93	99	109	114	117
FLORIDA	46	63	64	158	225	195	176	200	217	238	230	242	291	318	367	430	465	466
GEORGIA	50	62	90	112	156	177	199	211	197	166	192	196	245	252	269	291	291	305
HAWAII									1	46	46	46	46	54	51	56	56	56
IDAHO	17	31	52	56	61	73	84	97	94	101	105	99	134	141	150	146	153	146
ILLINOIS	447	514	569	745	911	1006	1069	1040	952	902	862	1004	1266	1546	1601	1743	2003	2067
INDIANA	463	446	552	571	563	629	676	652	591	529	509	520	713	726	630	694	600	610
IOWA	111	170	216	362	569	597	629	605	564	526	466	460	601	494	504	536	604	575
KANSAS	39	40	51	340	537	546	636	664	702	720	612	677	650	602	603	513	519	563
KENTUCKY	61	146	156	192	210	226	256	233	212	176	176	179	212	257	251	263	301	306
LOUISIANA	56	101	146	177	216	279	309	300	313	193	215	196	269	357	302	262	462	472
MAINE	137	169	169	229	219	203	211	204	197	196	157	188	113	117	137	141	120	131
MARYLAND	206	226	237	237	242	305	302	303	350	369	304	336	331	360	532	514	527	521
MASSACHUSETTS	488	467	502	560	631	640	663	652	635	606	532	501	521	466	506	642	779	686
MICHIGAN	211	169	322	437	524	665	766	935	949	946	799	1011	1231	1315	1376	1363	1433	1494
MINNESOTA	107	404	430	476	470	492	516	508	372	439	374	321	508	549	712	746	666	669
MISSISSIPPI	27	31	33	45	72	109	130	141	140	82	81	61	69	86	82	101	156	160
MISSOURI	378	276	366	437	570	586	606	772	639	577	562	564	632	663	664	666	660	669
MONTANA	7	20	19	23	30	34	48	73	65	56	56	64	161	179	206	211	211	206
NEBRASKA	31	43	106	219	262	319	362	394	426	456	433	392	421	404	397	374	360	391
NEVADA	2	2	2	2	2	1	17	22	26	29	26	21	27	22	45	60	57	53
N.HAMPSHIRE	123	118	112	129	133	131	130	128	138	134	123	106	110	104	118	146	149	154
NEW JERSEY	119	186	296	426	484	494	530	570	564	544	552	541	463	644	819	887	1553	1362
NEW MEXICO			21	31	32	34	46	50	59	46	52	46	61	77	83	108	108	119
NEW YORK	1081	1217	1333	1556	1630	1765	1994	1956	2280	2210	2011	1943	2247	2586	2831	3113	3255	3532
N.CAROLINA	29	64	109	128	149	171	199	182	171	162	118	154	252	286	325	347	379	403
N.DAKOTA	1	10	52	68	102	111	114	100	101	76	68	64	93	91	87	94	92	99
OHIO	899	613	782	988	1066	1106	1138	1251	1306	1176	1158	1256	1330	1482	1660	1660	2027	2053
OKLAHOMA	47	26	30	52	226	238	254	299	310	327	322	217	296	287	306	366	362	369
OREGON	111	124	154	176	192	194	226	204	196	196	206	153	303	361	352	336	333	349
PENNSYLVANIA	679	829	1032	1046	1173	1217	1339	1380	1256	1273	1136	1129	1216	1446	1746	1882	2306	2407
PORTO RICO											1	1	2	2	2	101	129	132
RHODE ISLAND	64	69	69	74	81	81	78	60	73	73	73	66	66	60	70	104	137	134
S.CAROLINA	22	23	24	39	40	52	60	72	74	86	86	102	140	141	143	167	161	174
S.DAKOTA		8	42	103	140	167	171	167	160	134	125	116	131	144	141	160	178	170
TENNESSEE	30	54	83	99	134	146	164	160	153	156	158	167	169	197	214	217	269	291
TEXAS	296	150	177	464	580	560	650	756	671	369	530	662	722	896	1100	1187	1806	1809
UTAH		59	96	93	119	123	139	135	131	127	128	134	154	156	163	174	173	174

S.DAKOTA		6	42	103	140	167	171	167	160	134	125	116	131	144	141	160	178	170
TENNESSEE	30	54	63	89	134	146	164	160	163	155	158	167	188	197	214	217	220	231
TEXAS	256	150	177	464	520	560	650	736	671	589	530	692	722	864	1100	1187	1205	1209
UTAH		59	68	93	119	123	139	135	131	127	128	134	154	166	163	174	173	174
VERMONT	64	65	53	57	65	60	64	65	75	74	66	63	61	62	64	65	64	66
VIRGIN ISLE.																	1	2
VIRGINIA	12	21	105	155	145	183	196	171	174	174	135	143	259	300	294	347	369	366
WASHINGTON	197	221	248	288	296	292	324	353	300	288	256	243	511	525	526	566	566	554
W.VIRGINIA	58	103	184	112	114	141	203	184	172	138	123	111	127	158	187	202	228	270
WISCONSIN	118	175	180	209	310	540	662	910	948	891	886	888	947	906	907	946	941	988
WYOMING		8	17	18	20	25	34	41	50	56	53	52	58	68	75	78	77	75
TOTALS -	7007	8803	10320	13042	15316	16662	18833	19015	18686	18043	17006	17282	20723	23137	25053	25878	25917	26084

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9/8/39

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[fol. 1343] PLAINTIFFS' EXHIBIT 22

(pp. 1122 and 1123 of Copyright Hearings, 1936)

The income from the sale of sheet music and books of music has been:

1927	$17,146,715	1931	$12,203,657
1929	16,537,747	1933	2,340,723

Considerable diminution of income to authors and composers occurred as radio took the place of the phonograph, with the result that few records were sold. The R. C. A. Manufacturing Co., makers of Victor records, the largest record manufacturers in the world, report that using the 1925 sales as 100 percent minimum, the total sales in the succeeding years were as follows:

	Percent		Percent
1926	127	1931	27
1927	150	1932	13
1928	149	1933	13
1929	139	1934	18
1930	65		

The Department of Commerce reports the sales of phonograph records as follows:

1921	$47,843,856	1929	$34,128,735
1923	36,372,410	1931	7,697,787
1925	26,790,847	1933	2,562,082
1927	31,781,443		

Another source of income to the author and composer, which was diminished through the advent of radio, were the mechanical royalties received from the sale of perforated music rolls. According to statistics of the Department of Commerce the value of music rolls was as follows:

1923	$ 5,261,614	1929	$ 2,555,544
1925	6,067,529	1931	428,186
1927	3,216,960		

The income from mechanical royalties of six representative publishers in the popular-music publishing field has been:

1924	$ 638,380.56	1930	$ 284,139.81
1925	714,724.80	1931	173,668.57
1926	936,224.72	1932	79,337.53
1927	852,588.82	1933	51,770.88
1928	723,689.72	1934	22,482.20
1929	562,267.20		

[fol. 1344] The income from mechanical royalties of six representative publishers in the standard music publishing field has been:

1924	$ 27,701.01	1929	$ 13,560.84
1925	19,012.77	1930	7,724.12
1926	13,767.90	1931	5,390.67
1927	11,771.85	1932	4,744.90
1928	15,300.12	1933	3,345.88

PLAINTIFF'S EXHIBIT NO. 29

Exhibit No. 29
Witness

Table 19

FEDERAL COMMUNICATIONS COMMISSION
Accounting Department

Summary of responses of broadcast stations to Commission Order No. 38

Income items of broadcast stations by States and broadcast regions
1937

State and broadcast region	Stations with net sales of $25,000 or more									All commercial stations				
	Number of stations	Time sales				Talent and misc. sales	Gross sales	Less: Agency commissions	Net sales	Number of stations	Net sales	Total expenses	Net broad. revenue	Net income
		Network	Local	National spot	Total									
(Col. 1)	(Col. 2)	(Col. 3)	(Col. 4)	(Col. 5)	(Col. 6)	(Col. 7)	(Col. 8)	(Col. 9)	(Col. 10)	(Col. 11)	(Col. 12)	(Col. 13)	(Col. 14)	(Col. 15)
NORTHERN DISTRICT	254	$16,290,112	$22,854,032	$17,232,824	$56,378,968	$4,273,610	$60,652,578	$4,745,969	$55,906,609	328	$57,147,880	$43,476,075	$13,671,765	$11,514,462
Northeastern Region--Total	111	7,701,234	11,552,578	6,406,580	25,662,332	1,776,049	27,438,381	2,140,551	25,297,830	140	25,751,497	19,694,341	6,057,156	5,053,092
Connecticut	8	392,913	429,066	294,282	1,116,261	37,291	1,153,552	72,094	1,081,458	9	1,105,619	968,141	137,478	34,019
Delaware Maryland Maine New Hampshire Vermont	8	483,802	763,380	253,904	1,471,086	37,810	1,508,896	98,779	1,410,117	9	1,411,852	994,655	417,197	349,177
	5	167,558	198,937	110,397	477,092	25,767	502,859	19,761	483,098	13	600,830	473,223	127,607	77,805
Massachusetts	15	1,098,865	1,680,394	359,267	3,178,526	78,999	3,257,525	280,217	2,977,308	15	2,977,308	2,485,470	491,838	449,807
New Jersey	4	366,693	941,062	1,568,364	2,876,119	421,771	3,277,890	422,341	2,855,549	9	2,914,967	2,392,045	522,922	475,621
New York	35	3,357,527	3,805,634	2,326,866	9,490,027	639,436	10,129,463	649,550	9,479,915	45	9,660,264	7,229,672	2,430,592	2,099,570
Pennsylvania	29	1,861,939	2,830,461	1,196,512	5,290,912	431,383	5,722,295	441,209	5,281,086	33	5,351,356	3,915,350	1,436,006	1,202,662
Rhode Island	3	310,348	245,638	134,952	690,938	1,474	692,412	46,077	646,335	3	646,335	423,564	222,771	186,517
District of Columbia	4	321,589	658,006	111,776	1,091,371	102,116	1,193,487	110,523	1,082,964	4	1,082,964	872,221	210,743	179,094
Great Lakes Region--Total	89	6,181,728	7,786,530	7,478,687	21,446,945	1,689,166	23,136,111	1,998,273	21,137,838	112	21,610,899	16,114,575	5,496,324	4,716,449
Illinois	23	1,128,708	2,862,999	2,597,431	5,988,738	610,572	6,599,310	552,336	6,046,974	30	6,180,421	4,734,561	1,445,860	1,220,199
Indiana	12	262,093	739,302	377,141	1,378,536	63,498	1,442,034	54,476	1,387,558	16	1,457,829	1,117,890	339,939	296,378
Kentucky	6	386,632	359,599	264,149	1,010,380	1,164	1,011,504	61,471	950,033	6	950,033	753,729	196,304	151,795
Michigan	14	1,017,776	1,897,032	1,278,968	3,793,776	248,651	4,042,427	373,984	3,668,443	17	3,714,294	2,674,233	1,040,061	838,774
Ohio	18	3,176,119	1,881,879	2,296,947	7,314,945	595,971	7,910,916	895,121	7,015,795	22	7,074,042	4,998,524	2,075,518	1,810,577
West Virginia	5	44,488	363,861	180,795	589,104	42,204	631,308	26,420	604,888	7	670,635	574,948	95,687	80,482
Wisconsin	11	225,912	782,298	423,296	1,371,506	127,106	1,498,612	34,465	1,464,147	14	1,563,645	1,260,690	302,955	256,264
Midwest Region--Total	54	2,807,150	3,516,524	3,345,617	9,269,691	808,395	10,078,086	607,145	9,470,941	76	9,785,444	7,667,159	2,118,285	1,744,921
Iowa	9	408,557	535,973	841,763	1,786,293	158,129	1,944,422	142,542	1,801,880	11	1,821,734	1,417,606	404,128	316,784
Kansas	8	121,638	321,024	220,661	663,323	31,461	694,784	21,948	662,836	13	731,203	690,308	40,895	26,021
Minnesota	10	483,017	883,675	602,483	1,969,315	200,218	2,169,533	153,814	2,015,719	12	2,042,269	1,567,043	475,226	422,364
Missouri	14	896,488	1,246,841	1,153,967	3,299,236	321,447	3,620,683	204,357	3,416,326	17	3,473,621	2,604,751	868,870	700,412
Nebraska	7	341,780	896,396	372,584	1,016,780	93,779	1,110,499	60,998	1,049,501	10	1,096,369	874,052	222,317	211,877
North Dakota	3	125,960	112,125	97,077	335,162	3,179	338,341	13,393	324,948	8	324,085	308,595	15,490	63,090
South Dakota	3	89,810	118,690	61,142	209,842	182	209,824	10,493	199,331	5	236,223	224,804	11,419	4,393
SOUTHERN DISTRICT	105	2,981,109	5,444,673	3,765,015	12,190,799	684,345	12,875,144	631,944	12,243,200	166	13,134,785	10,273,775	2,861,990	2,539,752
Southeastern Region--Total	70	1,995,681	3,312,862	2,414,992	7,683,535	328,079	8,011,614	371,301	7,640,250	111	8,225,516	6,497,319	1,728,197	1,513,903
Alabama	6	93,776	293,054	94,294	481,124	22,301	503,425	17,584	485,841	11	556,285	432,862	123,343	88,268
Arkansas Mississippi	6	85,308	181,473	117,035	383,816	23,822	407,638	18,235	389,403	17	514,697	458,686	56,011	46,806
Florida	10	332,535	427,676	380,128	1,100,339	20,012	1,120,351	33,972	1,086,379	15	1,141,724	947,909	193,815	167,733
Georgia	6	273,703	364,278	343,661	981,642	13,382	995,024	65,948	929,076	13	1,015,856	701,524	314,332	291,533
Louisiana	9	306,487	382,456	326,167	1,015,043	29,346	1,044,389	49,662	994,727	12	1,050,722	727,892	322,830	296,693
North Carolina	9	238,939	416,848	393,857	1,049,644	63,223	1,112,867	63,600	1,049,267	13	1,123,457	837,425	286,032	234,186
South Carolina	5	38,377	242,083	71,351	347,771	9,714	357,485	34,017	323,468	6	329,892	330,372	(1) 1,301	(1) 831
Tennessee	12	403,892	704,705	433,804	1,542,401	67,434	1,609,835	76,084	1,533,751	13	1,570,134	1,306,040	265,094	205,140
Virginia	7	186,731	300,329	294,695	781,755	78,845	860,600	12,262	848,338	11	923,409	753,786	169,623	141,605
South Central Region--Total	35	1,085,428	2,131,813	1,350,023	4,567,264	326,266	4,893,530	260,580	4,632,950	55	4,913,809	3,776,456	1,136,753	1,085,849
Oklahoma	6	246,114	413,880	383,984	1,043,898	62,866	1,126,764	58,317	1,068,447	14	1,188,873	1,001,702	187,171	150,394
Texas	29	739,314	1,718,013	966,039	3,523,366	293,400	3,736,766	202,263	3,534,503	41	3,724,936	2,774,754	949,582	875,455
EASTERN DISTRICT	84	2,869,316	5,723,958	2,119,297	10,713,171	773,737	11,486,908	800,497	10,686,411	130	11,363,153	9,639,865	1,723,288	1,327,914
Mountain Region--Total	24	621,865	1,581,174	451,685	2,654,664	236,706	2,891,370	158,980	2,736,390	47	3,027,614	2,560,640	466,974	329,046
Arizona	3	52,335	167,717	51,829	272,081	42,451	314,532	8,131	306,401	6	333,629	284,870	48,759	42,983
Colorado Wyoming	7	262,539	647,056	102,669	1,012,264	102,175	1,114,439	92,002	1,022,437	15	1,126,634	1,028,198	98,436	64,378
Idaho	4	-	127,480	22,721	150,201	63	150,264	3,907	146,357	6	193,335	173,452	19,883	18,176
Montana	4	27,883	155,918	92,563	276,364	55,732	332,096	11,378	320,718	7	361,189	278,137	83,052	62,862
Nevada New Mexico	3	8,838	118,536	86,813	154,187	5,531	159,718	5,032	154,686	8	210,959	192,486	18,073	7,837
Utah	3	270,070	364,467	195,030	789,567	30,754	820,321	34,530	785,791	5	802,272	603,503	198,769	163,290
Pacific Region--Total	60	2,246,051	4,142,784	1,667,612	8,056,507	537,031	8,593,538	643,517	7,950,021	83	8,333,539	7,079,825	1,256,314	998,828
California	36	1,565,636	2,806,421	1,083,213	5,535,270	331,535	5,866,805	515,862	5,350,963	49	5,909,111	4,782,932	782,179	564,808
Oregon	7	261,163	378,479	250,175	889,837	33,048	918,885	34,351	884,534	13	994,432	772,580	225,912	198,637
Washington	15	421,252	881,884	334,284	1,631,400	172,448	1,809,848	95,324	1,714,524	21	1,831,996	1,525,773	308,223	241,983
UNITED STATES	443	22,141,137	34,024,665	23,117,136	79,282,938	5,731,692	85,014,630	6,178,410	78,836,220	624	81,649,718	63,389,715	18,260,003	15,412,128

(1) - Deficit or other reverse item.
NOTE: - Of the 624 responses accounted for in this table, 5 cover 2 stations each. Thus the table actually embraces data for 629 stations.

PLAINTIFF'S EXHIBIT NO.32

NOTE: EACH UNIT IS PERFORATED TO BE PLACED ON 3 x 5 INDEX CARD

E-25

TITLE: ALHAMBRA

COMP: W. P. Chambers

COPYRIGHT 1907

AUTH:

PUBL: Carl Fischer, Inc. (ASCAP)

TITLE: ALICE IN WONDERLAND

COMP: Charles Tobias

COPYRIGHT 1933

AUTH: Jack Scholl
Murry Mencher

PUBL: Leo Feist, Inc. (ASCAP)

TITLE: ALHAMBRA

COMP: Ernesto Lecuona

COPYRIGHT 1929

AUTH:

PUBL: E.B. Marks Music Corp. (ASCAP)

TITLE: ALITA

COMP: F. H. Losey

COPYRIGHT R 1928

AUTH:

PUBL: Carl Fischer, Inc. (ASCAP)

TITLE: ALI BABA

COMP: Ernesto Lecuona

COPYRIGHT 1935

AUTH: Sonny Miller

PUBL: Schuster-Miller, Inc. (ASCAP)

TITLE: ALL ALONE

COMP: Irving Berlin

COPYRIGHT 1924

AUTH:

PUBL: Irving Berlin, Inc. (ASCAP)

TITLE: ALICE BLUE

COMP: Ferde Grofe

COPYRIGHT 1930

AUTH:

PUBL: Robbins Music Corp. (ASCAP)

TITLE: ALL ALONE

COMP: Harry Von Tilzer

COPYRIGHT 1911

AUTH: Wm. Dillon

PUBL: Harry Von Tilzer Mus. Pub. Co. (ASCAP)

TITLE: ALICE BLUE GOWN

COMP: Harry Tierney

COPYRIGHT 1919

AUTH: Joseph McCarthy

PUBL: Leo Feist, Inc. (ASCAP)

TITLE: ALL ALONE MONDAY

COMP: Harry Ruby

COPYRIGHT 1926

AUTH: Bert Kalmar

PUBL: Harms, Inc. (ASCAP)

822

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TITLE: LET'S GO COUNTRY

COMP: Joseph B. Peavey
&
AUTH:

COPYRIGHT 1936

PUBL: unp. Joseph B. Peavey (NM)

13464

Not a part of Plfs. Ex. 32

PLAINTIFF'S EXHIBIT NO. 33

The ASCAP Index

American Society of Composers, Authors & Publishers
Thirty Rockefeller Plaza
New York City

The ASCAP Index

As a service to broadcasters ASCAP announced in August, 1937, the preparation of its index to musical compositions, to be available, *entirely free of charge*, to all stations in the U.S.A. willing to accept the service.

Since that time six installments of the Index have been completed and forwarded to all subscribing broadcasters, and such comment as has been received has been uniformly complimentary. In all cases where the Index has been installed it has been found an extremely useful and worthwhile aid in the building of programs, checking of copyright ownerships, identification of titles and compositions, etc.

To date the Index includes some 76,000 of the titles most used in broadcasting—and the seventh installment, shortly to be forwarded will add some 14,000 titles—covering all published musical compositions copyrighted in 1938 and as well all unpublished works copyrighted by ASCAP members.

It should be distinctly borne in mind that the Index is *not limited* to works of ASCAP members, but, to the extent that we can secure the information, covers the listings of non-members as well.

The Index to date covers practically all musical compositions used by broadcasters in the year 1935; all of the published compositions listed in the U.S. Catalog of Copyright Entries (Part III) in the years 1936, 1937 and 1938—and all of the unpublished compositions of members of ASCAP copyrighted during those years. It is ASCAP's intention to henceforth keep the Index as closely as possible current with the U.S. Catalog of Copyright Entries (Part III) and to work backward from 1935 in that Catalog until the Index shall include for practical purposes all of the music under copyright in the U.S.A. which a broadcaster is likely to find occasion or necessity to use.

Complete alphabetical listing of all music publishers so far as known to us is included in the Index. Copyrighted arrangements of non-copyrights are listed on blue paper—to distinguish them from original copyrights which are printed on white. "Restricted" compositions are also indexed.

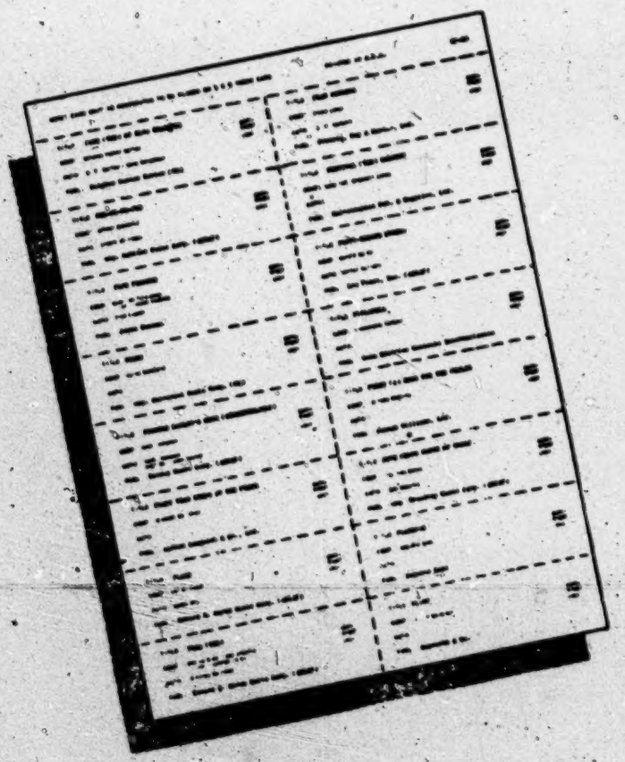
The ASCAP Index represents the first attempt ever made, so far as we know, to produce a comparatively complete card index to all copyrighted musical compositions. It is a

tremendous task, involving much careful research, checking and re-checking; and though every possible precaution is taken to avoid errors some must inevitably occur, and the co-operation is asked of all concerned in calling every discovered error promptly to our attention so that corrective notice may at once be generally distributed.

Therefore, while the Index will be copied from records upon which we ourselves rely, ASCAP definitely does not "warrant and guarantee" accuracy as of any particular date or as to any particular item listed. We will however upon request promptly re-check any questioned entry and warrant correctness of response to such special enquiries.

Preparation of ASCAP Index

The Index is furnished in the form of perforated sheets of gummed paper, 16 titles to a sheet, arranged to be torn apart at the perforations and each title separately pasted upon a 3 x 5 card. If a station is not staffed to conveniently do this work, the printer who produces the Index will furnish cards and do the pasting for $2.25 per thousand cards. In



Typical sheet of titles from ASCAP Index, gummed and perforated.

1349

928

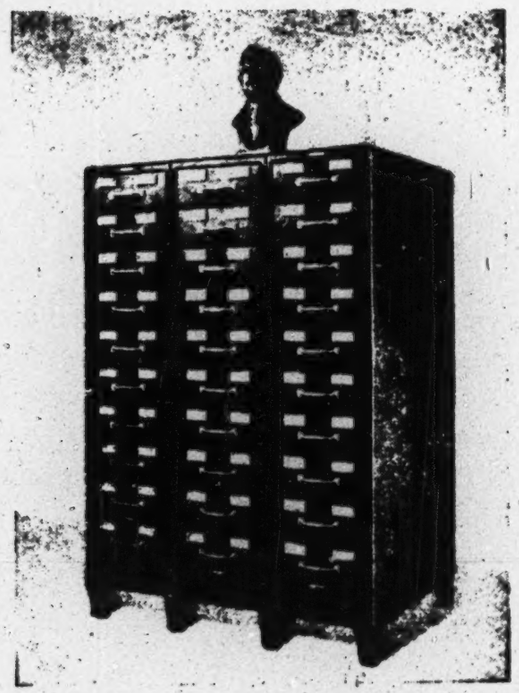
most cases it is much cheaper and more efficient for the broadcaster to have this pasting done than to attempt it in the studio with inexperienced personnel.

Guide Cards

To facilitate the filing and subsequent speedy location of a particular title, it is recommended that guides of what is known as the "Wabash Natural System of Indexing" be used. Our own experience shows this to be the most efficient guide system available for this particular Index. Full particulars and price of this Index-guide may be obtained from Metal Office Furniture Company, 205 East 42nd St., New York City.

Filing Cabinets

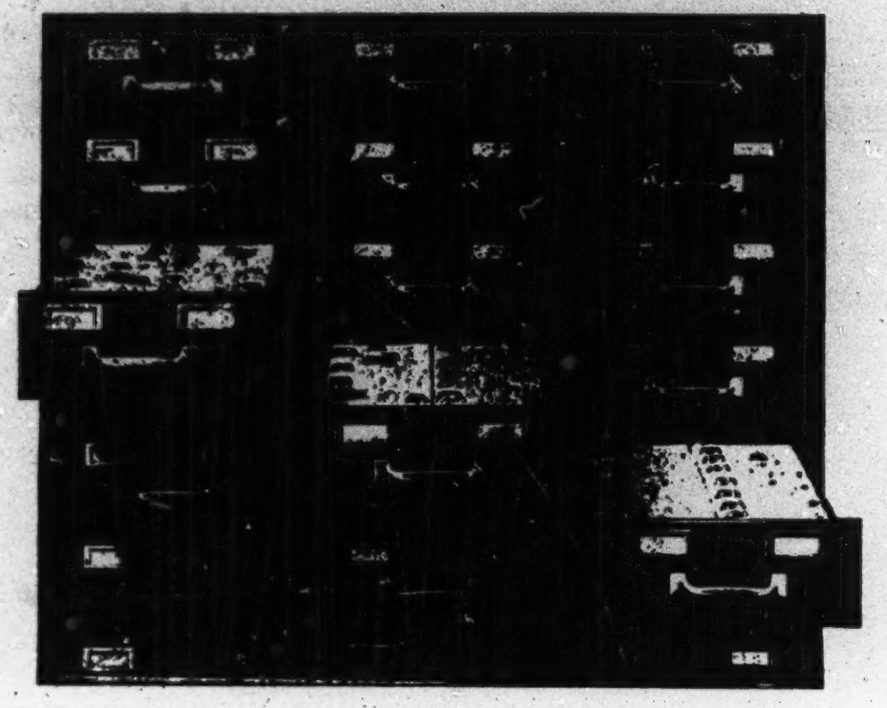
We use, and recommend the "Steelcase" 10-drawer cabinet, No. 1221. Each drawer of this model has two compartments, 26" deep, for 3 x 5 cards. One unit will accommodate about 50,000 cards. The price of this cabinet is about $120 f.o.b. Grand Rapids, Mich. Full information may be had upon inquiry of your local dealer in such equipment, or Metal Office Furniture Company, Grand Rapids, Michigan. Floor space required for 3 cabinets is 30" deep by 40" wide.



The ASCAP Index and cabinets required to accommodate it, with guide cards, as compiled to date. Three cabinets are required.

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Close-up showing open drawers with Index and guide cards.

Uses of the ASCAP Index

Purposes to be served by the Index include:

1. Checking programmed musical compositions to ascertain in advance of performance the copyright ownership to avoid infringement through performing copyrighted compositions for which the station does not hold license.

2. Facilitate the work of program building by providing complete and authentic information re title, composer, author, publisher, year of copyright, etc., of most (and finally, when completed, all) compositions which the broadcaster is likely to use.

3. Provide indexed storage facilities wherein the broadcaster may insert cards covering his library of phonograph records, electrical transcriptions, etc., and maintain on such cards reference records as to location in library, date of purchase, dates and numbers of uses, and other useful data.

4. Encourage the program personnel in a habit of carefully checking, in advance of performance, copyrighted ownerships, proper titles, etc.

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Cost of Installation

The approximate cost of complete installation of the ASCAP Index to date would be about as follows:

The ASCAP Index	No charge
Estimated express charges	$ 3.00
Cost for pasting (optional)	171.00
3 "Steelcase" cabinets, No. 1221, or equivalent—about	360.00
1 "Wabash Natural Index" guides	70.00
	$604.00
Estimated clerical cost of placing cards in Index in alphabetical order	100.00
	$704.00

In General

Entirely regardless of differences of opinion amongst broadcasters themselves, or between them and ASCAP as to the most practicable and just formula under which copyright licenses should be secured, there remain the fundamental facts that broadcasting is "public performance for purposes of profit"; that such performance of a copyrighted musical work is unlawful unless licensed by the copyright owner, and that the obligation rests upon the broadcaster to ascertain the ownership and secure license of the owner, *before* thus publicly performing his copyrighted work.

No matter whether music licenses are held from societies such as ASCAP, or from individuals, and no matter how much or how little they cost, and no matter what formula governs the use, the careful and law-abiding broadcaster should equip his station and staff so as to minimize the hazard of making illegal use of copyrights or any other property.

ASCAP's endeavor is to assist the broadcaster, in every possible way, to build up in his own studio and under his own control an efficient and comprehensive Index which besides great practical usefulness incident to program building will afford a reasonable insurance against musical copyright infringement. To this end it has undertaken the onerous task and incurred the very substantial cost of preparing and offering the ASCAP Index.

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Program builders, musical directors, and all concerned are invited to query us regarding any matter in connection with which we may be of service.

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS
30 Rockefeller Plaza
New York City

New York, July 10, 1939

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AMERICAN SOCIETY OF COMPOSERS
AUTHORS AND PUBLISHERS
THIRTY ROCKEFELLER PLAZA
NEW YORK CITY

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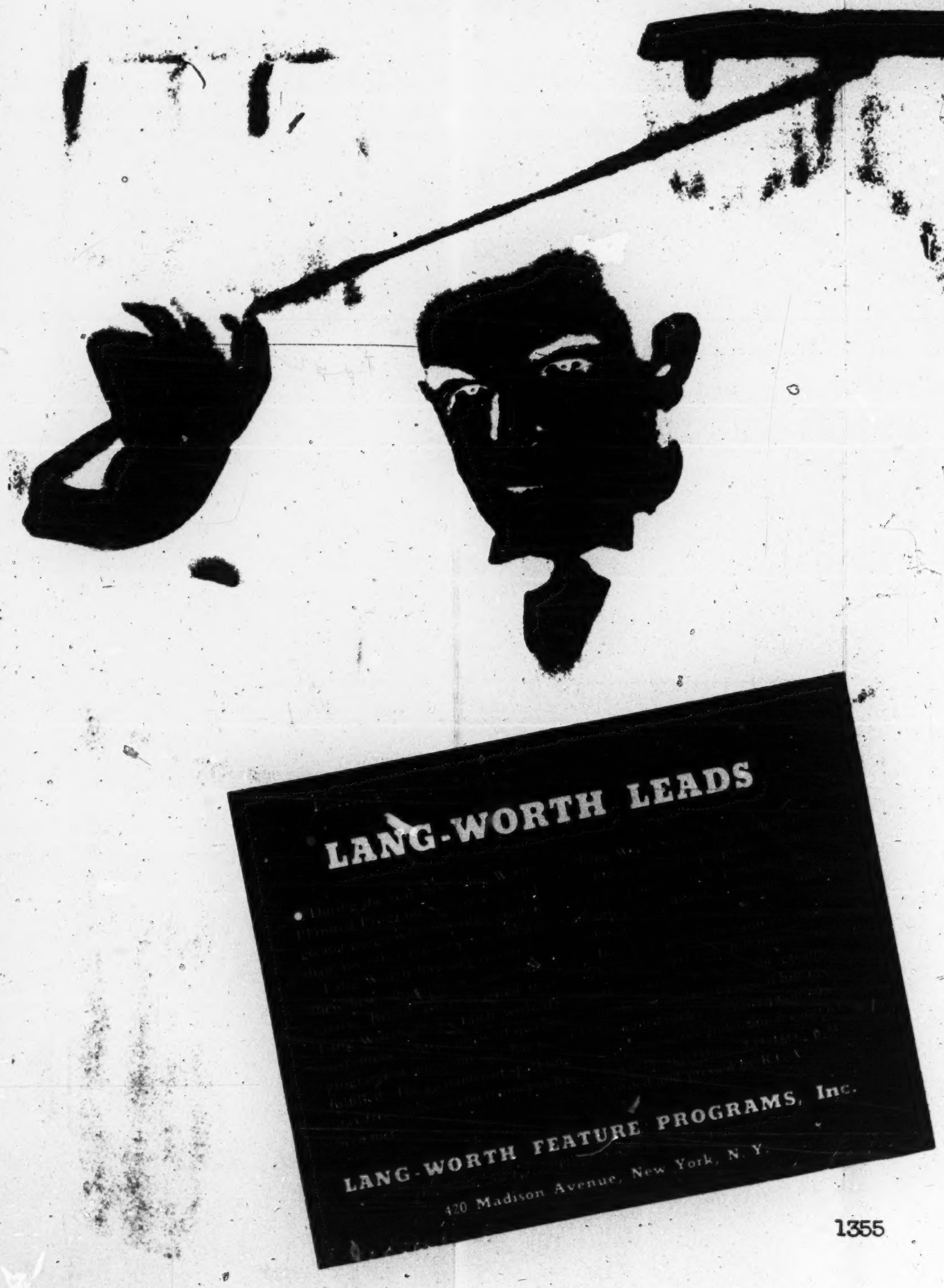
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PLAINTIFF'S EXHIBIT NO. 35

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PLAINTIFFS' EXHIBIT 36

Resume
ASCAP Foreign Accounts
1936 – 1939

	1936		1937		1938		1939	
	Received	Paid	Received	Paid	Received	Paid	Received	Paid
Argentine	2,080.76	.....	.....	222.28	.....	.....	2,122.11	2,496.60
Australia	.....	.....	4,305.21	.....	.....	.....	.....	.....
Austria	.....	4,000.00	3,616.24	22,727.49	18,572.98	23,090.28	29,345.62	34,524.26
Belgium	.....	.....	.....	.....	.....	200.00	.....	908.53
Brasil	748.50	.....	.....	.....	711.16	892.60	.....	.....
Bulgaria	.....	.....	.....	.....	.....	.....	.....	.....
Canada	20,220.28	.....	35,279.94	.....	35,069.04	.....	.....	454.27
Czecho Slovakia	125.86	.....	.....	.....	.....	.....	.....	.....
Denmark	3,450.34	500.00	.....	.....	6,884.59	1,127.27	3,011.51	1,817.07
England	109,314.21	95,000.00	121,527.83	95,000.00	160,992.11	240,777.57	.....	58,876.91
Finland	.....	.....	165.61	487.07	166.41	471.00	.....	.....
France	115,591.74	.....	86,944.66	46,512.42	56,443.60	92,352.96	41,075.10	83,161.46
Germany	.....	120.00	.....	.....	26,849.74	36,662.51	12,356.05	14,536.53
Hungary	.....	.....	7,255.60	2,580.46	1,775.94	2,249.93	1,158.38	1,362.80
Italy	14,590.03	.....	210.52	.....	25,056.01	26,983.05	14,190.08	16,694.21
Jugo Slavia	.....	.....	.....	.....	.....	.....	564.78	.....
Norway	2,612.64	.....	.....	1,389.26	.....	3,436.95	808.67	5,451.20
Poland	.....	.....	.....	.....	.....	.....	1,507.30	.....
Portugal	175.45	.....	137.32	277.85	123.70	139.22	237.49	908.53
Rumania	.....	.....	477.00	.....	2,085.19	300.00	361.43	.....
Spain	.....	.....	.....	.....	.....	.....	.....	237.41
Sweden	13,212.69	.....	.....	.....	22,532.03	682.95	.....	566.48
Switzerland	.....	.....	4.21	277.85	.....	139.22	5.74	.....
	282,122.50	99,620.00	259,924.14	169,474.68	357,262.50	429,505.51	106,744.26	221,996.26

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Neb. Trial Exhibit No. 38

WILLIAM J. MILL

TITLE OF COMPOSITION	COLLABORATOR/S	PUBLISHER	COPYRIGHT DATE	RENEWED	REMARKS
ALL I WANT IS JUST A LITTLE CABIN		SHAPIRO,BERNSTEIN& CO.	JULY 13,1935		
ALONE AT A TABLE FOR TWO	D.RICHMAN/T.FIORITO	SHAPIRO,BERNSTEIN& CO.	DEC. 23,1935		
ANGELINE	T.WALLER	EXCLUSIVE PUBLICATIONS	AUG. 5,1932		
ARE YOU SURE YOU LOVE ME	P.DE ROSE	SUPERIOR MUSIC INC.	MAY 8,1933		
ARIZONA MOON	W.RASKIN/F.RUSH	MILLS MUSIC INC.	APR. 13,1931		
BELLS OF NORMANDIE	J.KLENNER	SHAPIRO,BERNSTEIN& CO.	JUNE 14,1935		
BILLY HILL'S AMERICAN HOME SONGS		SHAPIRO,BERNSTEIN& CO.			
BLUE CHINA ROSE	K.PARKER	EXCLUSIVE PUBLICATIONS	JULY 29,1932		
BLUE MOON BAY	W.RASKIN/G.BAHRT	VINCENT YOUMANS INC.	NOV. 25,1929		
BUGGY (THE) SONG	J.YOUNG	SHAPIRO,BERNSTEIN& CO.	DEC. 13,1933		
BUILD YOUR NEST IN THE WEST		MC CLURE PUB. CO.	DEC. 27,1926		
BULL FIDDLE BLUES		EXCLUSIVE PUBLICATIONS	AUG. 5,1932		
CABIN IN THE CAROLINES	E.BURNETT	SHAPIRO,BERNSTEIN& CO.	1938		
CARIOCA : SEE 'A STREET IN HAVANA'					
CARMENDITA	L.YOELL	FLORINTINE MUSIC. CO.	NOV. 13,1923		
CLEAR LAKE HIGHLAND MOON	L.YOELL	CLEAR LAKE HIGHLAND CO.	APR. 14,1925		
CLOUDS WILL SOON ROLL BY	H.WOODS	SHAPIRO,BERNSTEIN& CO.	JUNE 2,1932		
COLORADO MEMORIES		SHAPIRO,BERNSTEIN& CO.	SEPT.12,1935		
COME HOME TO PEACEFUL VALLEY	H.MANNERS	MASON MUSIC CO.	MAY 15,1933		
COLORADO MOON	A.FRAZZINI/J.LEVENSON	SHAPIRO,BERNSTEIN& CO.	JULY 20,1933		
CROSS THE BAY FROM MANDALAY	A.SMITH		JUNE 11,1926		
DADDY OF MINE	R.LANDFIELD		FEB. 26,1924		
DON'T LET THE FIRE GO OUT		SHAPIRO,BERNSTEIN& CO.	AUG. 22,1936		
DOWN THE OLD TOBACCO ROAD		SHAPIRO,BERNSTEIN& CO.	FEB. 7,1934		
DREAM RIVER		JOE MORRIS MUSIC CO.	FEB. 21,1928		
DRIFTING BACK TO HONOLULU	A.HOFFMANN	MILTON WEIL MUSIC CO.	APR. 4,1930		
DYING (THE) MOUNTAINEER : SEE 'TAKE THOSE MOUNTAINS OUT OF MY WAY'					
EARLY IN THE MORNING BLUES			FEB. 24,1934		
EARLY IN THE MORNING BLUES			NOV. 21,1921		
EMPTY SADDLES		SHAPIRO,BERNSTEIN& CO.	APR. 23,1936		RHYTHM ON THE RANGE
EVERYBODY SINGS A LOVE SONG IN THE SPRING	A.SOLMAN	HARMS INC.	APR. 21,1931		
EVERYBODY WANTS SOMEBODY THAT BELONGS TO SOMEBODY ELSE	R.LANFIELD		FEB. 26,1924		
EVERYTHING HAS CHANGED BUT YOU		SHAPIRO,BERNSTEIN& CO.	AUG. 27,1934		
FADE (THE) IN THE FIREPLACE	P.DE ROSE	SHAPIRO,BERNSTEIN& CO.	DEC. 18,1934		
FADED ROSE			APR. 3,1926		
FATHER, MOTHER, SISTER AND BROTHER	A.BRYAN	SHAPIRO,BERNSTEIN& CO.	DEC. 15,1933		
FOR SALLY AND ME	A.SOLMAN/D.WINBROW	LEO FEIST INC.	JUNE 18,1929		
FORBIDDEN LOVE	E.MADRIGUERA	SHAPIRO,BERNSTEIN& CO.	AUG. 22,1932		
GLORY OF LOVE		SHAPIRO,BERNSTEIN& CO.	APR. 9,1936		
GOLDEN HARVEST DAYS	S.LEWIS	SHAPIRO,BERNSTEIN& CO.	MAR. 7,1934		
GOLDEN MOUNTAIN		SOUTHERN MUSIC PUB CO.	AUG. 8,1932		MO GRAVY FOLIO
GONNA BUILD A LITTLE SHACK 'DOWN THE RAILROAD TRACK		SHAPIRO,BERNSTEIN& CO.	MAY 23,1934		
HAPPY DREAMS	T.TURRUN	OLMAN MUSIC CORP.	JAN. 4,1933		
HAUNTED GROAN	V.YOUNG/J.YOUNG	LEO FEIST INC.	SEPT. 2,1932		
HAVE YOU EVER BEEN LONELY? HAVE YOU EVER BEEN BLUE?	P.DE ROSE	SHAPIRO,BERNSTEIN& CO.	JAN. 20,1933		
HAWAIIAN SERENADE	M.DOLIN/L.CAMPBELL		OCT. 19,1925		
HERE AWAY : SEE 'SUMMER TIME'					
HITCH THE BUGGY TO THE OLD GRAY MARE : SEE 'THE BUGGY SONG'					
HOOK AND LADDER 32		EXCLUSIVE PUBLICATIONS	AUG. 15,1932		
I TRIED TO MAKE SOMEONE SORRY			AUG. 20,1926		
I WONDER WHAT'S BECOME OF MY					

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LIST OF COMPOSITIONS WRITTEN BY WILLIAM J.HILL CON'T. PAGE 2

TITLE OF COMPOSITION	COLLABORATOR/S	PUBLISHER	COPYRIGHT DATE	RENEWED	REMARKS
WONDER WHERE MY OLD GIRL IS TO-NIGHT					
IF I HAD SOMEBODY TO LOVE	P.DE ROSE	SHAPIRO,BERNSTEIN & CO.	OCT. 25, 1935		
I'LL TELL THE WORLD SHE'S MINE	P.DE ROSE	SHAPIRO,BERNSTEIN & CO.	JULY 20, 1933		
I'M A GAMBLER IN LOVE	J.BROWN	COOPERATIVE MUSIC CO.	JULY 18, 1921		
I'M GOIN' TO YODEL MY WAY TO HEAVEN		EXCLUSIVE PUBLICATIONS	JULY 29, 1932		
I'M STRUGGLING IN DREAMS	J.MARVIN	SOUTHERN MUSIC PUB. CO.	SEPT. 9, 1932		
I'M WONDERING WHAT I'LL DO		DE SYLVA, BROWN AND HENDERSON INC.	NOV. 19, 1932		
IN A CHAPEL IN THE MOONLIGHT	J.BROWN	ADRIANA REECE CO. INC.	JULY 20, 1921		
IN THE DARK		SHAPIRO,BERNSTEIN & CO.	OCT. 14, 1936		
IN A LITTLE TOWN ACROSS THE BORDER	D.BERGMAN	SHAPIRO,BERNSTEIN & CO.	SEPT.26, 1935		
IN A LITTLE TWO-BY-FOUR FOR TWO	M.WAYNE	LEO FEIST INC.	AUG. 24, 1933		
IN THE MISSION BY THE SEA	A.HOFFMAN	JOL MORRIS MUSIC CO.	MAR. 19, 1928		
IT'S THE SAME OLD TOWN	A.SOLMAN/O.KREMER	SHAPIRO,BERNSTEIN & CO.	JULY 20, 1933		
IT'S THE SAME OLD TOWN			MAR. 19, 1934		
I'VE GOT A LITTLE SHACK WAY WAY BACK IN CLEAR LAKE HIGHLANDS	L.YOELL	CLEAR LAKE HIGHLAND CO.	MAR. 4, 1926		
I'VE GOT SOMETHING TO LIVE FOR NOW	H.STRIDE	SHAPIRO,BERNSTEIN & CO.	APR. 14, 1925		
JUST AROUND THE BEND FROM THE RAINBOW'S END	F.& J.MC GRAVY	SOUTHERN MUSIC PUB. CO.	NOV. 6, 1933		
JUST A LITTLE SHOP-WORN		SHAPIRO,BERNSTEIN & CO.	OCT. 3, 1932		
JUST AN OLD FASHIONED MOTHER	I.KAUFMAN	SKIDMORE MUSIC CO. INC.	MAY 13, 1932		
JUST SAY (ALOHA)	P.DE ROSE	SHAPIRO,BERNSTEIN & CO.	APR. 29, 1932		
LANGUAGE (THE) OF LOVE	E.MADRIGUERA/O.FRIEND	KORNHEISER MUSIC CO.	OCT. 20, 1936		
LAST (THE) ROUND-UP		SHAPIRO,BERNSTEIN & CO.	DEC. 7, 1932		
LIGHTS OUT		SHAPIRO,BERNSTEIN & CO.	AUG. 21, 1933		
LITTLE BLACK SHAWL		SHAPIRO,BERNSTEIN & CO.	DEC. 12, 1933		
LITTLE (A) BLUE HOUSE IN A LITTLE GREEN LANE		SHAPIRO,BERNSTEIN & CO.	MAY 22, 1934		BILLY HILL'S AMERICAN HOME SONGS
LITTLE (A) NEARER HEAVEN		SHAPIRO,BERNSTEIN & CO.	OCT. 30, 1934		
LITTLE OLD SHOVIN' GROUND		SHAPIRO,BERNSTEIN & CO.	AUG. 6, 1935		
LITTLE SWEETHEART OF THE PRAIRIE	A.SOLMAN	HARMS INC.	MAY 22, 1934		BILLY HILL'S AMERICAN HOME SONGS
LITTLE TOY PIANO		SHAPIRO,BERNSTEIN & CO.	JAN. 22, 1931		
LOCKED UP IN PRISON	J.BURNS	SKIDMORE MUSIC CO. INC.	AUG. 27, 1934		
LONELY LITTLE TOWN	J. MARVIN	SHAPIRO,BERNSTEIN & CO.	OCT. 13, 1932		
LOOKING THRU THE WINDOW OF THE HOUSE YOU CAN'T COME IN	W.RASKIN	SHAPIRO,BERNSTEIN & CO.	NOV. 25, 1933		
LOST	D.RUSSO/F.RUSH	MILTON WEIL MUSIC CO.	MAY 14, 1932		
LOUISVILLE LADY	P.DE ROSE	SHAPIRO,BERNSTEIN & CO.	DEC. 11, 1931		
MAKER OF DREAMS	A.SOLMAN	M.WITMARK & SONS	JUNE 9, 1933		
MANANA - TOMORROW	M.WAYNE	SHAPIRO,BERNSTEIN & CO.	JAN. 5, 1933		
MANY'S THE TIME	L.YOELL		MAY 18, 1933		
MANY'S THE TIME			NOV. 15, 1921		
MAY I HAVE THIS WALTZ WITH YOU MADAME	E.MADRIGUERA	KORNHEISER MUSIC CO.	JAN. 25, 1927		
MEET ME TO-NIGHT IN THE OLD MEETIN' HOUSE		SHAPIRO,BERNSTEIN & CO.	NOV. 30, 1932		
MOON OVER MONTEREY	M. WAYNE	HARMS INC.	MAY 22, 1934		BILLY HILL'S AMERICAN HOME SONGS
MOUNTAINEER'S (THE) SWEETHEART		SKIDMORE MUSIC CO.	JULY 26, 1933		
NIGHT AFTER NIGHT	G.JAMES	MORRIS MUSIC PUB. CO.	OCT. 13, 1932		
NIGHT ON THE DESERT		SHAPIRO,BERNSTEIN & CO.	NOV. 10, 1928		
NOBODY KNOWS WHAT I DO IN MY DREAMS		EXCLUSIVE PUBLICATIONS	MAY 10, 1934		ZIEGFIELD FOLLIES
NOBODY SINGS ME A LOVE SONG	J.CALDWELL		AUG. 5, 1932		
NOBODY SINGS ME A LOVE SONG	L.STALLOUP		MAR. 14, 1927		
OH, SUKIY SUKI, OH, WHICH MEANS I LOVE YOU SO	P.DE ROSE	SHAPIRO,BERNSTEIN & CO.	AUG. 14, 1926		
			APR. 23, 1934		

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LIST OF COMPOSITIONS WRITTEN BY WILLIAM J. HILL CON'T.

TITLE OF COMPOSITION	COLLABORATOR/S	PUBLISHER	COPYRIGHT DATE	RENEWED	REMARKS
OLD (THE) COVERED BRIDGE		SHAPIRO, BERNSTEIN & CO.	MAR. 7, 1934		
OLD FASHIONED NIGHT IN JUNE			JUNE 16, 1926		
OLD MAN OF THE MOUNTAIN	V. YOUNG	EXCLUSIVE PUBLICATIONS	JULY 5, 1932		
OLD MAN'S PARADISE : SEE 'ALL I WANT IS JUST A LITTLE CABIN'					
OLD (THE) SPINNING WHEEL		SHAPIRO, BERNSTEIN & CO.	MAR. 22, 1933		
ON THE GOOD OLD SANTA FE	W. RASKIN	SHAPIRO, BERNSTEIN & CO.	MAR. 21, 1935		
ON A LITTLE STREET IN SINGAPORE	P. DE ROSE	SHAPIRO, BERNSTEIN & CO.	JULY 12, 1937		
ON THE OREGON TRAIL	P. DE ROSE	SHAPIRO, BERNSTEIN & CO.	DEC. 14, 1934		
ON THE ROAD TO AVALON	P. DE ROSE	SHAPIRO, BERNSTEIN & CO.	MAY 23, 1934		
ON THE SHORES OF THE WESTERN SEA	W. RASKIN/F. RUSH	FORSTER MUSIC INC.	JUNE 26, 1930		
ON THE OZARK MOUNTAIN TRAIL	A. SOLMAN	HARMS INC.	JULY 10, 1931		
ONCE UPON A TIME	A. SOLMAN	VINCENT YOUMANS INC.	AUG. 21, 1929		
ONLY A BUM		SHAPIRO, BERNSTEIN & CO.	AUG. 15, 1933		
ONLY A BUM	W. RASKIN		NOV. 14, 1929		
OREGON (THE) TRAIL	P. DE ROSE	SHAPIRO, BERNSTEIN & CO.	MAY 31, 1935		
PEACE OF MIND		SHAPIRO, BERNSTEIN & CO.	NOV. 19, 1935		
PEACEFUL VALLEY : SEE SOME HOME TO PEACEFUL VALLEY					
PENALTY (THE) OF LOVE	D. LEE	KORNHEISER INC.	NOV. 24, 1931		
PLAYMATES		SHERMAN CLAY & CO.	FEB. 3, 1925		
POOR LITTLE GIGOLETTE	J. ETTLINGER	UNIVERSAL MUSIC CO. INC.	JUNE 15, 1931		
PRAIRIE LULLABY		KORNHEISER, SCHUSTER	JAN. 6, 1934		
PUT ON AN OLD PAIR OF SHOES	MRS. BILLY HILL	SHAPIRO, BERNSTEIN & CO.	FEB. 2, 1935		
RAIN	P. DE ROSE	SHAPIRO, BERNSTEIN & CO.	SEPT. 14, 1934		
RIPPLE ALONG LITTLE BROOK	C. GASKILL	SHAPIRO, BERNSTEIN & CO.	FEB. 10, 1934		
ROCK ME TO SLEEP IN MY ROCKY MOUNTAIN HOME	W. RASKIN/F. HOWARD/ N. VINCENT	M.M. COLE PUB. CO.	FEB. 2, 1931		
ROCKABYE MY BABY BLUES	L. YOELL	JOE GOODWIN MUSIC CORP.	MAR. 9, 1923		
ROCKABYE MY BABY ME	J. CALDWELL		MAR. 14, 1927		
ROLLIN' HOME	P. DE ROSE	SHAPIRO, BERNSTEIN & CO.	JUNE 7, 1934		
ROSE OF MONTEREY	L. YOELL/H. BRYANT	SHERMAN CLAY & CO.	JUNE 8, 1922		
SCENE (THE) CHANGES		SHAPIRO, BERNSTEIN & CO.	MAY 19, 1936		
SHADY LANE			MAR. 1, 1926		
SHOWER YOUR BLESSINGS ON MEE SEE 'RAIN'					
SIGH NO MORE	D. LEE	SHAPIRO, BERNSTEIN & CO.	OCT. 11, 1933		
SLEEPY HEAD	M. GUNSKY/ J. BROWN	MILLS INC.	JAN. 17, 1921		
SMOKE FROM A CHIMNEY	P. DE ROSE	SHAPIRO, BERNSTEIN & CO.		1937	
SOMETHING TO REMEMBER	K. VACEK	SHAPIRO, BERNSTEIN & CO.	MAY 31, 1935		
SO LITTLE TIME	P. DE ROSE	SHAPIRO, BERNSTEIN		1938	
STAY A LITTLE CLOSER TO ME		SHAPIRO, BERNSTEIN & CO.	MAY 22, 1934		
STREET IN HAVANA	[illegible]	SHAPIRO, BERNSTEIN & CO.	NOV. 6, 1935		
SUMMER TIME			JAN. 25, 1927		
SUMMER TIME			APR. 5, 1926		
SWEET MISERY OF LOVE	S. SIMONS	SKIDMORE MUSIC CO.	JUNE 30, 1936		
SWEETHEART I'M ON MY WAY	A. SOLMAN	IRVING BERLIN INC.	MAR. 14, 1929		
TAKE THOSE MOUNTAINS OUT OF MY WAY	W. RASKIN/O. HILL	MILLS MUSIC CORP.	OCT. 12, 1931		
TEN HOURS A DAY — SIX DAYS A WEEK		SHAPIRO, BERNSTEIN & CO.	OCT. 7, 1932		
TENNESSEE MOON	L. YOELL/ J. BROWN		DEC. 3, 1921		
THAT OLD SHADY LANE			MAR. 19, 1934		
THAT'S WHAT I CALL HEAVEN	D. WIMBROW/A. SOLMAN	DE SYLVA, BROWN, HENDERSON	FEB. 27, 1929		
THAT'S WHEN YOUR HEARTACHES BEGIN	F. FISHER/W. RASKIN	FISHER MUSIC CO.		1937	
THAT'S WHERE THE SOUTH BEGINS	T. WALLER	EXCLUSIVE PUBLICATIONS	JULY 29, 1932		
THERE'S A BLUE NOTE IN MY SONG OF LOVE	W. RASKIN/A. SOLMAN	VINCENT YOUMANS INC.	AUG. 21, 1929		
THEN YOU'LL UNDERSTAND	L. YOELL/J. BROWN	COOPERATIVE MUSIC PUB.	JULY 20, 1921		

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LIST OF COMPOSITIONS BY WILLIAM J. HILL CON'T.

TITLE OF COMPOSITION	COLLABORATOR/S	PUBLISHER	COPYRIGHT DATE	RENEWED	REMARKS
THERE'S A BEAUTIFUL LAND CALLED SOMEWHERE	J.MARVIN/J.ETTLINGER	METRO-GOLDWYN-MAYER	MAR. 23, 1931		
THERE'S A CABIN IN THE PINES		SHAPIRO,BERNSTEIN & CO.	APR. 22, 1933		
THERE'S A HOME IN WYOMIN'	P. DE ROSE	SHAPIRO,BERNSTEIN & CO.	OCT. 27, 1933		
THERE'S A LITTLE BOX OF PINE ON THE 7129	J. ETTLINGER/D. LEE	SHAPIRO,BERNSTEIN & CO.	OCT. 21, 1932		
THERE'S NO LIGHT IN THE LIGHT-HOUSE TO-NIGHT	J. ETTLINGER	TRUE STORY SONGS INC.	SEPT. 3, 1931		
THERE'S NO LIGHT IN THE WINDOW	V. YOUNG	EXCLUSIVE PUBLICATIONS	AUG. 11, 1932		
THERE'S A WILD ROSE THAT GROWS ON THE SIDE OF THE HILL		SHAPIRO,BERNSTEIN & CO.	MAY 22, 1934		
THEY CUT DOWN THE OLD PINE TREE	W. RASKIN/E.ELISCU	MILLER MUSIC INC.	NOV. 25, 1929		
TIMBER	B. EMMERICH	SHAPIRO,BERNSTEIN & CO.	OCT. 5, 1936		
TIN PAN ALLEY			FEB. 21, 1925		
TREE THAT FATHER PLANTED FOR ME		SHAPIRO,BERNSTEIN & CO.	NOV. 16, 1933		
TWILIGHT DOWN IN TENNESSEE	P. DE ROSE	SHAPIRO,BERNSTEIN & CO.	JUNE 12, 1933		
TWO LITTLE WINDOWS AND ONE LITTLE DOOR	S. LEWIS	SHAPIRO,BERNSTEIN & CO.	NOV. 3, 1933		
VILLAGE BY THE SEA	L. YOELL/J. BROWN	COOPERATIVE MUSIC PUB.	JULY 20, 1921		
WAGON WHEELS	P. DE ROSE	SHAPIRO,BERNSTEIN & CO.	JAN. 19, 1934		
WAS IT THE MOONLIGHT		SHAPIRO,BERNSTEIN & CO.	JULY 31, 1935		
WAS THERE EVER A NIGHT LIKE THIS	L.J.LITTLE	KORNHEISER INC.	JAN. 19, 1932		
WEDDING (THE) GOWN THAT NELLIE NEVER WORE	W. RASKIN	SHAPIRO,BERNSTEIN & CO.	SEPT.30, 1929		
WEDDING OF THE VALLEY AND THE HILLS	W. RASKIN/E. ELISCU	VINCENT YOUMANS INC.	APR. 30, 1930		
WEST (THE), A NEST AND YOU	L. YOELL	SHERMAN CLAY & CO.	JULY 31, 1922		
WEST-BOUND FREIGHT		MILLS MUSIC INC.	AUG. 15, 1932		
WHEN I HEAR THE SONG OF THE RIVER	A. SOLMAN	E.B.MARKS MUSIC CO.	DEC. 4, 1930		
WHEN I HEAR YOU SAY I LOVE YOU	L. STALLCUP		AUG. 14, 1926		
WHEN I WAS A BOY FROM THE MOUNTAINS	V. YOUNG/J. KAPP	LEO FEIST INC.	MAY 25, 1932		
WHEN LOVE KNOCKS AT YOUR HEART	P. DE ROSE	SHAPIRO,BERNSTEIN & CO.	FEB. 21, 1935		
WHEN IT'S MOONLIGHT ON THE OLD MILL STREAM		SHAPIRO,BERNSTEIN & CO.	AUG. 16, 1933		
WHEN PANAMA STARTS STRUMMIN' ON HIS OLD GUITAR		SHAPIRO, BERNSTEIN& CO.	AUG. 16, 1933		
WHEN THE SUN HIDES AWAY FOR THE DAY	B. WARNER	SHAPIRO,BERNSTEIN & CO.	JULY 8, 1936		
WHEN THERE'S JUST ONE PLACE LEFT TO GO		SHAPIRO,BERNSTEIN & CO.	FEB. 13, 1934		
WHEN YOU PLAYED THE ORGAN AND I SANG AULD LANG SYNE	A. SOLMAN	E.B.MARKS MUSIC CO.	DEC. 15, 1931		
WHILE THE BAND IS PLAYING			JAN. 25, 1927		
WHO DO YOU SUPPOSE			JAN. 25, 1927		
WHY AM I BLUE	P. DE ROSE	SHAPIRO,BERNSTEIN & CO.	SEPT.28, 1934		
WHY DID YOU LOVE ME AT ALL	M. SPENCER	DE SYLVA,BROWN,HENDERSON	NOV. 19, 1932		
YOU GOTTA NO DE NO	J.R.ROBINSON	EXCLUSIVE PUBLICATIONS	JULY 12, 1932		
YOU SHOULD HAVE TOLE ME	E. MADRIGUERA	SHAPIRO,BERNSTEIN & CO.	AUG. 30, 1935		
YOU'LL GROW SWEETER SWEETHEART	P. DE ROSE	SHAPIRO,BERNSTEIN & CO.	AUG. 16, 1935		

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PLAINTIFF'S EXHIBIT NO. 39

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LIST OF COMPOSITIONS

BY

JOHN PHILIP SOUSA

LIST OF COMPOSITIONS BY JOHN PHILIP SOUSA

TITLE OF COMPOSITION	COLLABORATOR/S	PUBLISHER	COPYRIGHT DATE	RENEWED	REMARKS
ABEND BEI SOUSA	ARR.-KARL HEISE	CHAEL			
ACROSS THE DANUBE	J. P. SOUSA	ELLIS			
AH ME					
ALWAYS FAITHFUL	ESTELLE CLARK				
	ARR.-PALMER CLARK	CARL FISCHER INC.	APR. 21, 1930		
AMERICA FIRST		HARMS INC.	MAR. 18, 1916		
AMERICAN GIRL	LEONARD LIEBLING	JOHN CHURCH CO.	NOV. 9, 1909	JAN. 4, 1937- JANE VAN M. SOUSA	THE GLASS BLOWERS
AMERICAN MAID	LEONARD LIEBLING	JOHN CHURCH CO.	MAR. 20, 1914		
AMERICAN WEDDING MARCH		SAM FOX PUB. CO.			
AMMONIA		JOHN CHURCH CO.	1898	MAY 6, 1926- JOHN P. SOUSA	CHARLATAN
ANCHOR AND STAR MARCH		JOHN PHILIP SOUSA	AUG. 22, 1918		
ANCIENT AND HONORABLE ARTILLERY COMPANY		SAM FOX PUB. CO.	JULY 23, 1924		
ANNABEL LEE	EDGAR ALLAN POE	THEODORE PRESSER CO.	MAY 5, 1931		
AT THE KING'S COURT		JOHN CHURCH CO.	1905	FEB. 1933- JANE VAN M. SOUSA	SUITE
AT THE MOVIES		CARL FISCHER INC.	AUG. 28, 1922		SUITE
ATLANTIC CITY PAGEANT		SAM FOX PUB. CO.	SEPT. 26, 1927		
AVIATORS (THE)		THEODORE PRESSER CO.	SEPT. 4, 1931		
BALANCE ALL AND SWING PARTNERS		CARL FISCHER INC.	AUG. 28, 1922		
BEAU IDEAL		CARL FISCHER INC.	APR. 17, 1893	MAR. 7, 1921- JOHN P. SOUSA	
BELLE OF BAYOU TECHE	O. E. LYNNE	JOHN CHURCH CO.	DEC. 11, 1911		
BELLE OF CHICAGO		CARL FISCHER INC.	MAR. 6, 1894	FEB. 6, 1922- JOHN P. SOUSA	
BEN BOLT MARCH		CARL FISCHER INC.	DEC. 27, 1888	DEC. 26, 1916- JOHN P. SOUSA	
BEN HUR		OLIVER DITSON			
BLACK HORSE TROOP		SAM FOX PUB. CO.	JULY 6, 1925		
BLACK MAN		JOHN CHURCH CO.	NOV. 1, 1910		DWELLERS IN THE WESTER WORLD
BLUE RIDGE I'M COMING BACK TO YOU		HARMS INC.	JUNE 27, 1917		
BONNIE ANNIE		J. W. PEPPER CO.			
BOOK OF AIRS FOR THE VIOLIN		FISCHER			
BOOK OF INSTRUCTIONS FOR TRUMPET & DRUM		FISCHER			
BOOTS	RUDYARD KIPLING	HARMS INC.	MAY 11, 1916		
BOUQUET OF BELOVED INSPIRATIONS		MSS			
BOY SCOUTS OF AMERICA		HARMS INC.	DEC. 16, 1916		
BOYS ARE HOME AGAIN		HAROLD FLAMMER INC.	DEC. 23, 1918		
BOYS IN NAVY BLUE		HARMS INC.	FEB. 4, 1918		
BRIDE ELECT		JOHN CHURCH CO.	1897	OCT. 17, 1925- JOHN P. SOUSA	COMIC OPERA
BULLETS AND BAYONETS		G. SCHIRMER INC.	FEB. 8, 1919		
CADETTEN (GER. TITLE FOR HIGH SCHOOL CADETS)					
CADETTEN-MARSCH	ARR- LEOPOLD WENINGER	ANTON J. BENJAMIN	OCT. 10, 1927		
CAMERA STUDIES		SAM FOX PUB. CO.	NOV. 11, 1921		
CAMPFIRE GIRLS		SAM FOX PUB. CO.	OCT. 11, 1923		LEAVES FROM MY NOTE B
CAPITAN (EL)				MAY 3, 1924- JOHN P. SOUSA	
CAPRIAN TARANTELLA		JOHN CHURCH CO.	1897	JAN. 29, 1927- JOHN P. SOUSA	THE BRIDE ELECT
CARD SONG		THEODORE PRESSER CO.			
CARRIER-PIGEON (THE)	HARRY BACHE SMITH	JOHN CHURCH CO.	1906	FEB. 1934- JANE VAN M. SOUSA	THE FREE LANCE
CENTURY OF PROGRESS		THEODORE PRESSER CO.	SEPT. 4, 1931		
CHANTY MAN'S MARCH		JOHN PHILIP SOUSA	JULY 13, 1918		
CHARIOT RACE		OLIVER DITSON			BEN HUR
CHARLATAN	CHARLES KLEIN	JOHN CHURCH CO.	1898	MAY 6, 1926- JOHN PHILIP SOUSA	OPERA

LIST OF COMPOSITIONS BY JOHN PHILIP SOUSA – CONT'D

TITLE OF COMPOSITION	COLLABORATOR/S	PUBLISHER	COPYRIGHT DATE	RENEWED	REMARKS
CHARLATAN LANCERS		JOHN CHURCH CO.	1898	SEPT. 23, 1926– JOHN P. SOUSA	
CHARLATAN MARCH		JOHN CHURCH CO.	1893	MAY 6, 1926– JOHN P. SOUSA	
CHARLATAN SELECTIONS		JOHN CHURCH CO.	1895	FEB. 1, 1927– JOHN P. SOUSA	
CHARLATAN WALTZES		JOHN CHURCH CO.	1895	OCT. 30, 1926– JOHN P. SOUSA	
CHILDREN'S BALL		SAM FOX PUB. CO.	NOV. 11, 1921		CAMERA STUDIES
CHRIS AND THE WONDERFUL LAMP	GLEN MACDONOUGH	JOHN CHURCH CO.	1899	SEPT. 15, 1927– JOHN P. SOUSA	OPERA
CIRCUMNAVIGATORS (THE) CLUB		THEODORE PRESSER CO.	NOV. 27, 1931		
CO-EDS (THE) OF MICHIGAN		JOHN CHURCH CO.	MAY 5, 1925		
COLUMBIA'S PRIDE		THEODORE PRESSER CO.	DEC. 21, 1914		
CONGRESS HALL MARCH		JOHN CHURCH CO.	DEC. 31, 1885	DEC. 13, 1913– JOHN P. SOUSA	
COQUETTE (THE)		CARL FISCHER INC.	DEC. 28, 1889	AUG. 18, 1917– CARL FISCHER INC.	
CRAFTY VILLIAN AND TIMID MAID		CARL FISCHER INC.	AUG. 28, 1922		AT THE MOVIES
CRUSADER (THE) MARCH			MAR. 1, 1889	FEB. 17, 1917– JOHN P. SOUSA	
CUCKOO GALOP		LEE & WALKER			
DANCE HILARIOUS	JOHN PHILIP SOUSA	JOHN CHURCH CO.	NOV. 16, 1922		
DAUGHTERS OF TEXAS		JOHN CHURCH CO.	APR. 2, 1930		
DAUNTLESS (THE)) BATTALION		JOHN CHURCH CO.	MAR. 15, 1923		
'DEED I HAS TO LAUGH		ELLIS			
DEFILIER MARSCH DES CORCORAN KADETTEN		RUHLE			
DEFILIER MARSCH DES NATIONAL TRUPPE		RUHLE			
DESIREE		J. W. PEPPER			OPERA
DESTRUCTION OF POMPEII AND NYDIA'S DEATH		JOHN CHURCH CO.	JULY 15, 1912		LAST DAYS OF POMPEII
DIPLOMAT (THE)		JOHN CHURCH CO.	1904	MAR. 1932– JOHN P. SOUSA	
DIRECTORATE (THE) MARCH		JOHN CHURCH CO.	SEPT. 29, 1894	MAR. 16, 1922– JOHN P. SOUSA	
DO WE WE DO			JAN. 26, 1899	JAN. 13, 1917– JOHN P. SOUSA	
THE DRAGONS		MSS			
DRAGOONS (THE)		MSS			OPERA
DRIFTING TO LOVELAND		SAM FOX PUB. CO.	NOV. 11, 1921		CAMERA STUDIES
DWELLERS IN THE WESTERN WORLD		JOHN CHURCH CO.	NOV. 1, 1910		SUITE
EASTER MONDAY ON THE WHITE HOUSE LAWN		JOHN CHURCH CO.	APR. 24, 1929		
ENSIGN (THE)		SAM FOX PUB. CO.			
FAIREST OF THE FAIR		JOHN CHURCH CO.	AUG. 28, 1908	JAN. 2, 1936– JANE VAN M. SOUSA	
FAITHLESS KNIGHT AND PHILOSOPHIC MAID		JOHN CHURCH CO.	1898	MAY 6, 1926– JOHN P. SOUSA	THE CHARLATAN
FANCY OF THE TOWN		MSS			
FANNY	GLEN MACDONOUGH	JOHN CHURCH CO.	1899	OCT. 15, 1927– JOHN P. SOUSA	CHRIS & THE WONDERFUL LAMP
FEAST OF THE MONKEYS		BOBBS MERRIL & CO.	1905	AUG. 1933– JANE VAN M. SOUSA	PIPETOWN SANDY
FEDERAL (THE) MARCH		JOHN CHURCH CO.	JAN. 13, 1911		
FESTIVAL					
FIFTH (THE) STRING		BOSEN-MERRILL CO.	JAN. 6, 1902		
FIGHTING (THE) RACE	J. L. C. CLARKE	HAROLD FLAMMER INC.	MAY 29, 1919		
FLAGS OF FREEDOM		CARL FISCHER INC.	OCT. 19, 1918		
FLASHING EYES OF ANDALUSIA		SAM FOX PUB. CO.	NOV. 11, 1921		CAMERA STUDIES
FLOR (LA) DE SEVILLA		JOHN CHURCH CO.	MAY 3, 1929		

LIST OF COMPOSITIONS BY JOHN PHILIP SOUSA — CONT'D

TITLE OF COMPOSITION	COLLABORATOR/S	PUBLISHER	COPYRIGHT DATE	RENEWED	REMARKS
FOREVER AND A DAY	IRVING BIBO	STASNY MUSIC CORP.	OCT. 27, 1927		
FOX COLLECTION OF SOUSA MARCHES		SAM FOX PUB. CO.	FEB. 14, 1927		
FOX LOOSE LEAF COLLECTION OF SOUSA MARCHES		SAM FOX PUB. CO.	JULY 5, 1926		
FREE LANCE	HARRY BACHE SMITH	JOHN CHURCH CO.	1906	FEB. 1934— JANE VAN M. SOUSA	COMIC OPERA
FREE LANCE MARCH		JOHN CHURCH CO.	1906	FEB. 1934— JANE VAN M. SOUSA	
FREE LANCE SELECTION		JOHN CHURCH CO.	1906	FEB. 1934— JANE VAN M. SOUSA	
FREE LANCE SONG "I AM A SALARIED WARRIOR"		JOHN CHURCH CO.	1906	FEB. 1934— JANE VAN M. SOUSA	THE FREE LANCE
FREE LUNCH CADETS		J. M. STODDART & CO.	1877		
FREIHEITS MARSCH		BOSWORTH & CO.			
FREUNDSCHAFTS MARSCH (GER. TITLE FOR "HANDS ACROSS THE SEA")		ANTON J. BENJAMIN			
FROM MAINE TO OREGON		JOHN CHURCH CO.	FEB. 11, 1913		THE GLASS BLOWERS
FUNERAL MARCH (SEE "HONORED DEAD")					
GALLANT SEVENTH		SAM FOX PUB. CO.	JULY 11, 1922		
GERIAL HOSTESS (THE)		SAM FOX PUB. CO.	OCT. 11, 1923		LEAVES FROM MY NOTE BOOK
GEORGE WASHINGTON BICENTENNIAL		SAM FOX PUB. CO.	NOV. 17, 1930		
GIRLS WHO HAVE LOVED	HARRY BACHE SMITH	JOHN CHURCH CO.	1906	FEB. 1934— JANE V. M. SOUSA	THE FREE LANCE
GLADIATOR MARCH		JOHN CHURCH CO.	DEC. 30, 1886	FEB. 13, 1914— JOHN P. SOUSA	
GLADIATORENMARSCH (GER. TITLE FOR "GLADIATOR")	ARR—KEMPFFENDORFFSTEIN	RUHLE			
GLASS (THE) BLOWERS	LEONARD LIEBLING	JOHN CHURCH CO.	NOV. 5, 1909	JAN. 4, 1937— JANE VAN M. SOUSA	LYRICAL COMEDY
GLIDING (THE) GIRL		JOHN CHURCH CO.	SEPT. 25, 1912		
GLOCKEN (DIE) VON CHICAGO (GER. TITLE FOR "BELLE OF CHICAGO")					
GLORY OF THE YANKEE NAVY	KENNETH S. CLARK	JOHN CHURCH CO.	SEPT. 23, 1909	JAN. 4, 1937— JANE VAN M. SOUSA	THE YANKEE GIRL
GOLDEN (THE) CARS	JOHN PHILIP SOUSA	JOHN CHURCH CO.	1897	MAR. 23, 1927— JOHN P. SOUSA	
GOLDEN JUBILEE		SAM FOX PUB. CO.	JULY 26, 1928		
GOLDEN STAR		CHAPPELL & CO., LTD.	MAR. 19, 1919		
GOOSE (THE) GIRL'S SONG	HARRY BACHE SMITH	JOHN CHURCH CO.	1906	FEB. 1934— JANE VAN M. SOUSA	THE FREE LANCE
GRAND FESTIVAL MARCH		JOHN CHURCH CO.	MAY 17, 1911		
GRAND PROMENADE AT THE WHITE HOUSE		JOHN CHURCH CO.	MAR. 30, 1914		TALES OF A TRAVELER
GREAT LAKES		HARMS INC.	FEB. 2, 1918		
GRIDIRON CLUB		SAM FOX PUB. CO.	JUNE 18, 1926		
GUIDE RIGHT		JOHN CHURCH CO.	DEC. 31, 1885	DEC. 13, 1913— JOHN CHURCH CO.	

LIST OF COMPOSITIONS BY JOHN PHILIP SOUSA

TITLE OF COMPOSITION	COLLABORATOR/S	PUBLISHERS	COPYRIGHT DATE	RENEWED	REMARKS
HAIL TO THE SPIRIT OF 'LIBERTY		THEO. PRESSER	1900	MAY 25,1928 JOHN P.SOUSA	
HAIR		JOHN CHURCH CO.	1906	FEB. 1934 JANE V.M.SOUSA	
HANDS ACROSS THE SEA		JOHN CHURCH Co.	1899	MAR.23,1927 JOHN P.SOUSA	
HARMONICA WIZARD		THEO. PRESSER Co.	OCT. 10,1930		
HAVE YOU GOT THAT TIRED FEELING		JOHN CHURCH Co.	1899	MAR.23,1927 JOHN P.SOUSA	
HER GRACE, THE DUCHESS		JOHN CHURCH CO.	1905	FEB.1933 JOHN P.SOUSA	
HER LADYSHIP, THE COUNTESS		JOHN CHURCH CO.	1905	FEB.1933 JOHN P.SOUSA	
HER MAJESTY, THE QUEEN		JOHN CHURCH CO.	1905	FEB. 1933 JOHN P.SOUSA	
HIGH SCHOOL CADETS		CARL FISCHER INC.	1891	MAR. 7,1921 JOHN P.SOUSA	
THE HIPPODROME		T.B.HARMS			
HOCHZEITS MARSCH ✤ GERMAN TITLE FOR "BRIDE ELECT" SEE					
HOMEWARD BOUND					
HONORED DEAD		CHURCH	MAY 26,1886	APR.10,1914 JOHN P.SOUSA	
HOPING					
I AM A SALARIED WARRIOR SEE- "SONG OF THE FREE LANCE"					
I NEVER WAS RIGHT IN MY LIFE		CHURCH	OCT. 6,1906	FEB.1934 JANE V.M.SOUSA	FREE LANCE
I TOO WAS BORN IN ARCADIE		THEO.PRESSER	1896		THREE QUOTATIONS
I WONDER		ELLIS			
IMMER FIDEL -GERMAN TITLE! SEE - "SEMPER FIDELIS"					
IMPERIAL EDWARD		JOHN CHURCH CO.	1902	FEB.21,1930 JOHN P.SOUSA	
IMPRESSIONS AT THE MOVIES		CARL FISCHER INC.	AUG.28,1922		
IN DARKEST AFRICA		JOHN CHURCH Co.	1896		THREE QUOTATIONS
IN THE DIMNESS OF TWILIGHT	L.LIEBLING	THEO.PRESSER			GLASS BLOWERS ?
IN FLANDERS FIELDS	JOHN MCCRAE	G.SCHIRMER INC.	FEB.27,1918		
IN THE HOUSE OF BUMBO AND STRATONICE		JOHN CHURCH Co.	JULY 15,1912		LAST DAYS OF POMPEII
IN THE LAND OF THE GOLDEN FLEECE		JOHN CHURCH CO.	OCT. 7,1912		
IN MEMORIAM OF PRESIDENT GARFIELD		STOCK			
IN PULPIT AND PEW		(MSS)			
IN THE REALM OF THE DANCE		(MSS)			
INDIAN LOVE SONG	L.LIFELING	JOHN CHURCH Co.	1904		
INTAGLIO					
INTERNATIONAL CONGRESS		CARL FISCHER INC.	JULY 15,1913		
INVINCIBLE EAGLE		JOHN CHURCH	1901	MAR.27,1929 JOHN P.SOUSA	
IRISH DRAGON					
IT DEPENDS UPON THE AIR - SEE! HAIR					
I'VE BEEN FIGHTING		BOBBS,MERRILL & Co.	1905	AUG.1933 JANE V.M.SOUSA	PIPETOWN SANDY
I'VE MADE MY PLANS FOR THE SUMMER		CHURCH	MAY 10,1907	JAN.10,1935 JANE V.M.SOUSA	
JACK TAR		JOHN CHURCH Co.	1903	MAY 29,1931 JOHN P.SOUSA	
JAZZ AMERICA		(MSS)			
KADETTEN MARSCH - SEE! ZWEI BELIEBTE MARSCHE					
KAFFIR ON THE KAROO		JOHN CHURCH Co.	MAR.30,1914		TALES OF A TRAVELER-A.
KALORAMA		(MSS)			

LIST OF COMPOSITIONS BY JOHN PHILIP SOUSA CON'T.

TITLE OF COMPOSITION	COLLABORATOR/S	PUBLISHERS	COPYRIGHT DATE	RENEWED	REMARKS
KANONIER MARSCH - GERMAN TITLE FOR "MAN BEHIND THE GUN"					
KANSAS WILDCATS		THEO.PRESSER CO.	MAY 19,1931		
KATHERINE OUVERTURE		JOHN CHURCH CO.			
KEEPING STEP WITH THE UNION		THEO.PRESSER CO.	MAY 3,1921		
KELLY, BURKE AND SHEA		HARMS INC.			
KING COTTON		JOHN CHURCH CO.	1905	FEB.21,1923 - JOHN P.SOUSA	
KING OF FRANCE		JOHN CHURCH	1896	AUG.1,1924 JOHN P.SOUSA	THREE QUOTATIONS
KLANGE AUS DEM OCCIDENT		RUHLE,LEIPZIG	1904 - 05		
KREUZFAHRER MARSCH		RUHLE,LEIPZIG	1904 - 05		
KREUZRITTER - GERMAN TITLE FOR "THE CRUSADER MARCH"					
LAMBS' GAMBOL		JOHN CHURCH CO.	MAY 7,1915		
LANCERS		JOHN CHURCH CO.	1897	JAN.30,1926 JOHN P.SOUSA	
LAST CRUSADE	ANNE HIGGINSON SPICER	JOHN CHURCH CO.	SEPT.15,1920		
LAST DAYS OF POMPEII		JOHN CHURCH CO.	JULY 15,1912		
LEAVES FROM MY NOTE BOOK		SAM FOX PUB. CO.	OCT. 9,1923		
LEGIONAIRES		THEO.PRESSER CO.	JULY 2,1931		
LIBERTY BELL MARCH		JOHN CHURCH CO.	NOV.25,1893	MARCH 1921 JOHN P.SOUSA	
LIBERTY LOAN MARCH		HARMS INC.	FEB.26,1918		
LILY-BELLS	E.S.BARTLETT	JOHN CHURCH CO.	SEPT.30,1914		
LION TAMER			APR.29,1893	MAR. 7,1921 JOHN P.SOUSA	
LITTLE BROWN THRUSH					
LIVELY FLAPPER		SAM FOX PUB. CO.	1923		
LONELY	JEFFERSON H.NONES	J.A.NORTH & CO.	1877		
LOOKING UPWARD		JOHN CHURCH CO.		1933	
LOVE THAT LIVES FOREVER	GEO.O.WALLIHAM	G.SCHIRMER INC.	MAR. 9,1918		
LOVELY MARY DONNELLY	WILLIAM ALLINGHAM	G.SCHIRMER INC.	MAR. 9,1918		
LOVE'S RADIANT HOUR	HELEN BOARDMAN KNOX	WITMARK & SONS	AUG.10,1928		
LOYAL LEGION		CARL FISCHER INC.	MAY 4,1894	FEB. 6,1922 JOHN P.SOUSA	
LOYALTY	ESTELLE CLARK	CARL FISCHER INC.	APR. 21,1930		
MAGIC GLASS					
MAGNA CHARTA MARCH		THEO.PRESSER CO.	JUNE 22,1927		
MAID OF THE MEADOW		THEO.PRESSER CO. (MSS)			
MAIDENS THREE					
MALLIE					
MAN BEHIND THE GUN		JOHN CHURCH CO.	1899	OCT.15,1927 JOHN P.SOUSA	
MANHATTAN BEACH		CHURCH	SEPT.16,1893	MAR. 7,1921 JOHN PHILIP SOUSA	
MARCH OF THE AMERICAN CAVALRY SEE: "SABRE & SPURS"		SAM FOX			
MARCH OF THE MITTEN MEN		THEO. PRESSER CO.	OCT.15,1924		
MARCH OF THE PAN AMERICANS		CARL FISCHER	OCT. 7,1916		
MARCH OF THE STATES		HARMS INC.	MAR. 18,1916		
MARCH PAST OF THE CORCORAN CADETS		CARL FISCHER INC.	DEC.31,1890	AUG.31,1918 JOHN P. SOUSA	
MARCH PAST OF THE NATIONAL FENCIBLES		CARL FISCHER INC.	JUNE 18,1888	JAN.19,1916 JOHN P.SOUSA	
MARCH SONG OF THE CHICAGO SCHOOLS	GERARD MOULTRIE	THEO. PRESSER CO.	NOV. 28,1930		
MARCHE DES CADETS - SEE TITLE: HIGH SCHOOL CADETS					
MARCHING SONG OF AMERICA - SEE: WE ARE COMING					
MARCHING SONG OF THE 26TH.REGIMENT	ERNEST W.RIX	CARL FISCHER INC.	AUG.25,1928		
MARQUETTE UNIVERSITY MARCH		JOHN CHURCH CO.	DEC.23,1924		
MARS AND VENUS		JOHN CHURCH CO.	1904		
MARSCH AUS DEM OCCIDENT - GERMAN TITLE FOR "OCCIDENTAL" - SEE					

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MATRIMONIAL GUARDS		JOHN CHURCH CO.	1896	SEPT. 6,1927 JOHN P.SOUSA	
MERRY BROWN THRUSH		THEO.PRESSER CO.			
MERRY MONARCH		COLEMAN			
MESSIAH OF THE NATIONS	JAMES WHITCOMB RILEY	JOHN CHURCH Co.		FEB. 21,1930 JOHN P. SOUSA	
MIKADO		(MSS)			
MINNESOTA MARCH		SAM FOX PUB. CO.	SEPT.26,1927		
MONONGAHELA WALTZ					
MOONLIGHT ON THE POTOMAC		ELLIS	APR, 10,1901		
MOTHER GOSSE		(COLEMAN) CARL FISCHER			
MILKMAID	AUSTIN DOBSON	JOHN CHURCH CO.	SEPT.22,1914		
MOTHER HUBBARD		JOHN CHURCH	APR.3,1894	FEB. 6,1922 JOHN P. SOUSA	
MUSIC OF THE MINUTE		(MSS)			
MY OWN GERALDINE		PRESSER			
MYRRAH GAVOTTE		(MSS)			
MYSTERY OF HISTORY SEE: GIRLS WHO HAVE LOVED					
MYSTICAL MISS		THEO. PRESSER	DEC.21,1914		
NAIL THE FLAG OT THE MAST		CARL FISCHER INC.	DEC.29,1888	JAN.19,1916 JOHN P.SOUSA	
NATIONAL FENCIBLES		SAM FOX PUB. CO.	JULY 6,1925		
NATIONAL GAME		CARL FISCHER INC.	NOV.22,1890	AUG.31,1918 JOHN P.SOUSA	
NATIONAL PATRIOTIC & TYPICAL AIRS OF ALL LANDS		GLOBUS - VERL.	1914 - 18		
DIE NATIONAL TRUPPE		HARMS INC.	JUNE 28,1917		
DIE NATIONALSPIEL - GERMAN TITLE FOR "THE NATIONAL GAME" SEE.		ELLIS			
NAVAL RESERVE MARCH		SAM FOX PUBL. CO.	N V. 16,1928		
NEW CENTURY		HARMS INC.	SEPT.28,1915		
NEW MEXICO MARCH		SAM FOX PUB. CO.	MAR. 14,1923		
NEW YORK HIPPODROME		JOHN CHURCH CO.	AUG. 26,1920		
NOBLES OF THE MYSTIC SHRINE		G.SCHIRMER INC.	OCT.12,1931		
NON-COMMITTAL DECLARATIONS		JOHN CHURCH CO.	JULY 15,1912		
NORTHERN PINES		CARL FISCHER INC.	JUNE 17,1894	FEB.6,1922 JOHN P.SOUSA	
NYDIA					
NYMPHALIN					
STARS AND STRIPES FOREVER		JOHN CHURCH CO.	1897	APR.11,1925 JOHN P.SOUSA	
STAR-SPANGLED (THE) BANNER	JOHN STAFFORD SMITH ARR-JOHN P. SOUSA	G. SCHIRMER INC.	FEB. 27,1918		
STUDY IN RHYTHMS		MSS			
SUMMER (A) GIRL	TRANS.-CHAS. KUNKEL	JOHN CHURCH CO.	1903	JAN.13,1931 CHAS. KUNKEL	
SUMMERTIME SONG (SEE "I'VE MADE MY PLANS FOR THE SUMMER")					
SWEET MISS INDUSTRY		ELLIS			
SWEET HEART I'M WAITING	CHARLES KLEIN	JOHN CHURCH CO.	1896	APR.30,1924 JOHN PL SOUSA	EL CAPITAN

LIST OF COMPOSITIONS BY JOHN PHILIP SOUSA CON'T.

TITLE OF COMPOSITION	COLLABORATOR/S	PUBLISHER	COPYRIGHT DATE	RENEWED	REMARKS
OCCIDENTAL,THE		CARL FISCHER INC.	MAY 4, 1894	FEB. 6, 1922 JOHN PHILIP SOUSA	
OH SUNLIT SEA BEYOND THE WEST		THEODORE PRESSER CO.			
OH,WARRIOR GRIM		THEODORE PRESSER CO.		MAY 3, 1924 JOHN PHILIP SOUSA EL CAPITAN	
OH,WHY SHOULD THE SPIRIT OF MORTAL BE PROUD		JOHN CHURCH CO.	1899	JAN.29,1927 JOHN PHILIP SOUSA	
OH, YE LILIES WHITE		THEODORE PRESSER CO.			
ON THE CAMPUS	HELEN SOUSA ABERT	SAM FOX PUB.CO.	APR.18,1921		
ON PARADE		CARL FISCHER,INC.		FEB. 8 1923 JOHN PHILIP SOUSA	
ON TO VICTORY(SECOND TITLE FOR "FREE LANCE MARCH")					
ON THE TRAMP		CARL FISCHER INC.		FEB. 8,1923 JOHN PHILIP SOUSA	
ON THE WINGS OF LIGHTNING		LEE & WALKER			
ON WITH THE DANCE (MSS)					
ONLY A DREAM		ELLIS			
ONLY THEE		ELLIS			
O'REILLY'S KETTLE DRUM	EDWARD M.TABER		DEC.13,1889	AUG.18,1917 JOHN PHILIP SOUSA	
OUR BOYS ARE HOME AGAIN	SECOND TITLE FOR: "WHEN THE BOYS COME SAILING HOME"				
OUR FLIRTATION		CARL FISCHER,INC.	FEB.20,1890	NOV.26,1917 JOHN PHILIP SOUSA	
OVER THE FOOTLIGHTS OF NEW YORK					
PAROLES D'AMOUR		COLEMAN			
LA PASTORELLA					
PATHFINDER OF PANAMA		JOHN CHURCH CO.	MAY 22, 1915		
PATIENT EGG		NORDISK MUSIKFORLAG			
PEACHES AND CREAM		CARL FISCHER,INC.	JAN.9,1925		
PEOPLE WHO LIVE IN GLASS HOUSES (MSS)					
PET OF THE PETTICOATS		J.W.PEPPER CO.			
PHILOSOPHIC MAID		JOHN CHURCH CO.		MAR.1, 1930 JOHN PHILIP SOUSA	"CHARLATAN"
PICADORE MARCH		CARL FISCHER,INC.	DEC.30,1889	AUG.18,1917 JOHN PHILIP SOUSA	
PIPETOWN SANDY		BOBBS,MERRILL & CO.	1905	AUG. 1933	
POWER AND GLORY		THEODORE PRESSER CO.		JANE VAN M.SOUSA	

TITLE OF COMPOSITION	COLLABORATOR/S	PUBLISHER	COPYRIGHT DATE	RENEWED	REMARKS
POWHATTAN'S DAUGHTER		JOHN CHURCH CO.	AUG. 7,1907	JAN.10,1935 JANE VAN M.SOUSA	
PRESIDENTIAL POLONAISE		CARL FISCHER,INC.	MAR.1,1889	FEB.17,1917 JOHN PHILIP SOUSA	
PRI[illegible] OF PITTSBURGH		SAM FOX			
PRICE OF THE WOLVERINES,THE		SAM FOX PUB.CO.	OCT.19,1926		
PRINCE CHARMING		CARL FISCHER,INC.	NOV.8,1928		
PROCESSIONAL-SEE -"WE MARCH,WE MARCH TO VICTORY"		JOHN CHURCH CO.			
PUSHING ON	GUY F.LEE		SEPT.29,1918		APPEARED IN CHICAGO TRIBUNE
QUEEN OF THE HARVEST		CARL FISCHER,INC.	DEC.30,1889	AUG.18,1917 JOHN PHILIP SOUSA	
QUEEN OF HEARTS (MSS)					
RARE OLD FELLOW,A					
RECHTS VORWARTS-GERMAN TITLE FOR "RIGHT FORWARD"					
RED CROSS NURSE		THEODORE PRESSER CO.			
RED MAN, THE		JOHN CHURCH CO.	NOV.1,1910		"THE DWELLERS IN THE WESTERN WORLD"
REINE(LA) DE LA MER		JOHN CHURCH CO.	JUNE 27,1894	FEB.6,1922 JOHN CHURCH CO.	
RESUMPTION		COLEMAN			
REVEILLE	ROBERT J.BURDETTE	ELLIS	JAN.30,1890	DEC.31,1917 JOHN PHILIP SOUSA	
REVERIE,NYMPHALIN		CARL FISCHER INC.	DEC.28,1889	AUG.18,1917 JOHN PHILIP SOUSA	
REVIEW,THE		ELLIS			
REVIVAL MARCH		COLEMAN	JULY 14,1894	FEB.6,1922 JOHN PHILIP SOUSA	
RIDERS FOR THE FLAG		SAM FOX PUB.CO.	AUG.12,1927		
RIFLE REGIMENT,THE		CARL FISCHER,INC.	DEC.31,1886	DEC.12,1914 JOHN PHILIP SOUSA	
RIGHT FORWARD	ADOLPHE DUMONT	CARL FISCHER,INC.	DEC.31,1912		
RIGHT LEFT		CARL FISCHER,INC			
RIGHT UPON THE FIRING LINE		JOHN CHURCH CO.	1899	MAR.23,1927 JOHN PHILIP SOUSA	
ROYAL WELCH FUSILIERS,THE		THEODORE PRESSER CO.	APR.24,1930		
RUSSIAN PEASANT DANCE		JOHN CHURCH CO.	1899		"CHARLATAN"
SABRE AND SPURS		SAM FOX PUB.CO.	JULY 6,1918		
ST.LOUIS EXPOSITION		PEPPER			

LIST OF COMPOSITIONS BY JOHN PHILIP SOUSA CON'T.

TITLE OF COMPOSITION	COLLABORATOR/S	PUBLISHER	COPYRIGHT DATE	RENEWED	REMARKS
SALUTATION (MSS)					
SALVATION ARMY MARCH		THEODORE PRESSER CO.	APR. 7,1930		
SANDALPHON (MSS)					
DIE SCHONEN VON CHICAGO GERMAN TITLE FOR "BELLE OF CHICAGO"					
DAS SCHWERE GESCHUTZ GERMAN FOR "THE THUNDERER"					
SEMPER FICELIS		CARL FISCHER INC.	DEC.29,1888	JAN.19,1916 JOHN PHILIP SOUSA	
SERENADE IN SEVILLE,A	JAMES FRANCIS COOKE	THEODORE PRESSER CO.	JULY 26,1924		
SERENADERS, THE		CARL FISCHER	AUG.28,1922		"AT THE MOVIES"
SESQUI-CENTENNIAL EXPOSITION MARCH		SAM FOX PUB.CO.	JUNE 18,1926		
SHERIDAN'S RIDE		JOHN CHURCH CO.	JULY 13,1908	JAN.2,1936 JANE VAN M.SOUSA	
SHOW OFF BEFORE COMPANY (MSS)					
SHOWING OFF BEFORE COMPANY					
SILVER SPRAY SCHOTTISCHE		CARL FISCHER INC.	DEC.28,1889	AUG.18,1917 JOHN PHILIP SOUSA	
SMICK SMACK SMUCK		W.F.SHAW			
SMUGGLERS,THE		PEPPER			
SNOW BABY		JOHN CHURCH CO.	1897	DEC.28,1925 JOHN PHILIP SOUSA	
SOLID MEN TO THE FRONT		G.SCHIRMER,INC.	MAR.14,1918		
SONG OF THE SEA		ELLIS			
SOUND OFF		CARL FISCHER,INC	MAY 4,1894	FEB.6,1922 JOHN PHILIP SOUSA	
SOUSA ALBUM	PRESTON WARE OREM	THEODORE PRESSER CO.	JUNE 4,1931		
SOUSA FOLIO		JOHN CHURCH CO.	1906	FEB. 1934 JANE VAN M.SOUSA	
SOUSA FOUR HAND ALBUM		THEODORE PRESSER CO.	NOV. 6,1931		
SOUSA MARCH				FEB. 21,1930 JOHN PHILIP SOUSA	
SOUSA MARCH AND DANCE ALBUM		JOHN CHURCH CO.	JAN.28,1914		
SOUSA MARCH FOLIO		JOHN CHURCH CO.	1902	DEC.31,1930 JOHN PHILIP SOUSA	
SOUSA MARCH MEDLEY	MC NAIR ILSENGRITZ	RECORDO PLAYER ROLL CO.	APR.24,1922		
SOUSA-PRYOR BAND BOOK	ARTHUR W.PRYOR	J.W.PEPPER & SON	MAY 18,1910		
SOUSA SONGS		JOHN CHURCH CO.	SEPT.8,1910		
SOUSA'S FAVORITE MARCH BOOK	JOHN KRACHTUS	CARL FISCHER,INC.	JUNE 15,1936		
SOUSA'S GREAT BAND MARCH	THEO.M.TOBANI	CARL FISCHER,INC.	MAR.28,1894	FEB.6,1922 JOHN PHILIP SOUSA	
SOUSA'S SEN-SEN MARCH		HARRY COLEMAN	1900		

LIST OF COMPOSITIONS BY JOHN PHILIP SOUSA CON'T.

TITLE OF COMPOSITION	COLLABORATOR/S	PUBLISHERS	COPYRIGHT DATE	RENEWED	REMARKS
TALES OF THE A TRAVELER		JOHN CHURCH Co.	1914		
TALLY-HO		CARL FISCHER INC.	DEC. 27,1886	FEB.13 1914 JOHN P. SOUSA	
DAS TAUSENDSTE MARSCH					
TE DEUM IN E FLAT					
THERE'S A MERRY BROWN THRUSH	LUCY LARCOM	THEO. PRESSER Co.	JULY 22,1926		
THREE QUOTATIONS		JOHN CHURCH Co.	1898		
THUNDERER		CARL FISCHER INC.	NOV. 22,1889	AUG.18,1917 JOHN. P. SOUSA	
TRANSIT OF VENUS		SMALL MAYNARD & Co.			
DIE TREUE LEGION					
SEE: "THE LOYAL LEGION"					
TRIUMPH OF TIME		CARL FISCHER INC.	APR. 1,1893	MAR. 7,1921 JOHN P. SOUSA	
TROOPING OF THE COLORS		JOHN CHURCH Co.	1898	FEB.19,1926 JOHN P. SOUSA	
TURKEY IN THE STRAW		G.SCHIRMER INC.	DEC. 8,1931		
TWO FIFTEEN(2115)			DEC.13,1889	AUG.18,1917 JOHN P. SOUSA	
TYPICAL TUNE OF ZANZIBAR		JOHN CHURCH Co.1	1896	APR.30,1924 JOHN P. SOUSA	
WHITE PLUME MARCH		JOHN CHURCH Co.	JUL.25,1884	MAY 11,1912 JOHN P. SOUSA	
WHITE ROSE MARCH		HARMS INC.	SEPT.12,1917		
WHO'S WHO IN NAVY BLUE		JOHN CHURCH Co.	MAY 25,1920		
WILL YOU LOVE WHEN THE LILIES ARE DEAD		THEO. PRESSER			
WILLOW BLOSSOMS		HARMS INC.	AUG.17,1916		
WINDOW BLIND		CHURCH			
WISCONSIN FORWARD FOREVER		HARMS INC.	JUNE 11,1917		
WITH PLEASURE		JOHN CHURCH Co.	NOV.16,1912		
WOLVERINES SEE! PRIDE OF THE WOLVERINES					
Y.M.I.MARCH		JOHN CHURCH Co.			
YORKTOWN CENTENNIAL MARCH		CARL FISCER INC.	DEC. 31,1885	DEC.13,1913 JOHN P. SOUSA	
YOU CANNOT TELL HOW OLD THEY ARE BY LOOKING AT THEIR SKIRTS		JOHN CHURCH Co.	JAN.15,1923		
YOU SEE IN ME MY FRIENDS -SEE! EL CAPITAN					
ZWEI AMERIKANISCHE MARSCHE - SEE! SEMPER FIDELIS					
ZWEI BELIEBTE MARSCHE - SEE! WASHINGTON POST		FISCHER,BROHEN	1928		

LIST OF COMPOSITIONS BY JOHN PHILIP SOUSA CONT

TITLE OF COMPOSITION	COLLABORATOR/S	PUBLISHER	COPYRIGHT DATE	RENEWED	REMARKS
UNCHAIN THE DOGS OF WAR		JOHN CHURCH CO.	1898	JAN. 30, 1926 JOHN PHILIP SOUSA	
UNDER THE AMERICAN FLAG		CARL FISCHER INC.	JULY 16, 1927		
UNDER THE CUBAN FLAG		CARL FISCHER INC.	JULY 16, 1927		
UNDER THE SPANISH FLAG		CARL FISCHER INC.	JULY 16, 1927		
UNDER THE WINDOW HE SOFTLY CREPT (SECOND TITLE FOR TYPICAL TUNE OF ZANZIBAR)					
U. S. FIELD ARTILLERY	ARR: H. L. LAKE	CARL FISCHER INC.	JAN. 22, 1918		
UNIVERSITY OF ILLINOIS MARCH		JOHN CHURCH CO.	AUG. 15, 1929		
UNIVERSITY OF ILLINOIS MARCH		JOHN CHURCH CO.	OCT. 7, 1929		
UNIVERSITY OF NEBRASKA		SAN FOX PUB. CO.	OCT. 4, 1928		
UNSER FLIRT — SEE: OUR FLIRTATION					
UNTER DEN STERNENBANNER SEE: STARS & STRIPES FOREVER					
USAAC MARCH	KERNELL & FECHHEIMER ARR: J. P. SOUSA	CHAPPELL & CO., LTD.	DEC. 1, 1919		
VALSE ROMANTIQUE SEE: IN LAND OF GOLDEN FLEECE					
VAUTOUR OVERTURE		JOHN CHURCH CO.	1886	FEB. 13, 1914 JOHN PHILIP SOUSA	
VOLUNTEERS		CARL FISCHER INC.	MAY 10, 1918		
WARRIOR GRIM	ARR: DAN GODFREY	JOHN CHURCH CO.	JAN 26, 1920		
WASHINGTON BICENTENNIAL		SAN FOX PUB. CO.	JUNE 7, 1930		
WASHINGTON POST		CARL FISCHER INC.	1889	AUG. 18, 1917 JOHN PHILIP SOUSA	
WE ARE COMING	EDITH WILLIS LINN	G. SCHIRMER, INC.	FEB. 16, 1918		
WE MARCH, WE MARCH TO VICTORY	GERARD HOULTRIE	JOHN CHURCH CO.	MAR. 23, 1915		
WEDDING MARCH		SAN FOX PUB. CO.	OCT. 22, 1918		
WE'RE COMING		G. SCHIRMER, INC.			
WHEN THE BOYS COME SAILING HOME SEE: OUR BOYS ARE HOME AGAIN BOYS ARE HOME AGAIN	HELEN ALBERT	HAROLD FLAMMER, INC.	DEC. 20, 1918		
WHEN YOU CHANGE YOUR NAME TO MINE		JOHN CHURCH CO.			
WHERE IS LOVE					
WHILE NAVY SHIPS ARE COALING	WELLS HANKS	THEO. PRESSER CO.	FEB. 23, 1923		
WHITE MAN		JOHN CHURCH CO.	APR. 5, 1911		

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[fol. 1373]

PLAINTIFFS' EXHIBIT 40

This is a list of approximately 275 musical compositions composed by Oley Speaks in collaboration with a number of authors of lyrics. Among his works listed, in which the copyrights date from 1902 to 1934, the following are typical:

Composition	Collaborator/s	Publisher	Copyright Date	Renewed	Remarks
Eyes of Blue	Frank L. Stanton	John Church Co.		12/8/28	O. Speaks/John Church Co.
Go Pretty Rose	Mike Beverly/ Anthony Richards	Luckhardt & Belder	1/ 2/24		
In Circe's Garden	T. R. Sullivan/Al Richards	Luckhardt & Belder NY	12/10/24		
Little One A-Cryin'	F. L. Stanton C. G. Spross/Arr.	Theodore Presser Co.	11/ 3/31		
Love's Like A Rosebud	F. H. Martens	DeSylva, Brown & Henderson, Inc.	9/14/28		
Memories	T. S. Jones	John Church Co.	8/28/06	1934	Oley Speaks/J. Church Co.
On The Road To Mandalay	R. Kipling	John Church Co.	11/18/07	G. Schirmer Inc. 1934	
Some Sweet Day	F. Crosbey	G. Schirmer Inc.	3/ 6/18		
Sylvia	C. Scollard	G. Schirmer NY	7/ 1/14		
Vagabond	R. L. Stevenson	G. Schirmer Inc.	5/ 2/22		

Many of the copyrights have been renewed by Mr. Speaks for an additional twenty-eight years.

PLAINTIFFS' EXHIBIT 41

This lists approximately 150 compositions of Deems Taylor copyrighted between 1909 and 1937. There are a great many collaborators. The list includes such works as "The King's Henchman," composed in collaboration with Edna St. Vincent Millay, published by J. Fisher & Bro. and copyrighted on December 31, 1926; the opera "Peter Ibbetson," composed in collaboration with George Du Maurier and Constance Collier, published by J. Fischer & Bro. and copyrighted on December 20, 1930; "Through the Looking Glass Suite," composed in collaboration with Lewis Carroll, published by J. Fischer & Bro. and copyrighted on October 22, 1923.

(Here follow 2 photolithographs, side folios 1374-1375)

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PLAINTIFF'S EXHIBIT NO. 42

AGREEMENT, Made this 1st day day of July 19 21 between the AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, hereinafter designated as the "Society," and Maleo Brothers

hereinafter designated as "Licensee," as follows:

1. The Society hereby grants to the licensee the license to publicly perform the musical numbers of the repertoire of the Society for the period of one (1) year, ~~commencing on the~~ for the season of 1921 day of 19 , on the premises known as No. Peony Park City of County of Douglas , State of Nebraska , and not elsewhere.

2. The licensee hereby accepts such license and agrees to pay the Society the sum of Thirty no/00 Dollars annually, payable in one equal installments Dollars in advance on the 1st day of July hereafter during the continuance of this agreement.

3. This license is not transferable. It is strictly limited to the licensee herein named and to the premises hereinabove mentioned; and it is further strictly limited to non-dramatic renditions.

4. The Society reserves the right at any time to revoke the privilege of the licensee to perform any specific number or numbers, in its repertoire, upon giving to the licensee notice in writing of such revocation. Such notice may be given to the licensee either personally or may be sent to the licensee by registered United States mail, postage prepaid, to the address above mentioned; and, upon the mailing of such notice of revocation the receipt by licensee of such notice personally delivered to the licensee, the licensee shall not thereafter privileged to perform such specific number, or numbers. Upon such revocation being made, the licensee shall have the right to terminate this agreement forthwith by written notice sent to the Society by registered United States mail, postage prepaid, addressed to its Chicago office.

Either party to this agreement may terminate the same at the end of any calendar month upon giving to the other of said parties thirty (30) days prior notice in writing. Such notice shall be forwarded by registered United States mail.

Upon the termination of this agreement for either of the causes in this paragraph "4" mentioned, any advance payments of unearned license fees shall be proportionately rebated to the licensee.

5. In event licensee shall violate any of the terms or conditions of this agreement, or make default in the payment of any of said installments at the time and place, and in the manner, as is above provided, then the Society may, at its election, at any time after such default, without previous notice of such election to the licensee, terminate this agreement; and, upon such termination being so made, this license and the rights and privileges herein granted to the licen shall immediately cease and determine.

6. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year unless either party, on or before thirty (30) days next preceding the termination of any year, shall give notice to the other of the desire of such party so giving such notice to terminate the same at the conclusion of such year. Such notice shall be given in writing and forwarded by registered United Stated mail.

IN WITNESS WHEREOF, This agreement has been duly subscribed and sealed by the Society and licensee.

In presence of:

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, (SEAL)

By Eugene de Blasi
Its Duly Authorised Agent and Attorney in Fact.

Maleo Bros (SEAL)

(SEAL)

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PLAINTIFF'S EXHIBIT NO. 43

AGREEMENT, Made this 20th day of April 1922, between the AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, hereinafter designated as the "Society," and Peony Park of Omaha, Nebr. hereinafter designated as "Licensee," as follows:

1. The Society hereby grants to the licensee the license to publicly perform the musical numbers of the repertoire of the Society for the period of one (1) year, commencing on the Twentieth (20) day of April 1922, on the premises known as No. Peony Park City of Omaha, State of Nebraska, and not elsewhere.

2. The licensee hereby accepts such license and agrees to pay the Society the sum of fifty 00/100 Fifty — Dollars annually, payable in one — equal installments Fifty and 00/100 — Dollars in advance on the 20th day of April, each year hereafter during the continuance of this agreement.

3. This license is not transferable. It is strictly limited to the licensee herein named and to the premises hereinabove mentioned; and it is further strictly limited to non-dramatic renditions.

4. The Society reserves the right at any time to revoke the privilege of the licensee to perform any specific number or numbers, in its repertoire, upon giving to the licensee notice in writing of such revocation. Such notice may be given to the licensee either personally or may be sent to the licensee by registered United States mail, postage prepaid, to the address above mentioned; and, upon the mailing of such notice of revocation, or the receipt by licensee of such notice personally delivered to the licensee, the licensee shall not thereafter be privileged to perform such specific number, or numbers. Upon such revocation being made, the licensee shall have the right to terminate this agreement forthwith by written notice sent to the Society by registered United States mail, postage prepaid, addressed to its Chicago office.

Either party to this agreement may terminate the same at the end of any calendar month upon giving to the other of said parties thirty (30) days prior notice in writing. Such notice shall be forwarded by registered United States mail.

Upon the termination of this agreement for either of the causes in this paragraph "4" mentioned, any advance payments of unearned license fees shall be proportionately rebated to the licensee.

5. In event licensee shall violate any of the terms or conditions of this agreement, or make default in the payment of any of said installments at the time and place, and in the manner, as is above provided, then the Society may, at its election, at any time after such default, without previous notice of such election to the licensee, terminate this agreement; and, upon such termination being so made, this license and the rights and privileges herein granted to the licensee shall immediately cease and determine.

6. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year unless either party, on or before thirty (30) days next preceding the termination of any year, shall give notice to the other of the desire of such party so giving such notice to terminate the same at the conclusion of such year. Such notice shall be given in writing and forwarded by registered United Stated mail.

IN WITNESS WHEREOF, This agreement has been duly subscribed and sealed by the Society and licensee.

In presence of:

R. L. Berry

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, (SEAL)

By Eugene N. Blazer
Its Duly Authorized Agent and Attorney in Fact.

Peony Park (SEAL)

Joseph Maley (SEAL)

1375 77th & Dodge

8521

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[fol. 1376] PLAINTIFFS' EXHIBIT 44

Amusement Protective Association of Nebraska

301 South 31st Street, Omaha, Nebraska

Matt Kobalter, Director, Lincoln.
Joseph W. Smith, Director, Hastings.
Bert Glover, Director, Grand Island.
Joseph Malec, President, Omaha.
H. H. King, Vice Pres., Norfolk.
H. A. Marble, Sec'y, Y Treas., Omaha.
William Barclay, Dir., Plattsmouth.
George Sharpnach, Dir., Lincoln.
Roy F. Gordon, Dir., Bennington.

March 13th, 1937.

DEAR SIR:

At a meeting of more than twenty-five representative ballroom operators held at the Fontanelle Hotel Wednesday, March 11th, this organization was formed for the protection of all operators in regard to state legislation or any forces which might take unfair advantage of us. The men listed above were chosen as officers of the organization.

Our first big problem is the promotion of the bill 478, which will protect us against the payment of the so-called license to play copyrighted music at public performances for profit. We have been forced to pay the American Society of Composers, Authors and Publishers long enough and we believe that if we all do our part, we will be able to keep this graft out of the state of Nebraska.

In order to aid in passing the Legislation Roll No. 478 which is of vital interest to us all, we are making the following suggestions:

1. Get in touch with the legislator from your district That You Know and explain to him how the monopoly created by the American Society of Composers, Authors and Publishers has unfairly collected from You and other operators year after year. Explain to him that you are vitally concerned with this legislation. Do not write or talk to any of the legislators that you do not know, as too many letters or calls from strangers will only agitate them.

2. Attend the next meeting of the Amusement Protective Association of Nebraska to be held at Lincoln, Nebraska, at 10 a. m. Wednesday, March 17th, at the Lincoln Hotel. The bill will be completely discussed at the meeting, after which the operators will retire in a body to the committee meeting where the actual legislation will come up. It Is Vitally Important That You or a Representative Be Present as every effort we can give will be necessary to show this committee that every dance hall operator is interested in this protective measure.

3. So that you might be familiar with the proposed legislation, read over the enclosed sheet before you contact your legislator and before you attend the meeting at Lincoln.

4. Thanking you in behalf of the newly formed organization, and trusting that we may count on seeing you at Lincoln on Wednesday to help us put this big job over, we are,

Sincerely yours, Amusement Protective Ass'n of Nebr., (Signed) By H. A. Marble, Sec'y.

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PLAINTIFF'S EXHIBIT NO. 49

MONTANA—Continued

GREAT FALLS—Continued

KFBB—Continued

Contract and Other Requirements
Rates quoted do not include artists' services.
No contract accepted for longer than one year. All contracts subject to station manager's approval and governmental regulations. All programs, program material and commercial copy subject to approval of program department.
Mechanical Program Equipment
Equipped to handle programs by electrical transcription, using 78 and 33-1/3 r.p.m. double turn-tables.
Personnel
Promotion Manager—J. Jacobsen.
Representatives
New York, Chicago, Detroit, San Francisco—Weed & Company.
Los Angeles, Seattle—Walker Biddick Co.

HELENA

(Lewis and Clarke County)

KPFA

(Established 1937)

Owned and operated by the Pioneer Forum of the Air. Business Office and Studio—1300 Eleventh Avenue, Helena, Montana.
Transmitter—1300 Eleventh Ave., Helena, Montana.
Wave—Power—Time
Operating power—250 watts days; 100 watts nights. 247.8 meters; 1,210 kilocycles.
Licensed to operate full time on local channel.
Operates on Mountain Time.
Actual operating schedule: 8:00 a.m. to 12:00 midnight.
General Advertising
For combination rates see listing of National Broadcasting Company (North Mountain Group).
Also sold in combination with KGIR, Butte, Montana. For rates and data see K NET at beginning of state.
Representatives
Gene Furgason & Company.

KALISPELL

(Flathead County)

KGEZ

(Established 1937)

Rates effective January 1, 1937. (Card No. 5.)
Owned and operated by Donald C. Treloar.
Business Office and Studio—208 First Avenue East, Kalispell, Montana. Other station, 1236 Fourth Avenue, East, Kalispell, Montana.
Transmitter—2-1/2 miles south of Kalispell on Highway 93.
Wave—Power—Time
Operating power—100 watts.
(100% modulation—crystal control.)
228.9 meters; 1,310 kilocycles.
Licensed to operate full time on local channel.
Operates on Mountain Standard Time. Daylight Savings Time not observed.
Actual operating schedule: Week days and Sunday, 7:00 a.m. to 10:00 p.m.
Commission and Cash Discount
Agency commission 15% to recognized agencies on time, not. Cash discount 2%—10 days.
General Advertising
(11:30 a.m. to 1:30 p.m. and 5:30 p.m. to 9:00 p.m.)

	1 wk.	13 wks.	26 wks.	39 wks.	52 wks.
1 hour	20.00	19.00	18.00	17.00	16.00
1/2 hour	12.50	11.85	11.30	10.65	9.90
1/4 hour	8.50	8.10	7.70	7.30	6.80
5 minutes	5.00	4.75	4.50	4.25	4.00

(7:00 a.m. to 11:30 a.m., 1:30 p.m. to 5:30 p.m. and 9:00 p.m. to 12:00 midnight)

1 hour	15.00	14.25	13.50	12.75	12.00
1/2 hour	9.50	8.55	8.10	7.65	7.20
1/4 hour	5.00	4.75	4.50	4.25	4.00
5 minutes	3.00	2.85	2.70	2.55	2.40

ADDITIONAL DISCOUNT
78 weeks or more, any time of the day 5%
ANNOUNCEMENTS
(7:00 a.m. to 9:00 p.m. week days)
100 words maximum:

Single announcements	2.50
1 daily, per week	12.00
2 daily, per week	22.00
3 daily, per week	32.00
Daily, per month	60.00

FREQUENCY DISCOUNTS
3 months contract, 5% off monthly rate
6 months contract, 10% off monthly rate.
9 months contract, 15% off monthly rate.
12 months contract, 20% off monthly rate.
78 weeks or over, 2% additional discount.
POLITICAL TALKS
Per minute, flat 2.50. Minimum of five minutes.
SPECIAL FEATURES
Market quotations, hour, time signals—rates on application.
RECORDED PROGRAMS
Details on request.
TALENT
Rates on application.
REMOTE CONTROL
Events or sports, etc.—rates on application.
Contract and Other Requirements
Rates are for station time only. All programs subject to approval. Transcriptions must be sent prepaid.
Mechanical Program Equipment
Equipped to handle programs by electrical transcription, using 33-1/3 and 78 r.p.m. double turn-tables.
Personnel
General Manager—Don Treloar.

MISSOULA

(Missoula County)

KGVO

(Established 1931)

COLUMBIA AFFILIATE

Rates effective November 1, 1938.
Owned and operated by Mosby's, Inc.
Studio—125 W. Front Street, Missoula, Montana. Telephone 2154.
Transmitter—Four miles west of Missoula, Montana, on Highway No. 10.
Wave—Power—Time
Operating power—5000 watts days; 1000 watts nights. (150% modulation—crystal control.)
238 meters; 1,260 kilocycles.
Licensed to operate unlimited time. Operates on Mountain Standard Time. Daylight Savings Time not observed.
Actual operating schedule: Week days 7:00 a.m. to 11:00 p.m. Sunday 8:00 a.m. to 11:00 p.m.
Commission and Cash Discount
Agency commission 15% on station time only. No cash discount. Payment date 1st of month following broadcast.
General Advertising
For combination rates see listings of Columbia Broadcasting System (Mountain Group) and Columbia Pacific Network (Supplementary Stations).
Rates include charges by owners of music copyrights.
The following rates are for both local and national advertising.

	1 ti.	13 ti.	26 ti.	52 ti.	156 ti.	312 ti.
1/2 hour	36.00	34.20	31.40	30.00	28.80	27.00
1/4 hour	24.00	22.80	21.00	20.40	19.20	18.00
10 minutes	18.00	17.10	16.20	15.30	14.40	13.50
5 minutes	12.00	11.40	10.80	10.20	9.60	9.00

Schedule "A"—7:00 p.m. to 11:00 p.m., net.
Schedule "B"—5:00 p.m. to 7:00 p.m., less 33-1/3%.
Schedule "C"—10:00 a.m. to 5:00 p.m., less 50%.
Schedule "D"—7:00 a.m. to 10:00 a.m., less 66-2/3%.

ANNOUNCEMENTS

2 minute electrical transcription	15.20	14.44	13.68	12.92	12.16	11.40
1 minute electrical transcription	10.12	9.63	9.12	8.61	8.10	7.60
100 words	6.75	6.41	6.07	5.74	5.40	5.07
50 words	4.50	4.27	4.05	3.83	3.60	3.38
25 words	3.00	2.85	2.70	2.55	2.40	2.25

Schedule "A"—7:00 p.m. to 11:00 p.m., net.
Schedule "B"—5:00 p.m. to 7:00 p.m., less 33-1/3%.
Schedule "C"—10:00 a.m. to 5:00 p.m., less 50%.
Schedule "D"—7:00 a.m. to 10:00 a.m., less 66-2/3%.

SPECIAL FEATURES
"Early Bird" Program: 7:30 a.m. to 8:00 a.m.
Musical Clock Program: 8:30 a.m. to 9:00 a.m.
Luncheon Program: 12:30 p.m. to 1:30 p.m.
Request Program: 10:00 a.m. to 11:00 a.m. and 1:00 p.m. to 2:00 p.m.
Dinner Concert: 6:30 p.m. to 7:00 p.m.
Regular rates apply to the above feature periods.
TALKS
Charged at announcement rates.
TALENT
Rates on request.
RECORDED PROGRAMS
No extra charge; details on request.
REMOTE CONTROL
Rates and other information on request.
Contract and Other Requirements
Advertising of alcoholic beverages not accepted, excepting beer and wine.
Maximum length of contract, twelve months.
Forwarding of an order is construed as acceptance of all rates and conditions under which service is sold. Failure to make order correspond with rate card is regarded as a clerical error and broadcast is made and charged for on terms of schedule in force without further notification.
Advertiser in all cases is held responsible for clearance of copyrights on any and all material contained in his program for broadcasting over station.
Closing Time
Program advice, five days in advance. Announcements one day in advance.
Mechanical Program Equipment
Equipped to handle programs by electrical transcription, using 33-1/3 and 78 r.p.m. double turn-tables.
Personnel
President and Manager—A. J. Mosby
Promotion Manager—Jack Burnett.
Representatives
Burn-Smith Company.

WOLF POINT

(Roosevelt County)

KGCX

(Established 1938)

Rates effective January 1, 1939.
Owned and operated by E. E. Krotzbeck.
Studio—Wolf Point, Montana, telephone 102.
Transmitter—Two miles east of Wolf Point.
Wave—Power—Time
Operating power—1,000 watts.
(100% modulation.)
294.8 meters; 1,650 kilocycles.
Licensed to operate unlimited time on national channel. Operates on Mountain Standard Time.
Commission and Cash Discount
Agency commission 15% to recognized agencies on net charges. Cash discount ——.
General Advertising
Fees charged by owners of music copyrights are not included in rates.
The following rates are for national advertising. For local advertising rates consult station management.
CLASS "A"
(11:30 a.m. to 1:30 p.m. and 6:00 p.m. to 8:00 p.m.)

	1 ti.	13 ti.	52 or more times
1 hour	42.50	35.00	30.00
1/2 hour	21.00	12.00	10.00
1/4 hour	11.50	8.00	7.00
5 minutes	7.50	6.00	4.50

CLASS "B"
(All other time)

1 hour	28.00	25.00	20.00
1/2 hour	15.00	12.00	11.50
1/4 hour	7.50	6.50	5.00
5 minutes	5.00	4.50	3.75

ANNOUNCEMENTS
CLASS "A"
(11:30 a.m. to 1:30 p.m. and 6:00 p.m. to 8:00 p.m.)

100 words	4.50	4.00	3.15
50 words	2.50	2.00	1.65

CLASS "B"
(All other time)

100 words	3.00	2.50	2.00
50 words	1.75	1.50	1.25

RECORDED PROGRAMS
Regular time charges apply to recorded programs. Not restricted to certain hours.
Electrically transcribed programs of any type can be furnished. Prices on request.
REMOTE CONTROL
Complete station and portable equipment for remote control broadcasts.
Contract and Other Requirements
All contracts are for exclusive use of contracting party and cannot be used by two or more firms or organizations. All broadcasting programs of every description are subject to the approval of the station management, without objection liability.
Forwarding of an order is construed as an acceptance of all rates and conditions under which service is sold. Failure to make order correspond with rate card is regarded as a clerical error and broadcast is made and charged for on terms of schedule in force without further notification.
Service of program, publicity and operating staff in securing talent, arranging, presenting and publishing programs are included without extra charge.
Mechanical Program Equipment
Equipped to handle programs by electrical transcription, using double dual speed tables.
Personnel General Manager—E. E. Krotzbeck.
Commercial & Station Manager—Milton J. Severson.
Promotion Manager—Adolph Jystad.

NEBRASKA

GRAND ISLAND

(Hall County)

KMMJ

(Established 1925)

Rate card dated September 1, 1938.
Owned and operated by KMMJ, Inc.
Business Office and Studio—Grand Island, Nebraska.
Transmitter—Grand Island, Nebraska.
Wave—Power—Time
Operating power—1,000 watts. (100% modulation.)
405.2 meters; 740 kilocycles.
Licensed to operate on cleared national channel.
Operates on Central Standard Time. Daylight Savings Time not observed.
Actual operating schedule: Sunday 7:00 a.m. to sundown. Week days 6:00 a.m. to sundown.
Commission and Cash Discount
Agency commission 15% to recognized advertising agencies. Cash discount 2%. All net charges for station time. Invoices mailed and due monthly. No discounts on talent and line charges.
General Advertising

	1 ti.	13 ti.	26 ti.	52 ti.
1 hour	100.00	95.00	90.25	85.75
1/2 hour	55.00	52.25	49.65	47.15
1/4 hour	30.00	28.50	27.10	25.75
5 minutes	20.00	19.00	18.05	17.15
2 minutes	12.00	11.40	10.85	10.30
1 minute	8.00	7.60	7.20	6.85

STRIP RATES

	For week for 3 mos.	6 mos.	12 mos.
1/2 hour:			
7 days weekly	125.00	112.50	100.00
5 days weekly	100.00	170.00	150.00
1/4 hour:			
7 days weekly	70.00	63.50	56.00
5 days weekly	105.00	94.50	84.00

Announcement service:
Special daily service sales talk (one minute), per month 125.00
Two daily special sales talks, per month 200.00
SPECIAL FEATURES
Live Stock Market Reports: Four 15 minute periods daily; feature not available for sponsorship, but station can supply spots before and after.
Weather Reports: Rates on request.
News: Seven quarter-hour periods daily. Regular rates apply, plus a news service charge.
TALENT
A complete staff of hill-billy talent to furnish single acts or combinations, including a brass band, Hawaiian orchestra, popular bands and all hill-billy combinations, rates on request.
REMOTE CONTROL
Facilities available for remote control broadcasts. Complete information on request.
Contract and Other Requirements
Rebate of time not permitted. All programs, announcements and announcements are subject to approval of station management.
Closing Time
All contracts should be placed as far in advance of initial program as possible to facilitate production.
(This Rating continued on next page)

1377

855

NEBRASKA—Continued

GRAND ISLAND—Continued

K M M J—Continued

Mechanical Program Equipment
Equipped to handle programs by electrical transcription, using 33-1/3 and 78 r.p.m. double turn-tables.
Personnel
Manager—Randy Ryan.
Representatives
Howard H. Wilson Company.

KEARNEY

(Buffalo County)

K G F W

Rates effective May 1, 1939.
Owned and operated by Central Nebraska Broadcasting Corporation.
Business Office and Studio—South Central Avenue, Kearney, Nebraska, telephone 31551.
Transmitter—South Central Ave., Kearney, Nebraska.
Wave—Power—Time
Operating power—250 watts.
(100% modulation—crystal control.)
228.9 meters; 1,310 kilocycles.
Licensed to operate unlimited time. Daylight Saving Time not observed.
Actual operating schedule: 6:00 a.m. to 10:30 p.m.
Commission and Cash Discount
Agency commission 15% to recognized agencies on net charge for station time. No commission on talent and remote charges. Cash discount of 2% allowed on/cash in advance. Bills are due and payable when rendered.
General Advertising

	1 tl.	13 tl.	26 tl.	52 tl.	100 tl.	300 tl.
1 hour	40.00	36.00	31.00	32.00	30.00	24.00
1/2 hour	25.00	22.50	21.25	20.00	18.75	15.00
1/4 hour	15.00	13.50	12.75	12.00	11.25	9.00
5 minutes	6.00	5.10	4.90	4.50	4.30	3.60
100 words	3.00	2.70	2.55	2.40	2.25	1.80
50 words	2.00	1.80	1.70	1.60	1.50	1.20

SPECIAL FEATURES
Time Signals, Weather and Temperature Reports. Rates on request.
REMOTE CONTROL
Additional charges made for programs originating outside of studios and for programs requiring special production.
SERVICE FACILITIES
Services of program department, staff announcers and engineers in arranging and presenting programs included without charge.
Contract and Other Requirements
No contract accepted for more than one year of service.
Rates subject to change upon thirty days' written notice. All contracts are subject to present and future State and Federal regulations. All contracts subject to approval by station management.
All programs subject to approval by station management.
Mechanical Program Equipment
Equipped to handle programs by electrical transcription, using 33-1/3 and 78 r.p.m. double turn-tables.
Personnel
Manager—Walter M. Ely.
Commercial Manager—W. J. Binkley.
Representatives
Cox and Tuns.
Pacific Coast—Walter Biddick Company.

LINCOLN

(Lancaster County)

K F A B

(Established 1924)

Rate card undated; received April 17, 1939. (Card No. 4-39.)
Owned by KFAB Broadcasting Company.
Operated by Central States Broadcasting System.
Business Office—Omaha National Bank Building, Omaha, Nebraska.
Main Studios—Hotel Lincoln, Lincoln, Nebraska.
Transmitter—located 1-1/2 miles from the main studios, at the edge of the city.
Wave—Power—Time
Operating power—10,000 watts.
(100% modulation—automatic crystal control.)
389.4 meters; 770 kilocycles.
Licensed to operate full time on cleared channel. Operates on Central Standard Time. Daylight Savings Time not observed.
Commission and Cash Discount
Agency commission 15% to recognized advertising agencies on net charges for station time. No cash discounts. Bills are due and payable when rendered.
General Advertising
For combination rates see listing of Columbia Broadcasting System (Basic Network).
Also sold in combination with KOIL, Omaha. These combination rates are included in this listing immediately following the KFAB rate schedule.
Rates in combination with KFOR on request.
The following rates are for general advertising. For retail rates consult station management.

CLASS "A"
(6:00 p.m. to 10:30 p.m. daily)

	1 tl.	13 tl.	26 tl.	52 tl.	104 tl.	250 tl.
1 hour	300.00	285.00	270.00	255.00	240.00	225.00
1/2 hour	165.00	156.75	148.50	140.25	132.00	123.75
1/4 hour	90.00	85.50	81.00	76.50	72.00	67.50
5 minutes	35.00	32.25	29.50	26.75	24.00	21.25
100 words	25.00	23.75	22.50	21.25	20.00	18.75

CLASS "B"
(8:30 a.m. to 6:00 p.m. week days)

1 hour	120.00	114.75	112.50	106.25	100.00	93.75
1/2 hour	72.00	74.10	70.20	66.30	62.40	58.50
1/4 hour	36.00	47.50	45.00	42.50	40.00	37.50
5 minutes	21.25	20.20	19.13	18.06	17.00	15.94
100 words	14.00	13.30	12.60	11.90	11.20	10.50

CLASS "C"
(10:30 p.m. to 12:00 midnight, 6:00 a.m. to 8:30 a.m. week days)

	1 tl.	13 tl.	26 tl.	52 tl.	104 tl.	250 tl.
1 hour	115.00	109.25	103.50	97.75	92.00	86.25
1/2 hour	65.00	61.75	58.50	55.25	52.00	48.75
1/4 hour	35.00	33.25	31.50	29.75	28.00	26.25
5 minutes	22.50	22.22	21.15	19.90	18.80	17.62
100 words	12.00	11.40	10.80	10.20	9.60	9.00

SUNDAY RATES
Class "A" and Class "C" rates same as week days.
Class "B" up to 12:00 noon same as week days.

CLASS "B"
(12:00 noon to 6:00 p.m.)

1 hour	150.00	142.50	135.00	127.50	120.00	112.50
1/2 hour	93.00	88.92	84.24	79.56	74.88	70.20
1/4 hour	60.00	57.00	54.00	51.00	48.00	45.00
5 minutes	37.50	35.62	33.75	31.88	30.00	28.13
100 words	16.80	15.96	15.12	14.28	13.44	12.60

ANNOUNCEMENTS
Daily one minute announcements, six days weekly, on daytime participating periods:
Package rate, per month 250.00
Participation five days weekly on Jane Tucker programs (home economics, cooking, etc.), per month 250.00

SPECIAL FEATURES
Time, temperature and weather reports—rates on request.
RECORDED PROGRAMS
Information on request. Transcription library service available.

COMBINATION RATES
KFAB-KOIL
CLASS "A"
(6:00 p.m. to 10:30 p.m. daily)

	1 tl.	13 tl.	26 tl.	52 tl.	104 tl.	250 tl.
1 hour	375.00	356.25	337.50	318.75	300.00	281.25
1/2 hour	193.50	183.82	174.15	164.48	154.80	145.13
1/4 hour	111.50	105.93	100.35	94.78	89.20	83.63
5 minutes	76.00	72.20	68.40	64.60	60.80	57.00
100 words	33.00	32.25	31.50	29.75	28.00	26.25

CLASS "B"
(8:30 a.m. to 6:00 p.m. week days)

1 hour	187.50	178.13	168.75	159.38	150.00	140.63
1/2 hour	117.25	111.39	105.53	99.66	93.80	87.94
1/4 hour	73.00	71.35	67.50	63.75	60.00	56.25
5 minutes	46.50	44.18	41.85	39.53	37.20	34.88
100 words	18.00	17.10	16.20	15.30	14.40	13.50

CLASS "C"
(10:30 p.m. to 12:00 midnight, 6:00 a.m. to 8:30 a.m. week days)

1 hour	145.00	136.75	128.50	120.25	112.00	103.75
1/2 hour	90.00	83.50	81.00	76.50	72.00	67.50
1/4 hour	50.00	47.50	45.00	42.50	40.00	37.50
5 minutes	33.50	31.83	30.15	28.48	26.80	25.13
100 words	15.00	14.25	13.50	12.75	12.00	11.25

SUNDAYS
Class "A" and Class "C" rates same as week days.
Class "B" up to 12:00 noon same as week days.

CLASS "B"
(12:00 noon to 6:00 p.m.)

	1 tl.	13 tl.	26 tl.	52 tl.	104 tl.	250 tl.
1 hour	223.00	213.75	202.50	191.25	180.00	168.75
1/2 hour	140.70	133.67	126.63	119.60	112.56	105.53
1/4 hour	90.00	85.50	81.00	76.50	72.00	67.50
5 minutes	55.80	53.01	50.22	47.43	44.64	41.85
100 words	21.60	20.52	19.44	18.36	17.28	16.20

TALENT
Rates on application.
REMOTE CONTROL
Programs originating outside the studios of station or requiring special production are subject to additional charges.
SERVICE FACILITIES
Services of the program and continuity departments and staff announcers are included without extra charge.
Contract and Other Requirements
Resale of time not permitted. All programs, transcriptions and announcements are subject to approval of station management.
Station reserves the right to reschedule any commercial period, subject to immediate cancellation if not acceptable to advertiser.
Closing Time
All contracts should be closed as far in advance of initial program as possible to facilitate production.
Mechanical Program Equipment
Equipped to handle programs by electrical transcription. Using 33-1/3 and 78 r.p.m. double turn-tables.
Personnel
General Manager—Don Searle.
National Advertising Director—Frank E. Pellegrin.
Representatives
The Katz Agency.

KFOR

(Established 1924)

Rate card undated; received April 17, 1939. (Card No. 4-39.)
Owned by Cornbelt Broadcasting Corporation.
Operated by the Central States Broadcasting System.
Studios—Hotel Lincoln, Lincoln, Nebraska. Other studios—Omaha Nat'l Bank Bldg., Omaha, Nebr.
Transmitter—Lincoln, Nebraska.
Wave—Power—Time
Operating power—250 watts days; 100 watts nights.
(100% modulation—crystal control.)
247.8 meters; 1,210 kilocycles.
Licensed to operate on local channel, full time. Daylight Saving Time not observed.
Actual operating schedule: 7:00 a.m. to 12:00 midnight.
Commission and Cash Discount
Agency commission 15% on net charges for station time to recognized advertising agencies. No cash discounts. Bills are due and payable when rendered.
General Advertising
For combination rates see listing of Mutual Broadcasting System (Basic Supplementary Stations).
Also sold in combination with KOIL. These combination rates are included in this listing immediately following the KFOR rate schedule.
The following rates are for general advertising. For retail rates consult station management.

CLASS "A"
(6:00 p.m. to 10:30 p.m. daily)

	1 tl.	13 tl.	26 tl.	52 tl.	104 tl.	250 tl.
1 hour	74.00	70.30	66.60	62.90	59.20	55.50
1/2 hour	38.50	36.58	34.65	32.73	30.80	28.88
1/4 hour	22.00	20.90	19.80	18.70	17.60	16.50
5 minutes	15.00	14.25	13.50	12.75	12.00	11.25
100 words	6.00	5.70	5.40	5.10	4.80	4.50

CLASS "B"
(8:30 a.m. to 6:00 p.m. week days)

1 hour	45.00	42.75	40.50	38.25	36.00	33.75
1/2 hour	28.00	26.60	25.20	23.80	22.40	21.00
1/4 hour	18.00	17.10	16.20	15.30	14.40	13.50
5 minutes	11.25	10.69	10.13	9.56	9.00	8.44
100 words	5.00	4.75	4.50	4.25	4.00	3.75

CLASS "C"
(10:30 p.m. to 12:00 midnight, 7:00 a.m. to 8:30 a.m. week days, and 7:00 a.m. to 12:00 noon Sundays)

1 hour	40.00	38.00	36.00	34.00	32.00	30.00
1/2 hour	22.00	20.90	19.80	18.70	17.60	16.50
1/4 hour	12.00	11.40	10.80	10.20	9.60	9.00
5 minutes	8.00	7.60	7.20	6.80	6.40	6.00
100 words	4.00	3.80	3.60	3.40	3.20	3.00

SUNDAY RATES
Class "A" and Class "C" rates same as week days.
Class "B" up to 12:00 noon same as week days.

CLASS "B"
(12:00 noon to 6:00 p.m.)

1 hour	54.00	51.30	48.60	45.90	43.20	40.50
1/2 hour	33.00	31.92	30.24	28.56	26.88	25.20
1/4 hour	21.00	20.52	19.44	18.36	17.28	16.20
5 minutes	12.50	12.82	12.15	11.48	10.80	10.13
100 words	6.00	5.70	5.40	5.10	4.80	4.50

SPECIAL FEATURES
Daily one minute announcements, six days weekly, on participation periods:
Musical Clock: Class "C" time, package rate, per month 70.00.
Participation Programs: Class "B" time, per month 85.00.
Time, temperature and weather reports—rates on request.

COMBINATION RATES
KOIL-KFOR
CLASS "A"
(6:00 p.m. to 10:30 p.m. daily)

	1 tl.	13 tl.	26 tl.	52 tl.	104 tl.	250 tl.
1 hour	252.50	239.88	227.25	214.63	202.00	189.38
1/2 hour	130.00	122.50	117.00	110.50	104.00	97.50
1/4 hour	75.00	71.25	67.50	63.75	60.00	56.25
5 minutes	51.25	48.69	46.13	43.56	41.00	38.44
100 words	20.00	19.00	18.00	17.00	16.00	15.00

CLASS "B"
(8:30 a.m. to 6:00 p.m. week days)

1 hour	125.00	118.75	112.50	106.25	100.00	93.75
1/2 hour	78.00	74.10	70.20	66.30	62.40	58.50
1/4 hour	50.00	47.50	45.00	42.50	40.00	37.50
5 minutes	31.25	29.69	28.12	26.56	25.00	23.44
100 words	12.00	11.40	10.80	10.20	9.60	9.00

CLASS "C"
(10:30 p.m. to 12:00 midnight; 6:30 a.m. to 8:30 a.m. week days)

	1 tl.	13 tl.	26 tl.	52 tl.	104 tl.	250 tl.
1 hour	82.50	88.03	84.15	79.48	74.80	70.13
1/2 hour	51.50	48.93	46.35	43.78	41.20	38.63
1/4 hour	28.00	26.60	25.20	23.80	22.40	21.00
5 minutes	18.50	17.58	16.65	15.73	14.80	13.88
100 words	8.00	7.60	7.20	6.80	6.40	6.00

SUNDAYS
Class "A" and Class "C" rates same as week days.
Class "B" up to 12:00 noon same as week days.

CLASS "B"
(12:00 noon to 6:00 p.m.)

1 hour	150.00	142.50	135.00	127.50	120.00	112.50
1/2 hour	93.00	88.92	84.24	79.56	74.88	70.20
1/4 hour	60.00	57.00	54.00	51.00	48.00	45.00
5 minutes	37.50	35.62	33.75	31.88	30.00	28.13
100 words	16.80	15.96	15.12	14.28	13.44	12.60

RECORDED PROGRAMS
Information on request. Transcription library service available.

TALENT
Rates on application.
REMOTE CONTROL
Programs originating outside the studios of station or requiring special production are subject to additional charges.
SERVICE FACILITIES
Services of program and continuity departments and staff announcers are included without extra charge.
Contract and Other Requirements
Resale of time not permitted. All programs, transcriptions and announcements are subject to approval of station management.
Station reserves the right to reschedule any commercial period, subject to immediate cancellation if not acceptable to advertiser.
Closing Time
All contracts should be closed as far in advance of initial program as possible to facilitate production.
Mechanical Program Equipment
Equipped to handle programs by electrical transcription, using either 33-1/3 or 78 r.p.m. recordings.
Personnel
General Manager—Don Searle.
National Advertising Director—Frank E. Pellegrin.
Representatives
The Katz Agency.

NORFOLK

(Madison County)

W J A C

(Established 1932)

Rate card undated, received April 21, 1939.
Owned and operated by Norfolk Daily News.
Studios and Offices—115 North Fourth Street, Norfolk, Nebr.
Main Studio—Hotel Norfolk, Norfolk, Nebraska.
Transmitter—located on W. Kensington Avenue—1-1/2 miles west of main studios in Norfolk.

(This listing continued on next page)

856

NEBRASKA—Continued

NORFOLK—Continued

WJAG—Continued

Wave—Power—Time
Operating power—1,000 watts. (1,000-A, nondefinite.)
461.3 meters; 1,680 kilocycles.
Licensed to operate day time. Operates on Central Standard Time.
Actual operating schedule: March 6:30 a.m. work days and 10:30 a.m. Sundays and closes at 7 January; 7:15 p.m.; February, 7:00 p.m.; March, 6:30 p.m.; April, 7:15 p.m.; May, 7:45 p.m.; June and July, 8:00 p.m.; August, 7:30 p.m.; September, 6:45 p.m.; October, 6:15 p.m.; November, 5:15 p.m.; December, 5:00 p.m.

Commission and Cash Discount
Agency commission 15% on net charges for station facilities to recognized advertising agencies. No commission on talent. No cash discount. Bills due on 10th of month following service.

General Advertising
No time available between 12:15 p.m. and 12:45 p.m. week days except for announcements. No time sold on this schedule for less than five minutes.
Rates include ASCAP fees and other copyright charges. For regulations applying to announcements see "Contests and Other Announcements." Announcements read by station announcer are charged by the word; when read by others, they are charged on a time basis.

CLASS "A"
(Before 7:00 a.m., 9:45 a.m. to 10:45 a.m., 11:45 a.m. to 12:15 p.m., 12:45 p.m. to 1:30 p.m.; after 5:00 p.m. week days and 12:00 noon to 1:00 p.m. Sundays)

1 hour	60.00
1/2 hour	30.00
1/4 hour	15.00
10 minutes	10.00
5 minutes	12.00

CLASS "B"
(7:00 a.m. to 9:00 a.m., 10:45 a.m. to 11:45 a.m., 1:30 p.m. to 3:00 p.m., 4:30 p.m. to 5:30 p.m. week days and 10:00 a.m. to 12:00 noon, 1:30 p.m. to 3:00 p.m. Sundays)

1 hour	40.00
1/2 hour	24.00
1/4 hour	16.00
10 minutes	14.00
5 minutes	10.00

CLASS "C"
(9:00 a.m. to 9:45 a.m., 3:00 p.m. to 4:30 p.m. week days and before 10:00 a.m., after 3:00 p.m. Sundays)

1 hour	30.00
1/2 hour	18.00
1/4 hour	10.00
10 minutes	9.00
5 minutes	3.00

ANNOUNCEMENTS
No time available between 12:15 p.m. and 12:45 p.m. week days except for announcements.
CLASS "A"
(12:15 p.m. to 12:45 p.m.)
100 words 10.00

CLASS "B"
(11:45 a.m. to 12:15 p.m. and 12:45 p.m. to 1:30 p.m.)
100 words 8.00

CLASS "C"
(Station breaks before 11:45 a.m. or after 1:30 p.m.)
100 words 6.00

CLASS "D"
(10:00 a.m. to 11:45 a.m., 1:30 p.m. to 3:00 p.m., except station breaks)

100 words	3.00
50 words	1.50
25 words	1.00

CLASS "E"
(Before 10:00 a.m. and after 3:00 p.m., except station breaks)

100 words	2.00
50 words	1.50
25 words	1.00

Extra words or seconds are charged proportionately. If an announcement is read by station announcer on Class "A" and is over 100 words, the extra words cost .10 each. If the advertiser is talking personally, or if a transcription is being run on Class "A" and runs over one minute, the extra seconds cost .16-2/3 each.

DISCOUNTS
Each unit of program takes a separate quantity discount. Spots may not be combined with programs to earn discounts. However, discounts earned on programs of 15 minutes or more may be applied to spot announcements for the same advertiser.
To be used within one year.

13 to 24 times	5%
25 to 51 times	10%
52 to 103 times	15%
104 to 155 times	20%
156 to 207 times	25%
208 to 259 times	30%
260 to 311 times	35%
312 or more times	40%

SPECIAL FEATURES
Sales Service: Details on request. For month 135.00.
News and Sports broadcasts: Five minutes each week day, per week 75.00; 10 minutes 112.00; 15 minutes 150.00.
Time signals and 50 words once each week day, except noon, per month 100.00.
Weather reports and 100 words once each week day, except noon, per month 130.00.
Lane range weather reports every Saturday noon and 100 words, per week 15.00.

Special Feature Discounts

13 weeks	5%	39 weeks	15%
26 weeks	10%	52 weeks	20%

News Flashes and 100 words, each 5.00. Regular discounts apply.
Informal interviews, each 25.00. Regular discounts apply.
Silmard Service: 500.00 for the season.
State League Baseball reports: 500.00 for the season.
Football discontinued; 300.00 for the season.

RTAP RATES
Use the base rate for spot time and apply the following discounts, instead of quantity discounts.

	6 mos.	9 mos.	12 mos.
1 weekly	10%	15%	20%
2 weekly	10%	15%	20%
3 weekly	10%	15%	20%
4 weekly	10%	15%	20%
5 weekly	10%	15%	20%
6 or more weekly	10%	15%	20%

TALENT
Rates on request.

Contract and Other Requirements
All advertising subject to approval.
Station cannot guarantee to read an announcement at any particular minute. There must be 10 minutes leeway.
No business, telegraph, or mail orders accepted from those who have not arranged for an extension of credit. Station reserves the right to edit announcements and to correct grammatical or other errors or to eliminate offensive statements. Station will not accept announcements concerning radio programs which are on the air on other stations at the same time as WJAG.
Sunday and liquor announcements are not accepted for any hour or on Sunday, nor close to devotional or children's programs.
Station does not read announcements with sound effects but accept transcribed announcements with sound effect on the transcription.
Announcements must conform with the rules of the Federal Communications Commission and the code of ethics of the National Association of Broadcasters. Station does not accept announcements starting out with "News Flash" or "S.O.S." or "Calling All Cars" or any other attempt to disguise the fact that it is an announcement. Announcements are not accepted of remedies or from manufacturers under investigation by the Federal Trade Commission or the Food and Drugs Administration or the Post Office Department.
Station reserves right to change schedule of programs or to cancel any announcement ordered to make time for a political broadcast or for the broadcast of a special event in the public interest.
All political announcements must be prefaced and concluded with the statement "this is a paid political announcement" or must be so worded that the listener understands it is a paid political announcement.
No contract accepted for more than one year.
Competitive announcements and programs must be separated.

Closing Time
Talks and addresses, copy of speech to be filed 24 hours in advance.

Mechanical Program Equipment
Equipped to handle programs by electrical transcription, using 33-1/3 and 78 r.p.m. turn-tables, either vertical or lateral.

Personnel
Station Manager—Arthur C. Thomas.
Program Director—Russell Jensen.

Representatives
Howard H. Wilson Company.

NORTH PLATTE
(Lincoln County)
KGNF
(Established 1930)

Rates effective September 1, 1937.
Owned and operated by Great Plains Broadcasting Company.
Business Office and Studio—1521 W. 12th St., North Platte, Nebraska, telephone 182.
Transmitter—1521 W. 12th St., North Platte, Nebr.

Wave—Power—Time
Operating power—1,000 watts.
210.1 meters; 1,430 kilocycles.
Licensed to operate day time on cleared regional channel. Operates on Central Standard Time. Daylight Savings Time not observed.
Actual operating schedule: Week days 7:00 a.m. to local sunset.

Commission and Cash Discount
Agency commission 15% to recognized advertising agencies. Commission does not apply on talent. No cash discount.

General Advertising
Rates include charges by owners of music copyrights on present contract arrangement.
The following rates are for national advertising. For local advertising rates consult station management.

1/2 hour	30.00
1/4 hour	17.50
10 minutes	15.00
5 minutes	10.00
2 minutes	7.50
1 minute	4.00

FREQUENCY DISCOUNTS
Allowed on net station time charges only:

12 times within 3 months	5%
24 times within 6 months	10%
39 times within 6 months	15%
52 times within 6 months	20%
78 times within 6 months	25%

SPECIAL FEATURES
News: Rates on application.

RECORDED PROGRAMS
Regular time charges apply to recorded programs. Transcription library service available.

TALENT
Rates and requirements on application.

REMOTE CONTROL
Remote control productions will be made at cost of extra facilities involved subject to the approval of the technical staff.

Contract and Other Requirements
All programs at the rates will include station identification announcements and announcements of transcription music from station studios.
Preferred position granted by priority and availability on contract basis. No contract accepted for more than one year. All contracts subject to the station manager's approval and permission.
The production staff or station owners reserves the right to cancel or refuse any advertising for reasons satisfactory to themselves.

Mechanical Program Equipment
Equipped to handle programs by electrical transcription, using 33-1/3 and 78 r.p.m. double turn-tables.

Personnel
President—W. I. LaDuron.

Representatives
None.

OMAHA
(Douglas County)
KOIL
(Established 1926)

Rate card undated; received April 17, 1939. (Card No. 4-39.)
Owned and operated by Central States Broadcasting Company.
Business Offices and Main Studios—Omaha National Bank Building, Omaha, Nebraska. Other studios—Hotel Lincoln, Lincoln, Nebraska.
Transmitter—Council Bluffs, Iowa.

Wave—Power—Time
Operating power 5,000 watts days; 1,000 watts nights. 258 meters; 1,500 kilocycles.
Licensed to operate full time. Daylight Savings Time not observed.
Actual operating schedule: 18 hours daily.

Commission and Cash Discount
Agency commission 15% allowed to recognized advertising agencies on net charges for station time. No cash discount. Bills are due and payable when rendered.

General Advertising
For combination rates see listing of Columbia Broadcasting System (Basic Network).
Also sold in combination with KFAB, Lincoln, and KFOR, Lincoln. For combination rates see listings of KFAB and KFOR.
The following rates are for general advertising. For retail rates consult station management.

CLASS "A"
(6:00 p.m. to 10:30 p.m. daily)

	1 t.	13 t.	26 t.	52 t.	104 t.	250 t.
1 hour	225.00	213.75	202.50	191.25	180.00	168.75
1/2 hour	118.00	112.10	106.20	100.30	94.40	88.50
1/4 hour	68.00	64.60	61.20	57.80	54.40	51.00
5 minutes	46.50	44.18	41.85	39.53	37.20	34.88
100 words	18.00	17.10	16.20	15.30	14.40	13.50

CLASS "B"
(6:30 a.m. to 6:00 p.m. week days)

1 hour	90.00	85.50	81.00	76.50	72.00	67.50
1/2 hour	56.25	53.44	50.63	47.81	45.00	42.19
1/4 hour	30.00	28.50	27.00	25.50	24.00	22.50
5 minutes	22.50	21.38	20.25	19.13	18.00	16.88
100 words	9.00	8.55	8.10	7.65	7.20	6.75

CLASS "C"
(10:30 p.m. to 12:00 midnight, 6:30 a.m. to 8:30 a.m. week days)

1 hour	82.50	82.18	77.85	73.52	69.20	64.88
1/2 hour	47.50	45.13	42.75	40.38	38.00	35.63
1/4 hour	26.00	24.70	23.40	22.10	20.80	19.50
5 minutes	17.50	16.63	15.75	14.88	14.00	13.13
100 words	7.00	6.65	6.30	5.95	5.60	5.25

SUNDAY RATES
Class "A" and Class "C" rates same as week days.
Class "B" up to 12:00 noon same as week days.

CLASS "D"
(12:00 noon to 6:00 p.m.)

1 hour	108.00	102.60	97.20	91.80	86.40	81.00
1/2 hour	67.50	64.13	60.75	57.38	54.00	50.63
1/4 hour	43.20	41.04	38.88	36.72	34.56	32.40
5 minutes	27.00	25.65	24.30	22.95	21.60	20.25
100 words	10.80	10.26	9.72	9.18	8.64	8.10

ANNOUNCEMENTS
Daily one minute announcements, six days weekly, on participating periods:
Polly, the Shopper: (Five days weekly) Class "B" time, per month 100.00.
Musical Clock: Class "C" time, package rate, per month 150.00.

SPECIAL FEATURES
Time, weather and temperature reports—rates on request.

RECORDED PROGRAMS
Information on request. Transcription library service available.

TALENT
Rates on application.

REMOTE CONTROL
Remote control productions will be made at cost of extra facilities involved subject to the approval of the technical staff.

Contract and Other Requirements
Rarely if time not permitted. All programs, transcriptions and announcements are subject to approval of station management.
Station reserves the right to reschedule any commercial period, subject to immediate cancellation if not acceptable to advertiser.

Closing Time
All contracts should be closed as far in advance of initial program as possible to facilitate production.

Mechanical Program Equipment
Equipped to handle programs by electrical transcription, using 33-1/3 and 78 r.p.m. double turn-tables.

Personnel
General Manager—Don Searle.
National Advertising Director—Frank E. Pellegrin.

Representatives
The Katz Agency.

1379

852

NEBRASKA—Continued

OMAHA—Continued

KOWH
(Established 1922)

Rates effective May 1, 1939. (Card No. 1.)
Owned and operated by Omaha World-Herald.
Business Office and Studio—World-Herald Building, Omaha, Nebraska, telephone AT 2222.
Transmitter—60th and Girard Streets, Omaha, Nebr.

Wave—Power—Time
Operating power—500 watts.
454.3 meters; 660 kilocycles.
Actual operating schedule: Sunday 8:00 a.m. to 5:00 p.m. Week days 6:00 a.m. to local sunset—

January	5:15 p.m.	July	8:00 p.m.
February	6:00 p.m.	August	7:30 p.m.
March	6:30 p.m.	September	6:30 p.m.
April	7:00 p.m.	October	5:45 p.m.
May	7:30 p.m.	November	5:00 p.m.
June	8:00 p.m.	December	5:00 p.m.

Commission and Cash Discount
Agency commission 15% to recognized advertising agencies on net charge for station time. No cash discount. Bills due and payable when rendered.

General Advertising
The following rates are for both local and national advertising.
Retroactive discount allowed on continuous time actually used. Contracts cancelled before completion become payable at once at the short rate.

	1 time	13 times	26 times	52 times	100 times	150 times	300 times
	tl.	tl.	tl.	tl.	tl.	tl.	tl.
1 hour	100.00	30.00	47.50	45.00	42.50	40.00	37.50
1/2 hour	60.00	30.00	28.50	27.00	25.50	24.00	22.50
1/4 hour	36.00	18.00	17.10	16.20	15.30	14.40	13.50
10 minutes	30.00	15.00	14.25	13.50	12.75	12.00	11.25
5 minutes	25.00	12.50	11.88	11.25	10.63	10.00	9.37
3 minutes	17.50	8.75	8.32	7.88	7.44	7.00	6.56
2 minutes	15.00	7.50	7.13	6.75	6.38	6.00	5.62
One minute or 125 words	10.00	5.00	4.75	4.50	4.25	4.00	3.75
1/2 minute or 50 words	7.50	3.75	3.57	3.38	3.19	3.00	2.82
1/4 minute or 25 words	5.00	2.50	2.38	2.25	2.13	2.00	1.88

STRIP RATES
Applicable to programs of five minutes or longer. Use of same period daily except Sunday takes a weekly rate of five times the daily rate. Use of same period five times weekly takes a weekly rate of four and one half times the daily rate. The above based on total times ordered.

SPECIAL FEATURES
For rates covering local retail merchants only, weather reports, temperature reports, time signals, consult station management.

ELECTRICAL TRANSCRIPTIONS
Transcription library services available—rates on request.

TALENT
Talent and special announcers are supplied at actual cost.

REMOTE CONTROL
Programs originating outside of studios or requiring special production are subject to additional charge.

SERVICE FACILITIES
Services of the program and continuity departments and staff announcers are provided without extra charge. Merchandising service available on cooperative basis.

Contract and Other Requirements
Contracts limited to one year.
All contracts subject to present and future state and federal regulation. Station reserves the right to discontinue or refuse any advertising program for reasons satisfactory to itself except in cases governed by federal regulations.

Mechanical Program Equipment
Equipped to handle programs by electrical transcription, using 33-1/3 and 78 r.p.m. double turn-tables.

Personnel
Manager—Vernon H. "Bing" Smith.
Assistant Manager—Frank Shapen.
Sales Manager—Clement W. Young.

Representatives
George P. Hollingbery Company.

WOW
(Established 1923)

Rates effective March 15, 1938. (Card No. 8.)
Owned and operated by Woodmen of the World Life Insurance Society.
Business Office and Studio—17th and Farnam Streets, Omaha, Nebraska, WE 5490.
Transmitter—60th and Keeney Street, Omaha, Nebr.

Wave—Power—Time
Operating power 1,000 watts days; 1,000 watts nights. 526.3 meters; 570 kilocycles.
Licensed to operate full time on cleared regional channel. Operates on Central Standard Time—13-1/2 hours daily. Daylight Savings Time not observed.

Commission and Cash Discount
Agency commission 15% on time rates only. No discount for talent to agencies. Cash discount 2%—10 days. Invoices mailed 1st of each month.

General Advertising
For combination rates see listing of National Broadcasting Company (Blue Red Network).
The following rates apply to national advertising. For local advertising, consult station management.

WEEK DAYS
(6:00 p.m. to 11:00 p.m.)

1 hour	250.00
1/2 hour	162.50
1/4 hour	82.50
5 minutes	45.00
25 words (chain breaks), net	25.00

(8:30 a.m. to 6:00 p.m.)

1 hour	100.00
1/2 hour	100.00
1/4 hour	60.00
5 minutes	45.00
25 words (chain breaks), net	15.00

(6:30 a.m. to 8:30 a.m., 11:00 p.m. to 12:00 midnight)

1 hour	100.00
1/2 hour	60.00
1/4 hour	36.00
5 minutes	30.00
25 words (chain breaks), net	7.50

SUNDAYS
(6:00 p.m. to 11:00 p.m.)

1 hour	220.00
1/2 hour	165.00
1/4 hour	95.00
5 minutes	65.00
25 words (chain breaks), net	25.00

(7:00 a.m. to 6:00 p.m.)

1 hour	200.00
1/2 hour	110.00
1/4 hour	75.00
5 minutes	65.00
25 words (chain breaks), net	15.00

(11:00 p.m. to 12:00 midnight)

1 hour	100.00
1/2 hour	65.00
1/4 hour	50.00
5 minutes	30.00
25 words (chain breaks), net	7.50

ANNOUNCEMENTS
WEEK DAYS
(6:00 p.m. to 11:00 p.m.)

100 words	25.00
60 words	20.00

(8:30 a.m. to 6:00 p.m.)

100 words	15.00
60 words	10.00

(6:30 a.m. to 8:30 a.m. and 11:00 p.m. to 12:00 midnight)

100 words	7.50
60 words	5.00

SUNDAYS
(6:00 p.m. to 11:00 p.m.)

100 words	25.00
60 words	20.00

(7:00 a.m. to 6:00 p.m.)

100 words	15.00
60 words	10.00

(11:00 p.m. to 12:00 midnight)

100 words	7.50
60 words	5.00

FREQUENCY DISCOUNTS
Applicable to all station time except chain breaks and special rates.

13 times	5%	100 times	20%
26 times	10%	300 or more times	
52 times	15%	(maximum)	25%

SPECIAL RATES
Applies on early morning and night closing time periods each week day.
Six 1/4 hours 150.00 net, including transcription library.
Three 1/4 hours 90.00 net, including transcription library.

SPECIAL FEATURES
Time signals, news reports and other features available for sponsorship. Rates on application.

POLITICAL TALKS
All political talks are carried at general rates and must be submitted to station prior to broadcast. Cash with order.

RECORDED PROGRAMS
No extra charge for broadcast of electrical transcriptions.

TALENT
Arrangements for all types of talent made at cost.

REMOTE CONTROL
Facilities for remote pick-up outside of studios. Expenses of such pick-ups charged at cost.

Contract and Other Requirements
Advertising of alcoholic beverages not accepted.
Station reserves right if necessary to reschedule any commercial period. If rescheduling not acceptable, advertiser reserves option to cancel immediately. All charges for talent additional to time rates.
Station reserves the right to approve or reject all commercial and non-political programs; and cancel all programs which are of objectionable character.

Closing Time
Closing date of program service two weeks in advance of broadcast.

Mechanical Program Equipment
Equipped to handle programs by electrical transcription, using 33-1/3 and 78 r.p.m. double turn-tables for vertical and lateral cut recordings.

Personnel
Personnel Director—Wm. Rosse.
General Manager—John J. Gillin, Jr.

Representatives
John Blair & Company.

SCOTTSBLUFF
(Scotts Bluff County)

KGKY
(Established 1936)

Rates received May 21, 1936.
Owned and operated by the Hilliard Company, Inc.
Business Office and Studio—1917 Broadway, Scottsbluff, Nebraska, telephone 42-4. Other studios, 307 Western Ave., Alliance, Nebraska.
Transmitter—South Broadway, Scottsbluff, Nebraska.

Wave—Power—Time
Operating power—250 watts days; 100 watts nights. (100% modulation—crystal control.)
[illegible]9.9 meters; 1,380 kilocycles.
Licensed to operate full time on local channel. Operates on Mountain Standard Time. Daylight Savings Time not observed.
Actual operating schedule: Sunday 10:00 a.m. to 4:00 p.m. Week days 6:30 a.m. to 7:30 p.m. and 1:00 p.m. to 9:00 p.m.

Commission and Cash Discount
Agency commission 15% to all recognized advertising agencies. Commission does not apply on talent. All programs to be on a cash basis unless otherwise agreed upon by management. No cash discount. Invoices are mailed 1st of the month.

General Advertising
The following rates apply to national advertising.

	(After 6:00 p.m. and from 12:00 noon to 1:00 p.m.) 1 tl.	13 tl.	26 tl.	52 tl.	104 tl.
1 hour	50.00	25.50	27.00	23.50	21.00
1/2 hour	18.00	17.10	16.20	15.30	14.40
1/4 hour	10.00	9.50	9.00	8.50	7.00

	(Day time except 12:00 noon to 1:00 p.m.) 1 tl.	13 tl.	26 tl.	52 tl.	104 tl.
1 hour	25.00	22.50	20.00	17.50	15.00
1/2 hour	12.00	11.50	11.00	10.50	9.00
1/4 hour	6.00	5.70	5.50	5.00	4.00

ANNOUNCEMENTS
Sponsored programs given preference over announcements. Price quoting permitted. Subject to station's approval.

	1 tl.	26 tl.	52 tl.	100 tl.
15 to 20 seconds	1.00	.90	.80	.70
1 minute	3.00	2.70	2.50	2.10
2 minutes	3.00	2.70	2.50	2.10
3 minutes	4.00	3.60	3.30	3.00
5 minutes	5.00	4.50	4.00	3.75

RECORDED PROGRAMS
Regular time charges apply to recorded programs. Not restricted to certain hours.

REMOTE CONTROL
Practically any arrangements can be made for remote control programs.

Contract and Other Requirements
Rates are for station time. Talent is extra.

Closing Time
Arrangements for programs must be made one week in advance. Talent programs close one week in advance.

Mechanical Program Equipment
Equipped to handle programs by electrical transcription, using 33-1/3 and 78 r.p.m. double turn-tables.

Personnel
Manager—L. L. Hilliard.
Assistant Manager—R. M. Stewart.

NEVADA

RENO
(Washoe County)

KOH
(Established 1938)

Rates effective October 1, 1937. (Card No. 8.)
Owned by the McClatchy Newspapers. Operated by The Bee, Incorporated.
Business Office and Studio—440 N. Virginia Street, Reno, Nevada, telephone 5166.
Transmitter—440 N. Virginia Street, Reno, Nevada.

Wave—Power—Time
Operating power—500 watts.
(100% modulation—crystal temperature control.)
[illegible].3 meters; 1,500 kilocycles.
Licensed to operate full time on cleared regional channel. Operates on Pacific Standard Time.
Actual operating schedule: Week days 7:00 a.m. to 12:00 midnight. Sundays 8:00 a.m. to 12:00 midnight.

Commission and Cash Discount
Agency commission 15% on net charges for station facilities to recognized advertising agencies. No commission on talent. This applies only to national business originating outside of Reno. Cash discount none.

General Advertising
For combination rates see listings of Columbia Broadcasting System (Mountain Group) and Columbia Pacific Network (Supplementary Stations).
A discount of 10% applies to rates shown below when KOH is used in conjunction with KSL, KWG, KFBK and KERN.
The following rates are for general advertising. For retail advertising rates consult station management.

	(6:00 p.m. to 10:00 p.m.) 1 tl.	13 tl.	26 tl.	52 tl.	104 tl.	261 tl.
1 hour	75.00	74.10	70.50	63.00	58.50	54.00
1/2 hour	47.00	44.65	42.30	37.60	35.25	32.90
1/4 hour	30.00	28.50	27.00	24.00	22.50	21.00
5 minutes	18.00	17.10	16.20	14.50	13.00	12.74

	(7:00 a.m. to 6:00 p.m. and after 10:00 p.m.) 1 tl.	13 tl.	26 tl.	52 tl.	104 tl.	261 tl.
1 hour	62.50	59.00	57.00	52.00	47.50	39.00
1/2 hour	39.00	36.75	35.00	30.00	28.50	23.50
1/4 hour	25.75	24.00	24.17	22.00	21.21	11.00
5 minutes	11.00	10.45	9.90	8.80	8.25	7.70
1 min. or less	6.75	6.41	6.37	5.50	5.50	5.25

ANNOUNCEMENTS
Spot announcements between 6:00 p.m. and 10:00 p.m., when available, each 6.00. No discounts.
(Before 6:00 p.m. and after 10:00 p.m.)
Daily except Sunday:

	For months for— 1 mo.	3 mos.	6 mos.
25 words	45.00	40.50	36.00
50 words	80.00	72.00	64.00
75 words	110.00	100.00	90.00

SPECIAL FEATURES
Time Signals, Weather Reports: 6:00 p.m. to 10:00 p.m. daily including Sunday; 25 words on contract for three months or more, per month 30.00; less than three months, regular spot announcement rate applies.

Educational, lodge and fraternal programs, 25% reduction from regular rates.
Police, missing persons and public welfare programs are gratis.

POLITICAL RATES
Regular commercial rate. Cash in advance.
All talks are to be made by candidates or their representatives. Manuscript is to be submitted to the management for approval 48 hours before broadcast time and must contain only statements in support of the candidate; nothing of a defamatory nature is to be said and no attack upon an opponent will be permitted; nothing outside the accepted commercial can be used over the air. An announcement by station announcer will be given before each political broadcast.

(This listing continued on next page)

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[fol. 1381] PLAINTIFF'S EX. No. 53 (2 Sheets)

G. L. Harman

May 12, 1939.

Eppley Hotels Company, 1804 Dodge Street, Omaha, Nebraska.

GENTLEMEN:

The writer spoke to Miss Hedlin a few days ago, who told him she thought that the Hotel Capitol at Lincoln had discontinued the use of music. The writer was in Lincoln yesterday and at the hotel noted that there was an advertisement of music. He spoke to the manager, who told him that music had been used and was being used but that the same would be immediately discontinued. We sent notices to the Hotel Capitol at Lincoln, the last being sent by registered mail on March 31, 1939, and we have the return receipt therefor.

The Hotel Room at Omaha also does not have a license from this Society to perform the copyrighted works of its members publicly for profit. We have taken up the matter a number of times with your office and have been unable to elicit a response.

Miss Hedlin told the writer just a few days ago she thought the rate on the Fontenelle Hotel was too high or that it ought to include the Rome Hotel. We advised Miss Hedlin, as we have advised your company a number of times, that every contract we write is on a particular establishment; that if your company thinks that any rate is too high you may take up directly with the Society the matter of the negotiation of a lower rate. The writer does not attempt to write contracts with Hotels, but the matter of contracts with hotels is dealt directly with by the Society. He has even sent in forms to be used and suggested the taking up of the matter directly with the Society.

In any event, the contract which you have on the Fontenelle does not include the Capitol Hotel at Lincoln nor the Rome Hotel at Omaha. Registered notices have been sent to both of these establishments. We of course do not know whether or not the copyrighted works of the members of this Society have been performed in either one of these hotels and we cannot state whether or not you need a con-

tract from this Society, but in any event you do not have [fol. 1382] contracts to publicly perform for profit the copyrighted works of its members in these hotels.

Miss Hedlin told the writer a few days ago she was taking the matter up directly with Mr. Hotz. The writer has taken up the matter with Mr. Hotz but we have never been able to consummate any written agreement. We are sending a copy of this letter to Mr. Hotz and beg to advise you that unless a written agreement is entered into between the Society and yourself wherein the right to publicly perform the copyrighted works of the members of this Society is granted to you, you have and shall have no right, express or implied, to publicly perform for profit such copyrighted music.

Very truly yours, —— ——. EMB:MD. cc Mr. W. O. Hotz.

[fol. 1383]

PLAINTIFFS' EXHIBIT 62

[fol. 1384]

Schedule of Suits Instituted in the State of Nebraska

Establishment	Location	Title of Action	Disposition of Action and Remarks
		Actions Instituted in 1926	
American Theatre	Kimball	Irving Berlin, Inc. vs. Marie Goodhand	Settled for $39.68 and license
Columbia Theatre	Omaha	Irving Berlin, Inc. vs. Frank J. Hirs & Anna Hirs	Settled for $65.00 and license
Crystal Theatre	Peru	Irving Berlin, Inc. vs. Fay Whitfield	Service of subpoena never made, defendant dying prior to service thereof
Kelpine Dancing Academy	Omaha	Jerome H. Remick & Co. vs. Wm. E. Kaufman	Settled for $50.00 and license
Liberty Theatre	Weeping Water	Buck vs. G. H. Dennis	Settled for $54.80 and license
Pace Theatre	Chadron	Leo Feist, Inc. vs. James W. Pace	Settled for $90.00 and licenses
Palm Theatre	Ashland	Irving Berlin, Inc. vs. F. B. Honey	Settled for $118.00 and license
Pastime Theatre	Ravenna	Leo Feist, Inc. vs. A. Gehrke and Gus Holub	Settled for $55.00 and license
Royal Theatre	Wisner	Villa Moret, Inc. vs. M. E. Schrieber	Settled for $63.70 and license
		Actions Instituted in 1925	
Blue Bird Party House	Lincoln	Irving Berlin, Inc. vs. Clarence E. Green	Settled for $75.00 and license
[fol. 1385]		Actions Instituted in 1927	
Electric Theatre	Cambridge	Harms, Inc. vs. E. J. Sherburne	Settled for $75.00 and license
Favorite Theatre	Schuyler	Buck & J. H. Remick & Co. vs. Oliver Van Housen	Settled for $50.00, and $20.70 court and costs license
Hastings Amusement Park	Hastings	Ager, Yellen & Bornstein vs. Lib Phillips	Settled for $75.00 and license
King's Park	Norfolk	Leo Feist, Inc. vs. Harry King	Settled for $60.00 and license
Pier Dance Pavilion	Grand Island	Buck vs. Sylvester T. Scott	Settled for $75.00 and license
Princess Theatre	Ogallala	Irving Berlin, Inc. vs. A. F. Kehr	Settled for $100.00 and license
Radio Station KGBZ	York	Leo Feist, Inc. vs. George R. Miller	Settled for $30.00 and license

Schedule of Suits Instituted in Nebraska—Continued

Establishment	Location	Title of Action	Disposition of Action and Remarks
		Actions Instituted in 1928	
Carnation Inn	Millard	Leo Feist, Inc. vs. Lottie Perring, Orville A. Perring and Ralph Evers	Motion to dismiss filed by defendants. Overruled, given leave to answer. No answer filed. Defendant Lottie Perring afterward committed to some institution and finally heard she was in County Poor Farm. Upon this advice per stipulation we dismissed the case
Electric Theatre	Falls City	Jerome H. Remick & Co. vs. J. F. Mullen	Settled for $100.00 and license
Peters Auditorium	Millard	Buck vs. C. W. Peters	Settled for $100.00 and license
[fol. 1386]			
Thelma Theatre	Pender	Harms, Inc. vs. M. C. Freed and Marie Freed	Settled for $54.10 and license
Paramount Theatre	Exeter	Irving Berlin, Inc. vs. Lester P. Ryan and L. E. Morris	Default decree entered 3/18/29, $500 plus $100 attorneys fees and $39.73 costs. Uncollected, whereabouts of defendants unknown
Platt Island	Madison	Shapiro, Bernstein & Co. Inc. vs. J. A. Platt	Settled for $125.00 and license
	Omaha	Buck vs. Hartsock	Settled for $20.00
		Actions Instituted in 1929	
Auditorium Theatre	Osceola	Buck vs. Lloyd Timm	Settled for $63.92 and license
Belle Isle Pavilion	Syracuse	Buck vs. C. W. Gardner	Default decree October, 1929, $750.00, $100.00 attorneys fees and costs. Def. has disappeared
Jones Pavilion	Crystal Lake	Buck vs. Clint Strawn	Defendant filed general denial except an admission he operated pavilion. Case set several times for hearing but because of inability of court to hear it, absence, or other causes, it was not heard. Def. in meantime gave up operation of business and on check of investigators were unable to remember compositions, and therefore dismissed by stipulation

[fol. 1387]

Merryland Party House.....	Omaha	Buck vs. Gust Coschka, Tom Erea and Alex Morar — Settled for $30.00 and license
Nebraska Hidden Paradise.....	Long Pine	Buck vs. Harry M. Culbertson — Default decree Dec. 1929, $250, attorneys fees and costs. Defendant is execution proof
Radio Inn.....	Omaha	Buck vs. Chawncey A. Barnbrook — No service obtained. Establishment closed and in 1931 suit dismissed by plaintiffs without prejudice
Radio Station KFOR.....	Lincoln	Buck vs. Howard A. Shuman and Harry A. Shuman — Settled for $50.00 and license, together with $100 back license fees
Royal Theatre.....	Ponca	Buck vs. S. N. Andress — Settled for $60.00 and license
Strand Theatre.....	Minden	Buck vs. Oscar W. Persons — Defendant filed answer admitting he was the owner and general denial as to each other allegation. Plaintiff moved to strike it, which was sustained. Decree entered into by stipulation providing if def. should pay $100 on or before 10/16/30 decree should be satisfied. $100 never paid and def. has disappeared, his whereabouts are unknown
West Center Park Pavilion.....	Omaha	Buck vs. John Hofeldt — Settled for $50.00 and license

[fol. 1388]

Actions Instituted in 1930

Auditorium Dance Hall.....	Elkhorn	Buck vs. Parkening and Davis — Settled for $75.00 and license
Auditorium Theatre.....	Beaver City	Buck vs. M. C. Shafer — Settled for $225.00 and license
Farmer's Pavilion	Cuming County	Buck vs. Constant Rief — Settled for $100.00 and license
Ideal Theatre.....	Lyman	Buck vs. G. A. Parberry — Default decree entered on 11/13/33, $500.00, $50.00 attorney's fees and costs. Defendant execution proof.
Island Theatre.....	Grand Island	Buck vs. Island Theatre Corporation — Settled for $100.00. Defendant sold theatre and licensed with new exhibitor.
Jan-Mar Theatre.....	Howells	Buck vs. Janata and Frank Marek — Settled for $75.00 and license
Lyric Theatre.....	Atkinson	Buck vs. A. G. Miller — Decree 4/24/30, $250.00 damages, $100.00 attorney's fees and costs. Defendant finally paid $80.00 and we dismissed the case.
Old Mill.....	Leroy	Buck vs. Carl J. Hempel — Settled for $100.00 and license
Olivecrest.....	Omaha	Buck vs. Kai Lauritzen — Settled for $33.70 and license
Queen Theatre.....	Omaha	Buck vs. Anton Delizzi — Settled for $57.00 and license
Star Pavilion.....	West Point	Buck vs. Frank Fiese — Settled for $75.00 and license

Schedule of Suits Instituted in Nebraska—Continued

Establishment	Location	Title of Action	Disposition of Action and Remarks
[fol. 1389]		Actions Instituted in 1931	
Bon Ton Night Club	Omaha	Buck vs. Loyd & McGuigan	Settled for $37.50 and license
Dance Garden	Atkinson	Buck vs. Fred J. Jungman	Dismissed by plaintiff
		Actions Instituted in 1932	
McDonald's Pavilion	Gering	Buck vs. Vernon McDonald	Decree 11/13/33, for $500.00, $50.00 attorney's fees & costs
Riviera Theatre	Gering	Buck vs. George W. Luce	Decree 11/13/33, for $500.00, $50.00 attorney's fees & costs
Radio Station KFOR	Lincoln	Buck vs. Shuman, Jr., et al.	Settled for back license fees and costs
		Actions Instituted in 1933	
Clover Leaf Club	Omaha	Buck vs. Hart & Yousem	Settled for costs amounting to $78.75 & license
Essaness Theatre	Rushville	Buck vs. McParland	Settled for $58.40 and costs
Lafayette Club	Omaha	Buck vs. Martin J. Dineen and Thomas P. Dineen	While suit was pending defendant became bankrupt
Nebraska State Fair Walkathon	Lancaster County	Buck vs. G. E. Lewis, et al.	Settled for $69.60 and license
Radio Station KFOR	Lincoln	Buck vs. Howard A. Shuman and Harry A. Shuman	Settled for $50.00 and license, together with $100 back license fees
Rivoli Theatre and Electric Theatre	Falls City	Buck vs. Falls City Amusement Co. Inc.	Settled for court costs, back license fees and new contracts
[fol. 1390]			
Roxy Theatre	Hemingford	Buck vs. H. C. Drury	Settled for $60.00 and license
Trail Theatre	Bridgeport	Buck vs. Ross Labart	Settled for $70.00 costs and license
Vagabond Nite Club	Omaha	Buck vs. George Vercruysse	Settled for $150.00 and license
		Actions Instituted in 1934	
Bizzarri Inn	Omaha	Buck vs. D. Bizzarri	Settled for $24.35 and license
Coney Island	Lincoln	Buck vs. Elstun and Pappas	Settled for $80.00 and license
Edelweiss Gardens	Omaha	Buck vs. Hanfeldt, Sand and Christensen	Settled for $43.15 and license
Honeymoon Inn	Omaha	Buck vs. Catino and Maddalena	Settled for new contract and costs amounting to $25, $14.40 of which was received. Advised in May 1938 that the debtor was N.G.

Ike's Place	Omaha	Buck vs. Frank Pane & Ike Pane	Judgment entered as to Ike Pane and suit dismissed as to Frank Pane. Decree $500 and costs; defendant execution proof
Jubilee Tavern	Omaha	Buck vs. N. Sankovich	Settled for $29.00 and license
The Oasis	Omaha	Buck vs. M. Hawkins	Settled for $60.00 and license
Princess Theatre	Decatur	Buck vs. Small	Settled for $25.00 and license
[fol. 1391]			
Club Reno	Omaha	Buck vs. John Holman	Settled for $28.50 and license
State Theatre	Central City	Buck vs. Osland and LaHue	Decree secured 1/13/36, $500, attorneys fees and costs. Judgment debtor has disappeared
Wine and Dine	Omaha	Buck vs. Harry H. Benedict	Settled for $35.00 and license
		Actions Instituted in 1935	
Club Beer Parlor	Grand Island	Buck vs. B. J. Knowles	Decree secured 1/13/36. Advised in May, 1938 debtor's whereabouts unknown, nothing to levy on
Clover Leaf Club	Omaha	Buck vs. Volker & Hutter	Settled for $200.00 and license
Farmers & Truckers Inn	Omaha	Buck vs. Gust Coschka	Secured judgment which was satisfied and took chattel mortgage on equipment, which judgment debtor sold. Defendant paid $140 and we released lien
JB Cavern	Omaha	Buck vs. Harry E. Isard	Settled for $36.00 and license
Kelso Pavilion	Chadron	Buck vs. Nelson D. Kelso	Action pending; defendant is judgment proof
Lighthouse	Omaha	Buck vs. Olen E. and David Perry	Settled for $100.00 and license
[fol. 1392]			
Lyric Theatre	Atkinson	Buck vs. A. G. Miller	Settled for $80.00
Marigold Club	Lincoln	Buck vs. Marigold Club Inc.	Decree secured 9/16/36 allowing $1,500 & costs. Corporation defunct, no assets
Mug House Grotto	Omaha	Buck vs. Hedges	Settled for $25.00 and license; suit dismissed
Stratton Hotel	Grand Island	Buck vs. C. D. Stratton	Action pending
		Actions Instituted in 1936	
Auburn Theatre	Auburn	Buck vs. O. R. Bennett	Judgment secured in amount of $250 & costs. Agreed to settle with defendant for costs and back license fees. Defendant finally paid a total of $149.30, of which $49.30 was for court costs and investigating expense and $100 for back license fees

Schedule of Suits Instituted in Nebraska—Continued

Establishment	Location	Title of Action	Disposition of Action and Remarks
		Actions Instituted in 1936—Continued	
Bert Hiatt's Modern Nite Club	Sarpy County	Buck vs. Bert Hiatt	Settled for $35.00 and license
Capitol Bar	Omaha	Buck vs. Allen B. Carey	Settled for $40.00 and license
JB Cavern	Omaha	Buck vs. Harry E. Isard	Secured decree in amount of $500 and attorney's fees. Defendant execution proof
[fol. 1393]			
Northern Star	Nashville	Buck vs. Prochnow, Rix and Jorgensen	Default decree entered as to Rix only, other defendants having answered they had no interest in establishment at date of infringement; cause dismissed as to them.
Peony Park	Omaha	Buck vs. Peony Park Corp.	Original contract reinstated
Pier, The	Grand Island	Buck vs. Sylvester T. Scott, Jr.	Decree & findings of fact entered 1/11/37. Establishment closed. Defendant is without funds
Riverview Inn	Columbus	Buck vs. Anna Heitkam	Settled for $35.00
Roxy Club	Omaha	Buck vs. DePrez & Haddad	Decree secured in amount of $500, atty's fees and costs. Judgment debtor disappeared
Shady Lake Inn	Columbus	Buck vs. George Petros	Settled for $60.00 and contract submitted. Suit dismissed
Waller's Park	Aurora	Buck vs. Lowell M. Andrew	Never got service on defendant. Court dismissed case, sending refund
		Actions Instituted in 1937	
Peony Park	Omaha	Buck vs. Peony Park Corp.	Original contract reinstated
[fol. 1394]			
		Actions Instituted in 1938	
Clover Leaf Club	Omaha	Buck vs. Fred Barnes	Settled for court costs in the amount of $23.30 and license
Skyline Lodge	Elkhorn	Buck vs. Dell Dean	Settled for $17.75 and license
Wagon Wheel	Nebraska City	Buck vs. Frank Schey	Settled for $46.00 and license
		Actions Instituted in 1939	
Pleasure Isle	Dannebreg	Buck vs. A. H. Norgard	Action pending

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PLAINTIFF'S EXHIBIT NO. 64

Broadcasting Performance License

MEMORANDUM OF AGREEMENT made this 1st day of April 1935 between WOODMEN OF THE WORLD LIFE INSURANCE ASSOCIATION, 14th and Farnam Sts., Omaha, Nebraska.

(hereinafter called the LICENSEE), and SOCIETY OF EUROPEAN STAGE AUTHORS AND COMPOSERS, INC., a New York Corporation (hereinafter called the LICENSOR), with its principal office located at 113 West 42nd Street, New York, N. Y.

The LICENSOR has entered into various agreements covering small and/or grand rights with certain Foreign and American Publishers, viz.: VEREINIGTE BERLINER MUSIK VERLAGE DEUTSCHER BUHNENSCHRIFTSTELLER UND BUHNENKOMPONISTEN, Berlin; "SOLUHARFA" MUSIK VERLAG, H. HARMEN HELASCO, Berlin; EDITION ADLER, Berlin; ARN U. STEINCK BUHNENVERLAG, Berlin; ALLEGRO THEATERVERLAG, Berlin; MAX BECK VERLAG, Leipzig; BRYANT MUSIC CO., New York; ERNST EULENBURG, Leipzig; S. FISCHER VERLAG, Berlin; RUD. FORBERG, Leipzig; PAUL GENSCH, BUHNENVERTRIEB, Berlin; HARMONIE-VERLAG, Berlin; INTERNATIONAL EDITION, Leipzig; RICHARD KAUN-VERLAG, Berlin; KOLLO-VERLAG, Berlin; GEBRUDER REINECKE, Leipzig; ROMBO-VERLAG, Berlin; ROBERT ROHLE, Berlin; SCHLESINGER'SCHE B. u. M., Berlin; EDWARD SCHUBERTH & Co., INC., New York; SEBAC PUBLICATIONS, New York; STEINGRABER VERLAG, Leipzig; CHR. FRIEDR. VIEWEG, Berlin; EDITION VULCAN VERLAG U. VERTRIEB, Berlin; OTTO WERNTHAL, Berlin., M.M.Cole, Chicago; O. Pagani & Bro.; Apollo Music Co., New York.

Under said agreements, the LICENSOR is empowered, subject to the various terms and conditions therein contained, to authorize, prohibit, supervise and control performances in the UNITED STATES OF AMERICA of certain musical compositions, dramatico-musical works and dramatic works. The LICENSOR is also engaged generally in the publication, purchase, sale and rental of musical and dramatico-musical works.

The LICENSEE is engaged in producing and furnishing renditions of musical and dramatico-musical works for space radio broadcasting over the station(s) licensed by the Federal Radio Commission as follows:

Station(s)	*Wattage*	*Location*
-WOW-	-1000-	As Above
-	-	-
-	-	-
-	-	-
-	-	-
-	-	-
-	-	-

The parties hereto accordingly hereby mutually agree as follows:

1. The LICENSOR hereby grants and the LICENSEE accepts a non-exclusive license to broadcast publicly (excluding television) from the space radio station(s) mentioned hereinabove such musical compositions as may now be and during such period owned or controlled by LICENSOR, (except those mentioned in Paragraph 2 hereof) and the performance of which for space radio broadcasting, the LICENSOR may under the aforesaid agreements, authorize, prohibit, supervise and control. Such license shall continue throughout the period of LICENSOR's ownership or control thereof as aforesaid, but shall not extend beyond the duration of this agreement.

2. The license granted herein does not cover so-called "GRAND RIGHTS", namely dramatic renditions of dramatico-musical and dramatic works, *e. g.*, musical comedies, operettas, operas, revues, dramas, plays, sketches, and like productions in whole or part, as well as symphonic orchestral works with or without chorus, etc., for all of which special permission must be secured from the LICENSOR and special broadcasting performance fees and rental fees shall be paid to the LICENSOR, which will be specified in each instance by the LICENSOR.

3. The LICENSOR reserves the right, at any time, from time to time, to restrict the performance by LICENSEE unless LICENSOR's written consent be first obtained, of any musical composition covered by the license herein granted.

4. All musical compositions broadcast by LICENSEE under this license shall be announced by the title and composer, and in the event that same shall be taken from a musical production or sound film, the name of the production or sound film shall also be announced in said broadcasting. The LICENSEE hereby agrees to furnish weekly, to LICENSOR its program records and furthermore agrees to permit the LICENSOR to examine at LICENSEE's office, the original program records.

5. The LICENSEE hereby accepts this license subject to all the conditions, restrictions and limitations set forth in this agreement and agrees to pay the LICENSOR an annual license fee of $420.00 (Four Hundred Twenty Dollars and No Cents) - - -

ANNEX "A"

Subject to the terms and conditions of the BROADCASTING PERFORMANCE LICENSE, of which this annex is hereby made part, it is understood that the license fees payable as specified in Paragraph 5 of said BROADCASTING PERFORMANCE LICENSE, shall apply only so long as the LICENSEE shall remain associated in the NATIONAL BROADCASTING COMPANY, INC. network as a "serviced" station thereby securing through means of a license executed between LICENSOR and the NATIONAL BROADCASTING COMPANY, INC. the benefit of certain terms and conditions from LICENSOR.

Commencing pro rata from the day LICENSEE is no longer benefited or "associated" in the NATIONAL BROADCASTING COMPANY, INC. network as aforesaid, of which disassociation LICENSEE agrees to inform LICENSOR immediately by United States registered mail, LICENSEE agrees to pay during the period for which this license is granted, an annual license fee in the amount of $480.00 (Four Hundred Eighty Dollars and No Cents) in twelve equal monthly installments in the manner provided in Paragraph 5.

SOCIETY OF EUROPEAN STAGE AUTHORS AND COMPOSERS, INC.
Licensor

By R C Mancike
Treas. ~~President~~

[illegible]
Licensee

1396

By [illegible] (L.S.)
Personell Director

868

ANNEX "A"

Subject to the terms and conditions of the BROADCASTING PERFORMANCE LICENSE, of which this annex is hereby made part, it is understood that the license fees payable as specified in Paragraph 5 of said BROADCASTING PERFORMANCE LICENSE, shall apply only so long as the LICENSEE shall remain associated in the NATIONAL BROADCASTING COMPANY, INC. network as a "serviced" station thereby securing through means of a license executed between LICENSOR and the NATIONAL BROADCASTING COMPANY, INC. the benefit of certain terms and conditions from LICENSOR.

Commencing pro rata from the day LICENSEE is no longer benefited or "associated" in the NATIONAL BROADCASTING COMPANY, INC. network as aforesaid, of which disassociation LICENSEE agrees to inform LICENSOR immediately by United States registered mail, LICENSEE agrees to pay during the period for which this license is granted, an annual license fee in the amount of $480.00 (Four Hundred Eighty Dollars and No Cents) in twelve equal monthly installments in the manner provided in Paragraph 5.

SOCIETY OF EUROPEAN STAGE AUTHORS AND COMPOSERS, INC.
Licensor

By R C Hemecke
Treas. ~~President~~

1397

~~WOMAN OF THE WORLD LIFE INSURANCE ASSOCIATION,~~
Licensee

By Wm Rivers (L.S.)
Personell Director

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DEFENDANT'S EXHIBIT NO. 45

NATIONAL BROADCASTING COMPANY, INC.

Woodmen of the World Life Insurance Assn. New York, N. Y., December 2 1936.

Omaha, Nebraska

Radio Station WOW

Gentlemen:

We are proposing in this letter the following plan of network cooperation between this Company and your Station WOW, which shall replace, as of the effective date hereof, our present agreement dated January 28, 1935.

I. NETWORK AFFILIATION AND PROGRAM SERVICE

In order that your station may continue to serve the public interest, convenience and necessity by broadcasting programs of a quality and character generally beyond the reach of individual stations, NBC will, at its own expense, extend its program transmission lines to your control board at your main studios and offer your station network programs of wide variety, including musical, educational, religious, sports, public affairs, international and special events programs. Except in case of failure of facilities, we will offer to furnish your station a minimum of 200 unit hours* of our network sustaining and commercial programs combined during each 28-day period, or if we fail to do so we will pay you at the hourly rate of compensation set forth in Section II, paragraph (1) subdivision (a) of this letter for network commercial programs for any time necessary to make up the difference between the service actually offered to your station and the minimum mentioned above. The network sustaining programs which we will offer to furnish are for sustaining use only and may not be sold by your station for commercial sponsorship or used for any other purpose.

In return for the NBC network affiliation, including sustaining program service, you will waive compensation for 16 unit hours of our network commercial programs broadcast by your station during each 28-day period.

* Unit hours are computed according to the following table:

LOCAL TIME	1 Hour	¾ Hour	½ Hour	¼ Hour
	Unit Hour Credit	Unit Hour Credit	Unit Hour Credit	Unit Hour Credit
WEEKDAYS:				
12:00 Mid. to 8:00 A.M.	.333	.250	.167	.083
8:00 A.M. to 6:00 P.M.	.500	.375	.250	.125
6:00 P.M. to 11:00 P.M.	1.000	.750	.500	.250
11:00 P.M. to 12:00 Mid.	.500	.375	.250	.125
SUNDAYS:				
12:00 Mid. to 8:00 A.M.	.333	.250	.167	.083
8:00 A.M. to 12:00 Noon	.500	.375	.250	.125
12:00 Noon to 6:00 P.M.	.750	.563	.375	.188
6:00 P.M. to 11:00 P.M.	1.000	.750	.500	.250
11:00 P.M. to 12:00 Mid.	.500	.375	.250	.125

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6-36 N-E

II. STATION COMPENSATION

(1) Beginning with the effective date of this agreement, we will pay you for each succeeding 28-day period, approximately 15 days after the close of such period, in accordance with the following provisions:

Your compensation for broadcasting our network commercial programs under this arrangement will be based upon an average unit hour rate computed for each 28-day period by dividing the total value at the network rate for your station of the network commercial programs broadcast from your station, by the total number of unit hours of such programs during that period.

(a) For the first 25 unit hours in excess of the 16 unit hours covering the network affiliation, NBC will pay you at the rate of 20% of your average unit hour rate for the 28-day period.

(b) For the next 25 unit hours, NBC will pay you at the rate of 30% of your average unit hour rate for the 28-day period.

(c) For all unit hours in excess of 66 unit hours, NBC will pay you at the rate of 37½% of your average unit hour rate for the 28-day period.

(2) The network station rate for your station, on which its compensation will be figured as provided above, will be $320.00 per full evening hour. This rate will apply between 6:00 P.M. and 11:00 P.M. local time at your station. Rates for other hours and for shorter periods will be as follows:

LOCAL TIME AT STATION	1 Hour	¼ Hour	½ Hour	¼ Hour
	Network Station Rate	Network Station Rate	Network Station Rate	Network Station Rate
DAILY EXCEPT SUNDAY:				
12:00 Mid. to 8:00 A.M.	$106.67	$ 85.33	$ 64.00	$ 42.67
8:00 A.M. to 6:00 P.M.	160.00	128.00	96.00	64.00
6:00 P.M. to 11:00 P.M.	320.00	256.00	192.00	128.00
11:00 P.M. to 12:00 Mid.	160.00	128.00	96.00	64.00
SUNDAY:				
12:00 Mid. to 8:00 A.M.	106.67	85.33	64.00	42.67
8:00 A.M. to 12:00 Noon	160.00	128.00	96.00	64.00
12:00 Noon to 6:00 P.M.	240.00	192.00	144.00	96.00
6:00 P.M. to 11:00 P.M.	320.00	256.00	192.00	128.00
11:00 P.M. to 12:00 Mid.	160.00	128.00	96.00	64.00

Rates for periods longer than one hour will be in exact proportion to the corresponding one-hour rate. Commissions to agencies and discounts and rebates to advertisers will not be applied to the foregoing rates in computing the average unit hour rate for your station. It is our policy, however, to allow advertisers using a block of time, even though it be broken into half-hour and/or quarter-hour contiguous periods for the purpose of advertising separate products, the benefit of the rate applicable to the entire block of time, in which event the rate for your station for such entire block of time will be used in computing the compensation due your station.

(3) NBC reserves the right to change at any time your network station rate to advertisers from that set forth in the preceding table. In the event of such a change, the station compensation due you will be adjusted as follows:

(a) If NBC increases your network station rate to advertisers above that set forth in the preceding table, such increased rate shall be used in computing the station compensation due you on business actually sold by NBC at such increased rate.

It is further agreed, that if at any time during the period of this contract in your opinion your Station has increased it's coverage, we agree, at your request, to re-survey your Station coverage provided such request for re-surveys are not made by you oftener than once every twelve months. We agree to increase your net work station rate if such rate increase is justified by the formula for determing net work station rates then in general use by the National Broadcasting Company, provided further that in the opinion of the National Broadcasting Company it is an opportune time to make such an increase in the rate for your Station.

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(b) Except as provided in subsection (c) of this paragraph, if NBC decreases your network station rate to advertisers below that set forth in the preceding table, such decreased rate shall be used in computing the station compensation due you, provided NBC has given you one year's written notice of its intention to so decrease your station compensation. In the event of such decrease in your station compensation, you may terminate this agreement as of the effective date of such station compensation decrease by giving NBC written notification within ninety days after the receipt of our notice to you to so reduce your compensation.

(c) If NBC decreases your network station rate to advertisers below that set forth in the preceding table and at the same time decreases the network station rate to advertisers of a majority of all NBC network stations, such decreased rate shall be used in computing the station compensation due you, provided NBC has given you ninety days' written notice of its intention to so decrease your station compensation. In the event of such decrease in your station compensation, you may terminate this agreement as of the effective date of such station compensation decrease by giving NBC written notification within thirty days after the receipt of our notice to you to so reduce your compensation.

~~(4) If you accept from national advertisers any payments less than those at which NBC sells your station to network advertisers for corresponding periods of time, as set forth in the preceding table, then NBC may, at its option, reduce the network station rate for your station in like proportion, in which event the compensation due you from NBC will be likewise reduced but the right of termination provided for in the preceding paragraph shall not thereby accrue to you.~~

III. NETWORK OPTIONAL TIME

(a) Upon 28 days' notice, your station will broadcast network commercial programs for NBC during any periods requested by NBC within the hours designated below as Network Optional Time, provided, that because of your public responsibility your station may reject a network program the broadcasting of which would not be in the public interest, convenience and necessity.

Network optional time will be as follows:

Weekdays (New York City Time)	Sundays
10:00 A.M.-12:00 Noon	1:00- 4:00 P.M.
3:00 P.M.- 6:00 P.M.	5:00- 6:00 P.M.
7:00 P.M.- 7:30 P.M.	7:00-11:00 P.M.
8:00 P.M.-11:00 P.M.	

(b) You will maintain and operate the broadcasting equipment of your station in such manner as to keep pace with the broadcasting art and will keep the operation of such equipment entirely under your control.

(c) We will give you at least 28 days' advance notice of the discontinuance of any scheduled series of network commercial programs, failing which we will pay you the compensation you would have received if the series had continued for 28 days following the receipt by you of notice of discontinuance, except that you will not be entitled to compensation for any discontinued programs for which we substitute another network commercial program. Nothing in this paragraph shall entitle you to compensation as a result of our changing a network program, without 28 days' advance notice, to a time in network optional time for which your station is not already committed to carry a commercial broadcast.

(d) Because of the public responsibility of the network and its Associated Stations, NBC may at any time substitute for any scheduled network program a network program which involves a special event of public interest or importance. No compensation will be paid for the cancelled program or for the substituted program unless the substituted program is commercially sponsored, when the regular compensation will be paid for it.

IV. GENERAL

(1) You will submit to NBC daily in writing reports for all network programs broadcast by your station, upon forms provided by us for that purpose.

(4) If you accept from national advertisers payments less than those at which NBC sells your station to network advertisers for corresponding periods of time as set forth in the preceding table, then NBC may, at its option, upon three months' notice in writing to you reduce the network station rate of your station in like proportion, Provided, that during the three months' notice period you have not raised your rate to equal that charged by NBC in which event the compensation due you from NBC will be likewise reduced but the right of termination provided in the preceding paragraph shall not thereby accrue to you.

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(2) You agree to maintain for your station such licenses, including performing right licenses, as now are, or hereafter may be, necessary for your station to broadcast the programs which we furnish to you hereunder, provided you shall not be liable for any damages for failure so to do if you are notified in time so as not to send you any broadcasts.

(3) Your failure to broadcast a scheduled network program or our failure to deliver it to you, due to failure of facilities, will subject neither of us to liability to the other.

(4) In the event that the transmitter location, power, frequency or hours or manner of operation of your station, are changed at any time so that your statien is less valuable to NBC as a network outlet than it is at the time this offer is accepted by you, NBC will have the right to discontinue this arrangement upon thirty days' written notice to you.

(5) You agree not to sell or lease your station during the term of this contract, unless such sale or lease is expressly made subject to the terms and conditions of this contract.

(6) In the event you substitute another program for a network program which we offer you and which you are obligated to broadcast in accordance with the provisions of Section III, paragraph (a), you agree to pay us, as liquidated damage, a sum equal to the difference between the total monies received by you for broadcasting such other program and the monies you would have received as the result of broadcasting such network program. This provision is without prejudice to any other rights which we may have under this contract arising from your failure to broadcast any of our network programs, and shall not be deemed to give you the option to refuse to accept such a network program by making the payments specified in the foregoing sentence.

(7) You agree not to authorize, cause, permit, or enable anything to be done whereby any other station may broadcast any program which we supply to you.

(8) You agree not to authorize, cause, permit, or enable anything to be done without our consent whereby a recording is made, or a recording is broadcast, of a program which has been, or is being, broadcast on NBC networks.

(9) For the purpose of eliminating confusion on the part of the radio audience as to the affiliation and identity of the various individual stations comprising radio networks, you agree not to permit the use of your station's facilities by any radio network, other than ours, with which is permanently or occasionally associated any station serving wholly or partially a city or county of one million or more inhabitants.

(10) No waiver by either of us of any breach of any provision of this agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other provision.

(11) This agreement shall be construed in accordance with the laws of the State of New York.

(12) Any arrangement with your station relates only to NBC and your station and is not related to any arrangement that exists or may later be made between NBC and any other station.

(13) This agreement shall become effective at 3:00 A.M., EST, on the 15th day of December, 1936, and it shall continue for five years thereafter, and thereafter this agreement may be terminated by either party upon not less than twelve months' written notice to the other.

If, after examination, you find that the arrangement here proposed is satisfactory to you, please indicate your acceptance on the copy of this letter enclosed for that purpose and return that copy to us.

Very sincerely yours,

NATIONAL BROADCASTING COMPANY, Inc.

By Frank E. Mason

Vice President

Accepted this 21st day of

January, 1937.

Woodmen of the World Life Ins Assn

By H. E. Bradshaw

*** Insert in lieu of deletion: "for the period of the time of such broadcast and the monies which you would have received for the broadcast of such network program for the period over your facilities."

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DEFENDANT'S EXHIBIT NO. 52

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

THIRTY ROCKEFELLER PLAZA
NEW YORK CITY

H. L. Harman

Gentlemen:

We understand that music is being rendered at your establishment for the entertainment of its patrons. Copyrighted music may not thus be lawfully performed without license of the copyright owners.

The purpose of this communication is to notify you of the facts and the law so that you may avoid committing an illegal act in this regard.

Should there be any doubt in your mind regarding our statements we suggest that you consult your own attorney. An excerpt from the Copyright Law and citation of controlling decisions follow.

This Society represents the group of musical copyright owners named in the enclosed list in the issuance of licenses authorizing the public performance of their compositions.

A staff of investigators is employed for the purpose of discovering infringements against which we are charged with the duty of protecting our members.

Please refrain from including in your programs any compositions copyrighted by any of our members unless and until you have applied for license so to perform them.

Damages provided by the Copyright Law for illegal rendition of musical compositions are fixed at a minimum of $250.00 for each such infringement. Responsibility for the infringement rests with the proprietor of the establishment.

We have no wish to bring suits against you. If copyrighted music is being publicly performed at your establishment we urge you to make application for license on the form printed on last page hereof. Upon receipt of the application a price for the license will be quoted.

Please do not disregard this notice as a record of it is being kept and should our inspectors subsequently report infringements at your establishment of the copyrights of our members we shall have no alternative but to procure redress thereof through legal action.

Any further information will be given promptly upon your request.

Sincerely yours,

AMERICAN SOCIETY OF COMPOSERS
AUTHORS AND PUBLISHERS

If music is not being used at
your establishment please so advise.

ENCLOSURE:

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The 1909 Copyright Law of the United States of America

(In relation to the public performance of copyrighted mu-

For the information of users of copyright music in public performances for purpose of profit, the following extracts are quoted from the Copyright Law of the United States of America.

No attempt is made to construe or interpret the language of the Law. It is here presented just exactly as the Law is written.

The power of Congress to enact Copyright Law derived from the Constitution (Article I, Section 8), which provides:

"The Congress shall have power: * * * * To promote the progress of science and useful arts, BY SECURING FOR LIMITED TIMES TO AUTHORS and inventors THE EXCLUSIVE RIGHT TO THEIR respective WRITTINGS and discoveries.

The Law itself provides:

SECTION 1—

"That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

(a) To print, reprint, publish, copy and vend the copyrighted work;
(b) * * * * *
(c) * * * * *
(d) * * * * *
(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit * * * * *."

SECTION 6—

"That * * * arrangements * * * or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this act * * *

SECTION 23—

"That the copyright secured by this Act shall endure for twenty-eight years from the date of first publication * * * * the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright * * *."

SECTION 25—

"That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) To an injunction restraining such infringements;

(b) To pay the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringement * * * or in lieu of actual damages and profit such damages as to the Court shall appear to be just, and in assessing such damages the Court may, in its discretion, allow the amounts as hereinafter stated * * * and such damages shall not exceed the sum of five thousand dollars, nor be less than two hundred and fifty dollars, and shall not be regarded as a penalty * * * nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

* * * * * *

FOURTH. In the case of dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance * * *."

SECTION 28—

"That any person who wilfully and for profit shall infringe any copyright secured by this Act, or who shall knowingly and wilfully aid and abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or a fine of not less than one hundred dollars nor more than one thousand dollars, or both, in the discretion of the Court; provided, however, that nothing in this Act shall be so construed as to prevent the performances of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit."

COURT DECISIONS

Herbert vs. The Shanley Company	242 U. S. 591
Maxwell vs. Faust Company, Inc.	90 Misc. 702
Hubbell vs. Royal Pastime Amusement Co.	242 Fed. 1002
174th St. & St. Nicholas Ave. Amusement Co. vs. Maxwell	169 N. Y. Supp. 905
Waterson, Berlin & Snyder Co. vs. Chris Tolladeon	253 Fed. 859
Harms vs. William Cohen	279 Fed. 276
Witmark vs. L. Bamberger & Co.	291 Fed. 776
Witmark vs. Pastime Amusement Co.	295 Fed. 479 Aff'd 2 Fed. (2) 1020
Pastime Amusement Company vs. Witmark	2 Fed. (2) 1020
Berlin vs. Evans	300 Fed. 977
Remick vs. American Automobile Accessories Co.	298 Fed. 628
Remick vs. American Automobile Accessories Co.	5 Fed. (2) 411
Witmark vs. Calloway	22 Fed. (2) 412
Buck vs. Lester and Rialto Theatre Co.	24 Fed. Rep. (2) 977
Buck vs. Heretis	24 Fed. Rep. (2) 976
Berlin, et al vs. Russo & Daigle	31 Fed. (2) 628
Buck vs. Mfiam and Williams	32 Fed. (2) 622
Buck vs. Duncan, et al	32 Fed. (2) 806
In re Waterson, Berlin & Snyder	43 Fed. (2) 704
Buck vs. Jewell-LaSalle Realty Co.	283 U. S. 190
Jewell LaSalle Realty Co. vs. Buck	283 U. S. 202
Buck vs. Jewell LaSalle Realty Co.	51 Fed. (2) 726
Buck vs. Debaum	49 Fed. (2) 734
Messager vs. British Broadcasting Co., Ltd.	(1927) 2 K.B. 543, reversed (1928) 1 K.B. 660, aff'd (1929) A.C. 151
Chappell & Co., Ltd. vs. Associated Radio Co.	(1925) Vict. L.R. 859
Dreamland Ball Room, Inc. vs. Shapiro, Bernstein & Co.	36 Fed. (2) 354
Lutz vs. Buck	49 Fed. (2) 501, certiorari denied, 283 U. S. 820
Remick vs. General Electric Company	16 Fed. (2) 829

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WHAT CONSTITUTES "PERFORMANCE FOR PROFIT"?

SUPREME COURT OF THE UNITED STATES

VICTOR HERBERT, HARRY B. SMITH, et al.,
vs.
THE SHANLEY COMPANY

THE JOHN CHURCH COMPANY
vs.
HILLARD HOTEL COMPANY

242 U. S. 591

[January 22, 1917.]

Mr. Justice HOLMES delivered the opinion of the Court.

These two cases present the same question: whether the performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it, infringes the exclusive right of the owner of the copyright to perform the work publicly for profit. Act of March 4, 1909, c.320. I (e). 35 Stat. 1075. The last numbered case was decided before the other and may be stated first. The plaintiff owns the copyright of a lyric comedy in which is a march called "From Maine to Georgia." It took out a separate copyright for the march and published it separately. The defendant hotel company caused this march to be performed in the dining room of the Vanderbilt Hotel for the entertainment of guests during meal times, in a way now common by an orchestra employed and paid by the company. It was held by the Circuit Court of Appeals, reversing the decision of the District Court, that this was not a performance for profit within the meaning of the Act, 221 Fed. Rep. 229, 136 C. C. A. 639.

The other case is similar so far as the present discussion is concerned. The plaintiffs were the composers and owners of a comic opera entitled "Sweethearts," containing a song of the same title as a leading feature in the performance. There is a copyright for the opera and also one for the song which is published and sold separately. This the Shanley Company caused to be sung by professional singers, upon a stage in its restaurant on Broadway, accompanied by an orchestra. The District Court, after holding that by the separate publication the plaintiff's rights were limited to those conferred by the separate copyright, a matter that will be not necessary to discuss, followed the decision in 221 Fed. Rep. 229 as to public performance for profit. 222 Fed. Rep. 344. The decree was affirmed by the Circuit Court of Appeals, 229 Fed. Rep. 340, 143 C. C. A. 460.

CHARGING ADMISSION FEE NOT ESSENTIAL

If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected. Performances not different in kind from those of the defendant could be given that might compete with and even destroy the success of the monopoly the law intends the plaintiff to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are a part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item in which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.

1404 Decree Reversed

PLEASE FILL IN TO COVER YOUR CLASS OF ESTABLISHMENT
AND MAIL TO ADDRESS SHOWN. RATE FOR LICENSE WILL THEN BE QUOTED.

APPLICATION FOR LICENSE

To—

**AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS**

30 Rockefeller Plaza
New York City

.....
(City and State)

.....19....
(Date)

Application is hereby made for license authorizing the non-dramatic public performance of musical works copyrighted by members of your society, in the following described premises:

.....
(Name and street address of establishment as publicly known and advertised)

.....
(Name of proprietor, lessee, or operating corporation) (Name of manager or party in charge)

Method of rendering music .....orchestra .....mechanical .....piano .....organ.....radio

.....
(If seasonal resort state opening and closing dates) (Date commenced using music)

THEATRES

Seating capacity .....
Days per week operated.....
Highest admission price.....
Kind of Music: Talking Pictures.....Orchestra.....Radio.....
Radio in Lobby.....Organ.....

DANCE HALLS

Capacity of dance floor.....
Price of admission.....
Number in Orchestra.....
During what hours is dance hall operated.....
Days per week operated.....
Weeks per year operated.....

CAFES, RESTAURANTS, and MISCELLANEOUS

Seating capacity .....
State cover or minimum charge.....
Do you maintain dancing.....
Do you maintain a floor show or other entertainment.....
Type of Music: Orchestra.....Radio.....Mechanical Device.....

HOTELS

No. of rooms.....Master-controlled radio in guest rooms?.....
Music in public rooms?.....Orchestra.....Radio.....
Mechanical Device.....
During what hours is music rendered.....
State cover or minimum charge.....
Do you maintain dancing.....

Please describe below the type of establishment operated, and extent to which music is used.

.....
.....
.....
.....
.....

License Number.....Rate $.....
Received .....
.....

.....
(Name of firm, corporation or individual)

By .....
(Signature)

.....
(Title)

(This is NOT a license; rates therefor will be quoted upon receipt of this application) 1405

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DEFENDANT'S EXHIBIT NO. 54

AFFILIATION AGREEMENT

between

COLUMBIA BROADCASTING SYSTEM

485 Madison Avenue · New York City

and

CENTRAL STATES BROADCASTING COMPANY

Station KOIL at Omaha, Nebraska

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AFFILIATION AGREEMENT

between

COLUMBIA BROADCASTING SYSTEM, *Inc.**

485 Madison Avenue, New York, New York *and*

CENTRAL STATES BROADCASTING COMPANY**

Omaha, Nebraska

licensed to operate

radio station KOIL at Omaha, Nebraska

full time on a frequency of 1260 kilocycles

with a power of 5000 watts day-time and 1000 watts night-time

COLUMBIA is engaged in furnishing programs to radio broadcasting stations. The Station and Columbia recognize that the audience regularly listening to the Station will be increased, to their mutual benefit, if Columbia provides the Station with programs not otherwise locally available, including broadcasts from the scenes of national and international events, presentations of music, drama and other entertainment from the principal centers of talent, informative, educational and cultural broadcasts of general interest and other programs of public acceptance and value.

Accordingly, it is mutually agreed as follows:

1. Columbia will furnish to the Station for broadcasting by the Station all available network sustaining programs, without charge, and Columbia network sponsored programs for which clients may request broadcasting by the Station and which are consistent with Columbia's sales and program policies. Columbia agrees that it will, subject to continuance of wire service, make available to the Station an average of at least sixty hours per week of network sustaining and sponsored programs. Network sustaining programs made available by Columbia are for sustaining use only and may not be sold for local sponsorship or used for any other purpose without the consent of Columbia in specific instances.

2. The Station will broadcast all sponsored programs offered to it by Columbia during the time when the Station is licensed to operate, but need not (except in occasional instances of sponsorship of special events, such as World Series broadcasts, not exceeding two weeks in duration at any one time) accept programs in excess of fifty "converted hours" (as defined below, but computed, during the entire term of this agreement, on the basis of the differences in rates at different hours specified in Columbia's Rate Card No. 23) per week. The Station may require Columbia to give not less than twenty-eight days prior notice of the commencement of sponsored programs for new accounts. Either the Station or Columbia may on special occasions substitute for one or more of such sponsored

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**hereinafter called the Station.

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programs sustaining programs devoted to education, public service or events of public interest without any obligation to make any payment on account thereof, and in the event of such substitution by either party it will notify the other by wire as soon as practicable after deciding to make such substitution. In case the Station has reasonable objection to any such sponsored program or the product advertised thereon as not being in the public interest the Station may, on three weeks' prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the Station shall be satisfied. The Station will not make spot announcements in the "break" occurring in the course of a single network program or contiguous programs for the same sponsor and will, at the request of Columbia, desist from making commercial spot announcements in the "break" occurring before or after specified network programs.

3. A "converted hour" means the broadcast over the Station of one or more sponsored network programs for an aggregate period of one hour for which Columbia shall charge its full night-time card rate for the Station. The broadcast for an aggregate period of one hour of one or more network sponsored programs for which Columbia shall charge a fraction of such night-time card rate, such as its daytime card rate, shall be considered as equal to the same fraction of a "converted hour". Fractions of an hour shall for all purposes be treated as their fractional proportions of full hours at the same time of the day.

Columbia will pay the Station for broadcasting sponsored programs supplied by Columbia as specified in Schedule A attached hereto and made a part of this agreement.

4. Payment to the Station will be made by Columbia for network sponsored programs broadcast by the Station within twenty days following the termination of Columbia's four or five week fiscal period, as the case may be, during which such sponsored programs were broadcast.

5. The Station will maintain and operate its facilities in accordance with the best practice in the broadcasting art and conduct of the industry and in accordance with good engineering practice, and will maintain such licenses under copyrights as are necessary to enable the Station to broadcast the programs to be furnished by Columbia. If the power, frequency, time or manner of operation of the Station is changed, resulting in a substantial lessening of the value of the Station as a Columbia outlet, Columbia may at any time thereafter cancel this agreement on at least sixty days' notice to the Station.

6. Columbia will whenever practicable provide in advance notices of the programs to be furnished to the Station. In the event of any change of programs, Columbia will notify the Station as soon as possible and the Station will make every effort immediately to conform with the substituted programs.

7. Neither party shall be liable to the other for claims by third parties or for failure to operate facilities or supply programs for broadcasting if such failure is due to failure of equipment or action or claims by network clients, labor disputes or any cause or reason beyond the party's control.

8. Columbia will continue the Station as the exclusive Columbia outlet in the city in which the Station is located and will so publicize the Station, and will not furnish its exclusive network programs to any other station in that city, except in case of public emergency. The Station will operate as the exclusive Columbia outlet in such city and will so publicize itself, and will not join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations. The Station shall be free to join occasional local, state-wide or regional hook-ups to broadcast special events of public importance.

9. The obligations under this agreement are subject to all applicable laws, rules and regulations, present and future, especially including rules and regulations of the Federal Communications Commission.

10. If the Station applies to the Federal Communications Commission for consent to a transfer of its license or transfers all or any of its assets without which it would be unable to perform this agreement, it will agree with the transferee that the transfer shall be subject to the obligation on the part of the transferee to assume and perform this agreement, unless this condition shall be waived by Columbia in writing.

11. If either the Station or Columbia fails to in-

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sist upon strict performance of any of the covenants or conditions of this agreement, such failure shall not be construed as an election or as a waiver or condonation of any breach, or as a waiver or relinquishment for the future of any such covenants or conditions.

12. The term of this agreement shall begin on see Schedule A attached hereto.

As of the beginning of the term hereof, this agreement takes the place of and is substituted for any and all agreements heretofore existing between the parties hereto, subject only to the fulfillment of any accrued obligations thereunder.

13. Any notice hereunder shall be sent by registered mail to the parties at their respective addresses hereinbefore set forth.

14. This agreement has been made in the State of New York and shall be governed by the laws of that State applicable to contracts fully to be performed therein, and this agreement is not subject to oral modification.

IN WITNESS WHEREOF, this agreement has been signed by the parties and dated the 25th day of April, 1938.

COLUMBIA BROADCASTING SYSTEM, INC.

By H Ahlenberg VP

CENTRAL STATES BROADCASTING COMPANY

By W L Parker
Vice Pres

April 25, 1938

This contract includes the affiliation agreement between the parties and memorandum letter marked "B" together with letter of acceptance marked "C" all of this date. All of these memoranda and contracts shall be construed together as one agreement even though they appear as separate writings.

COLUMBIA BROADCASTING SYSTEM, INC.

By H Ahlenberg
Vice-President

CENTRAL STATES BROADCASTING COMPANY

By W L Parker
Vice-President

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SCHEDULE A

(Attached to and forming part of Affiliation Agreement between Columbia Broadcasting System, Inc. and Central States Broadcasting Company, relating to Station KOIL, Omaha, Nebraska)

The Station represents that at the date of this agreement it is affiliated with National Broadcasting Company, Inc. under an agreement which is terminable at the option of the Station upon one years' notice. Promptly upon the execution hereof, the Station will exercise such option and will give notice to National Broadcasting Company, Inc. whereby such agreement shall be terminated not later than one year from the date of the giving of such notice. This agreement between Columbia and the Station shall not become effective unless and until the affiliaton of the Station with National Broadcasting Company, Inc. shall cease by termination of said agreement within twelve months from the date of giving of such notice, and the term of this agreement shall begin upon the termination of said agreement and continue thereafter for a period of five calendar years.

From and after the date that this agreement shall begin and for each calendar year during the term hereof commencing on said date, Columbia will pay the Station for broadcasting sponsored programs at a rate for each "converted hour" in each week to be calculated in accordance with one or the other of the following options:

A. Option A:

The Station shall not be credited for the first five "converted hours" in each week, but for each of the next five "converted hours" per week, the Station shall be credited with $60, and for each of the next five hours per week, the Station shall be credited with $70, and for each "converted hour" per week in excess of such first fifteen "converted hours" per week, the Station shall be credited with $75; and in each case the Station shall be credited with proportionate sums for a fraction of a "converted hour".

B. Option B:

The Station shall not be credited for the first five "converted hours" in each week, but for each of the next five "converted hours" per week, the Station shall be credited with $50, and for each of the next five "converted hours" per week, the Station shall be credited with $75, and for each "converted hour" per week in excess of such first fifteen "converted hours" per week, the Station shall be credited with $82.50; and in

each case the Station shall be credited with proportionate sums for fractions of a "converted hour".

The total of the credits in each week shall be divided by the total number of such "converted hours" in that week and the result shall be the rate payable by Columbia to the Station for each "converted hour" in that week.

At least thirty days prior to the date when the term of this agreement shall begin the Station shall notify Columbia in writing under which of the foregoing Options A or B it elects to be paid for the first calendar year of the term of this agreement, and at least thirty days prior to each anniversary of the date on which this agreement shall begin, the Station shall likewise notify Columbia under which of the foregoing Options A or B it elects to be paid for the ensuing calendar year, and payment shall be made by Columbia to the Station accordingly. In default of any notice as aforesaid prior to any such anniversary, Columbia shall continue to pay the Station for the ensuing year on the basis of the Option in effect for the preceding year.

When this agreement becomes effective, Columbia will list the Station as a Basic Station on Columbia's network, and Columbia shall charge a gross hourly night-time card rate of $175 for broadcasting sponsored programs over the Station.

If thereafter Columbia changes the gross hourly card rate at which it sells broadcasting time over the Station for sponsored programs from $175 per night-time hour, the rate per "converted hour" in each week, computed as above provided, will be changed in respect of the number of "converted hours" for which Columbia receives such changed rate, by the percentage of such change in such gross hourly card rate from $175 per night-time hour.

(End of Schedule A)

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[fols. 1412-1413] DEFENDANTS' EXHIBIT No. 60
G. L. Harman

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION

Equity No. 562

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al., Complainants,

against

HARRY R. SWANSON, as Secretary of State of Nebraska, et al., Defendants

Answering the interrogatories propounded by the defendants, the complainant, Gene Buck, states:

Answering Interrogatory No. 1, which reads as follows:

Q. "State the name and address of each composer and author member of the American Society of Composers, Authors and Publishers as of January 1st of each year from the date of the organization of the Society to and including the date of answering this interrogatory."

A. The names and addresses of the present composer and author members of the Society are annexed hereto as Exhibit 1. The complainant objects to so much of Interrogatory No. 1 as requests the name and address of the composer and author members of the Society as of January 1st of each year from the date of the organization of the Society to the date hereof, with the exception of the list of the present members which is hereto annexed. Furnishing this information would serve no useful purpose and would mean an examination of the records of the Society since 1914. This would involve the employment of a staff of clerks and the expenditure of a vast sum of money, and [fol. 1414] the information could not be gathered in less than a period of approximately six months. The physical work of typing the twenty-four pages of present names and addresses alone took a substantial period of time.

Answering Interrogatory No. 2, which reads as follows:

Q. "State the name and address of each publisher member of the American Society of Composers, Authors and Publishers as of January 1st of each year from the date

of the organization of the Society to and including the date of answering this interrogatory."

A. The names and addresses of the present publisher members of the Society are annexed hereto as Exhibit 2. The complainant objects to so much of Interrogatory No. 2 as requests the name and address of the publisher members of the Society as of January 1st of each year from the date of the organization of the Society to the date hereof, with the exception of the list of the present members which is hereto annexed. Furnishing this information would serve no useful purpose and would mean an examination of the records of the Society since 1914. This would involve the employment of a staff of clerks and the expenditure of a vast sum of money, and the information could not be gathered in less than a period of approximately three months.

Answering Interrogatory No. 3, which reads as follows:

Q. "State the name and address of each corporation, company or catalogue of copyrighted musical compositions or arrangements thereof, owned or controlled in any manner by publishers who were members of the American Society of Composers, Authors and Publishers as of December 1, 1937, which are included in the Society's representation by reason of the Society's contract with the publisher member owning or controlling such corporation, [fol. 1415] company or catalogue, and state the name of the publisher member exercising such ownership or control."

A. The following publishers own or control the following named subsidiary corporations, companies or firms, and the catalogues of such subsidiaries. The address in each case is that of the member list given in answer to Interrogatory No. 2. There is no such thing as the name and address of a catalogue.

A B C Standard Mus. Publications, Inc.
Berlin, Irv., Standard Mus. Corp.

Alfred Music Co., Inc.
Feature Music Syndicate
Lowe-Goulston, Inc.
Manus Music Co., Inc.,
Piantadosi, Al., Music Publisher
Rosey, Geo., Band & Orch. Catalog.
Song Creators

Ascher, Emil, Inc.
Brooks & Denton
Empire Music Co.
Royal Music Co.

Belwin, Inc.
Berg, S. M.
Cinema Music Co.

Boston Music Company
Hatch Music Company
Thompson, C. W., Co.

Broadway Music Corporation
Artmusic, Inc.
Empire Music Co., Inc.
York Music Co., The

Chappell & Co., Inc.
Chappell-Harms, Inc.

Crawford Music Corporation
De Sylva, Brown & Henderson, Inc.
Green & Stept
Yellen, Jack, Inc.

Curtis, L. B., Music Pub.
Van Alstyne & Curtis

Davis, Joe, Inc.
Aloha Music Co.
Georgia Music Co.
Triangle Mus. Pub. Co., Inc.

[fol. 1416] Exclusive Publications Inc.
Bloom, Harry, Inc.
Milsons Mus. Pub. Corp.

Feist, Leo., Inc.
Brown, Nacio Herb, Inc.

Fischer, Carl, Inc.
Oxford University Press

Flammer, Harold, Inc.
Luckhardt & Belder

Fox, Sam, Publishing Co.
Pallma Music Publishers, Inc.

Gamble Hinged Music Co.
Wulschner Music Co.

Goodman Music Co., Inc.
Handman & Goodman, Inc.
Handman, Kent & Goodman, Inc.
Universal Music Co., Ltd.

Hall-Mack Company
Geibel, Adam, Music Co.

Hope Publishing Company
Bigelow-Main-Excell Co.
Excell, E. O., Co.
Tabernacle Pub. Co.

Jacobs, Walter, Inc.
Abt, Valentine
Bates & Bendix
Bendix, Theodore
Eby, Walter M.
Farrand, Van L.
Gay, Mace, Catalog
Jacques, Percy
Musiclovers Co.
Partee, C. L., Music Co.
Shattuck, B. E.
Virtuoso Music School
Williams, Ernest S.

Kay & Kay Music Pub. Corp.
Franklin, John, Music Co.

Lincoln Music Corp.
Capano, Frank, Music Pub.

Lorenz Publishing Co.
Tullar-Meredith Co., Inc.

[fol. 1417] Marks, Edw. B., Music Corp.
Bergstrom Mus. Co., Ltd.
Berliner, Leo E., Pub. Co.
Chilton, Forrest S.
Dresser, Paul, Pub. Co.
Evans (George Honeyboy Evans)
Fassio, A.
Globe Music Publishing Co.
Halle, R. L.
Jordan, Julian, Mus. Co.
King, Chas. E.
Lecuona Music Co.—Cuba

Lyceum Music Co.
Metz, Theodore, Music Co.
Miller, Roy M.
Musin, Ovide
Penn, Wm. H.
Petrie, H. W., Catalog
Prelude Mus. Co.
Primrose & West Mus. Co.
Recker, Robert, Music Co.
Reed, Bert, Catalog
Reed & Keller Catalog
Seitz, R. F.
Shields, Ren
Stern, Jos. W., & Co.
Vandersloot Music Publishing Co.
Wagner & Levien
Willis-Woodward Mus. Co.

McKinley Music Co.
Root, Frank K., & Co.

Mills Music, Inc.
American Composers, Inc.
Beck, Mort
Clark, Frank, Mus. Co.
Daly, Joseph, Mus. Pub. Co.
Edwards, Gus, Mus. Pub. Co.
Gordon & Rich, Inc.
Gotham Attucks Mus. Co.
Gotham Mus. Service, Inc.
Jerome, M. K.
Jerome & Schwartz Pub. Co.
Kalmar, Puck & Abraham Consolidated
Keit Music Corp.
Kornheiser, Phil, Inc.
Lawrence Music Pubs., Inc.
Morse, Theodore, Music Co.
Nelson, Jack, Mus. Co.
Stark & Cowan, Inc.
Stept & Powers, Inc.
Sterling Songs, Inc.
Sunlight Mus. Co., Inc.
Waterson, Berlin & Snyder, Co.
Waterson, Henry, Inc.
Williams, Harry, Mus. Co.

[fol. 1418] Nazarene Publishing House
Bilhorn Bros. Mus. Co.
Lillenas Pub. Co.

Olman Music Corporation
Down Home Music Co.

Paull-Pioneer Music Co.
Rossiter, Harold, Mus. Co.

Photo Play Music Co., Inc.
Luz Brothers Mus. Pubs.
Music Buyers Corporation

Pond, Wm. A., & Company
Ellis, Robin

Popular Melodies, Inc.
Spier & Coslow, Inc.

Red Star Songs, Inc.
Allen & Harrison Mus. Co.

Robbins Music Corporation
Mayfair Mus. Corp.
Metro-Goldwyn-Mayer Corp.
Sonnemann Mus. Co., Inc.
Whiteman, Paul, Publications
Wiedoeft, Rudy, Mus. Pub. Co.

Rubank, Inc.
Carlson, M. L.
Finder & Urbanek
Victor Music Co.

Santly Bros.—Joy, Inc.
Santly Bros., Inc.

Schirmer, G., Inc.
Heffelfinger, R. W.
Sanders-Weiss, Inc.

Schuster & Miller, Inc.
Kornheiser-Gottler, Inc.
Kornheiser-Schuster, Inc.

Southern Music Pub. Co., Inc.
Acme Music Pub. Co.
Bleyer, Archie, Inc.
Blues Music Co.
Bradford, Perry, Inc.
Bradford, Perry, Music Co.
Palmer, Robert, Music Pub. Co.

Stasny Music Corp.
Bibo-Lang, Inc.
Stasny-Lang, Inc.

[fol. 1419] Tesio, P., & Sons
Major Music, Inc.
Tesio-Major, Inc.

Vogel, Jerry, Music Co., Inc.
Crumit, Frank, Songs Co.
Haviland, F. B., Pub. Co.
Worth, Geo. T., & Co.

Words & Music, Inc.
Davis, Coots & Engel, Inc.
Engel, Harry, Inc.
Keit-Engel, Inc.

Answering Interrogatory No. 4, which reads as follows:

Q. "State the name and address of each corporation, company or catalogue of copyrighted musical compositions or arrangements thereof, owned or controlled in any manner by authors or composers who were members of the American Society of Composers, Authors and Publishers as of December 1, 1937, which are included in the Society's representation by reason of the Society's contract with the author or composer member owning or controlling such corporation, company or catalogue, and state the name or names of the member or members exercising such ownership or control."

A. It is impossible to answer this interrogatory. Catalogues of copyrighted musical compositions have no name or address. I am not informed of and do not know the names and addresses of the corporations or companies owned or controlled by the author and composer members of the Society. Speaking for myself, however, as an author member of the Society, I do not own any corporation, company or catalogue of copyrighted musical compositions, or arrangements thereof. I do not own any copyrights. My rights are purely contractual and I have renewal rights, as stated in my affidavit on the motion for a temporary injunction, verified June 8, 1937, all of the statements of which I repeat, reiterate and reallege in answer to these interrogatories with the same full force and effect as if fully set [fol. 1420] forth and repeated herein. As to other composer

members of the Society, I respectfully refer the Court to the affidavit of Deems Taylor on the same motion, verified June 8, 1937, and I am informed and believe that the other composer and author members of the Society have contracts similar to that set forth in the said affidavits.

Answering Interrogatory No. 5, which reads as follows:

Q. "State the names and addresses of all associations or societies located in any foreign country which are represented by the American Society of Composers, Authors and Publishers in licensing the public performance of musical compositions in the United States and in the State of Nebraska."

A. The names and addresses of the associations or societies located in foreign countries which have contractual relations with the American Society of Composers, Authors and Publishers are annexed hereto in a list marked Exhibit 3.

Answering Interrogatory No. 6, which reads as follows:

Q. "State the complete and exact wording of the contract or agreement now in effect between each of the foreign Societies named in the answer to Interrogatory No. 5, together with any supplemental additions or modifications thereto and interpretations thereof."

A. True copies of each and every contract between the American Society of Composers, Authors and Publishers and the foreign societies in force at the present time are annexed hereto as Exhibit 4, 4-a, 4-b, 4-c, 4-d, 4-e, 4-f, 4-g, 4-h, 4-i, 4-j, 4-k, 4-l, 4-m, 4-n, 4-o, 4-p, 4-q, 4-r, 4-s, 4-t.

[fol. 1421] Answering Interrogatory No. 7, which reads as follows:

Q. "Will you voluntarily produce, upon the trial of this cause, without being required to do so by subpoena or other judicial process, all contracts between the American Society of Composers, Authors and Publishers and any association or society or copyright owner in any foreign country?"

A. The answer to Interrogatory No. 6 sets forth true and correct copies of all the contracts referred to in Interroga-

tory No. 7. The complainant demands, pursuant to Equity Rule 58, that the defendants admit in writing the execution and genuineness of the said contracts within five days after the service of a copy of these answers to defendants' interrogatories. Complainants' counsel will produce the original of each and every one of these contracts upon the trial.

Answering Interrogatory No. 8, which reads as follows:

Q. "State the total number of individual entries or registrations of published copyrights of musical compositions and arrangements thereof, including copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., during the past twenty-eight years from January 1, 1909, to date in the name of each publisher who was a member of the American Society of Composers, Authors and Publishers as of December 1, 1937."

A. For the reasons stated in the affidavits annexed to the motion for a temporary injunction herein, it is impossible to state the total number of individual entries or registrations of published copyrights of musical compositions and arrangements thereof entered or registered, pursuant to the Copyright Laws of the United States during the past [fol. 1422] twenty-eight years. This is a matter of public record, and the records are just as available to the defendants as they are to the complainants. It would take from six months to a year to get this information. A compilation of this information would cost in excess of $25,000. The complainant, American Society of Composers, Authors and Publishers, however, has endeavored to make a list of such musical compositions as are currently used to such an extent as to make a worthwhile and serviceable record. A copy of such compilation is annexed hereto as Exhibit 5.

Answering Interrogatory No. 9, which reads as follows:

Q. "State the total number of individual entries or registrations of published copyrights of musical compositions or arrangements thereof, including copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the

Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., during the past twenty-eight years from January 1, 1909, to date in the name of each of the corporations, companies or catalogues described in your answer to Interrogatory No. 3."

A. This interrogatory is answered by the answer to Interrogatory No. 8.

Answering Interrogatory No. 10, which reads as follows:

Q. "State the total number of individual entries or registrations of published copyrights of musical compositions or arrangements thereof, including copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., during the past twenty-eight years from January 1, 1909, to date in the name of each of the corporations, companies or catalogues included in your answer to Interrogatory No. 4."

[fol. 1423] A. This interrogatory is answered by the answer to Interrogatory No. 8.

Answering Interrogatory No. 11, which reads as follows:

Q. "State the name and address of each publisher member of each association or society located in any foreign country which is included in the representation of the American Society of Composers, Authors and Publishers by virtue of the agreements with such foreign association or society described in your answer to Interrogatory No. 5 and No. 6, and state the name of such foreign association or society of which each publisher is a member."

A. The names of each publisher member of the foreign societies are included in the list of all members of the foreign societies, which is hereto annexed as Exhibit 6. The addresses of these publishers, which are in foreign countries, are not available to me at this time.

Answering Interrogatory No. 12, which reads as follows:

Q. "State the name and address of each corporation, company, firm or catalogue of copyrighted musical compositions or arrangements thereof, owned or controlled in any

manner by publisher members of foreign associations or societies included in your answer to Interrogatory No. 11, and state the name of the publisher member exercising such ownership or control and the name of the foreign association or society of which a member."

A. As stated in answer to Interrogatory No. 4, catalogues have no name or address, and I do not know the name and address of each corporation, company or firm owned or controlled in any manner by publisher members of foreign associations or societies, other than the information contained in Exhibit "6".

[fol. 1424] Answering Interrogatory No. 13, which reads as follows:

Q. "State the name and address of each corporation, company, firm or catalogue of copyrighted musical compositions or arrangements thereof, owned or controlled in any manner by authors or composers or by the estates or beneficiaries of deceased authors and composers who are members of foreign associations or societies which are included in the American Society of Composers, Authors and Publishers' representation by reason of the membership in such foreign association or society of the authors or composers owning or controlling such corporation, company, firm or catalogue."

A. As stated in answer to Interrogatory 4, catalogues have no name or address, and I do not know the name and address of each corporation, company or firm owned or controlled in any manner by author or composer members of foreign associations or societies, other than as such information may be contained in Exhibit "6".

Answering Interrogatory No. 14, which reads as follows:

Q. "State the total number of individual entries or registrations of published copyrights of musical compositions and arrangements thereof, including copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., during the past twenty-eight years from January 1, 1909, to date in the name of

each of the publisher members of an association or society located in a foreign country which is included in the representation of the American Society of Composers, Authors and Publishers by virtue of the agreements with such foreign association or society described in your answer to Interrogatories No. 5 and No. 6."

A. It is impossible to answer this interrogatory for the reasons expressed in answer to Interrogatory No. 8.

Answering Interrogatory No. 15, which reads as follows:

[fol. 1425] Q. "State the total number of individual entries or registrations of published copyrights of musical compositions and arrangements thereof, including copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., during the past twenty-eight years from January 1, 1909, to date in the name of each corporation, company, firm or catalogue described in your answer to Interrogatory No. 12 as owned or controlled by a publisher member of a foreign association or society, which is included in the representation by the American Society of Composers, Authors and Publishers by virtue of the agreements with such foreign association or society described in your answer to Interrogatories No. 5 and No. 6."

A. It is impossible to answer this interrogatory for the reasons stated in answer to Interrogatory No. 8.

Answering Interrogatory No. 16, which reads as follows:

Q. "State the total number of individual entries or registrations of published copyrights of musical compositions and arrangements thereof, including copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., during the past twenty-eight years from January 1, 1909, to date in the name of each corporation, company, firm or catalogue described in your answer to Interrogatory No. 13 as owned or controlled by an author or composer member of a foreign association or society, which copyrights are included in the representation

by the American Society of Composers, Authors and Publishers by virtue of the agreements with such foreign association or society described in your answer to Interrogatories No. 5 and No. 6."

A. It is impossible to answer this interrogatory for the reasons stated in answering Interrogatory No. 8.

Answering Interrogatory No. 17, which reads as follows:

Q. "State the name and address of each corporation, company or catalogue of copyrighted musical compositions or arrangements thereof, owned or controlled in any manner by the estates or beneficiaries of a deceased author or composer member of the American Society of Composers, Authors and Publishers which are included in the Society's repre-[fol. 1426] sentation by virtue of the Society's contract with the estate or beneficiary of such deceased author or composer, and State the name of the estate and the name of the beneficiary."

A. I do not know the names or addresses of each corporation or company (and there is no name and address of any catalogue) of copyrighted musical compositions or arrangements thereof, owned or controlled by estates or beneficiaries of deceased author or composer members of the Society. With respect to the ownership of copyrights by such members, I respectfully refer the Court and incorporate herein and make a part hereof as if the facts were fully and at length repeated herein, the affidavit of Anne Paul Nevin, verified June 8, 1937 and the affidavit of Ella Herbert Bartlett, verified June 8, 1937, and exhibits annexed thereto submitted in support of the motion for a temporary injunction.

Answering Interrogatory No. 18, which reads as follows:

Q. "State the total number of individual entries or registrations of published copyrights of musical compositions and arrangements thereof, including copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., during the past twenty-eight years from January 1, 1909, to date in the name of each of the corporations, companies or catalogues described

in your answer to Interrogatory No. 17 as owned or controlled by the estate or beneficiary of a deceased author or composer which are included in the Society's representation by virtue of the Society's contract with such estate or beneficiary. ''

A. I cannot answer this interrogatory for the same reasons given in answer to Interrogatories Nos. 8 and 17.

[fol. 1427] Answering Interrogatory No. 19, which reads as follows:

Q. "State the total number of individual entries or registrations of renewals of expired copyrights of musical compositions and arrangements thereof, including renewals of copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., during the past twenty-eight years from January 1, 1909, to date in the name of each publisher who was a member of the American Society of Composers, Authors and Publishers as of December 1, 1937."

A. I do not have a list of the renewals of expired copyrights of musical compositions or arrangements thereof entered or registered with the Register of Copyrights during the past twenty-eight years in the name of the publisher members of the Society. This information is ascertainable from the files of the Register of Copyrights and is equally available to the defendants as to the plaintiffs. The compilation of such a list would involve a search taking from six months to a year, and would entail the expenditure of a sum of money in excess of $25,000.

Answering Interrogatory No. 20, which reads as follows:

Q. "State the total number of individual entries or registrations of renewals of expired copyrights of musical compositions and arrangements thereof, including renewals of copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., during the past twenty-eight years from January 1, 1909, to

date in the name of each of the corporations, companies or catalogues described in your answer to Interrogatory No. 3 as owned or controlled by a publisher member of the American Society of Composers, Authors and Publishers."

A. I cannot answer this interrogatory for the reasons set forth in answer to Interrogatories Nos. 3, 8 and 19.

[fol. 1428] Answering Interrogatory No. 21, which reads as follows:

Q. "State the total number of individual entries or registrations of renewals of expired copyrights of musical compositions and arrangements thereof, including renewals of copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C. during the past twenty-eight years from January 1, 1909, to date in the name of each author or composer, or both, who was a member of the American Society of Composers, Authors and Publishers as of December 1, 1937, or in the name of each corporation, company or catalogue described in your answer to Interrogatory No. 4 as owned or controlled by a composer or author member of the Society."

A. I cannot answer this interrogatory for the reasons set forth in answer to Interrogatories Nos. 4, 8 and 19.

Answering Interrogatory No. 22, which reads as follows:

Q. "State the total number of individual entries or registrations of renewals of expired copyrights of musical compositions and arrangements thereof, including renewals of copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., during the past twenty-eight years from January 1, 1909, to date, in the name of each deceased composer or author member of the American Society of Composers, Authors and Publishers during the lifetime of such deceased member, which renewed copyrights are included in the Society's representation by virtue of the Society's contract with the estate or beneficiary of such deceased member."

A. I cannot answer this interrogatory for the same reasons set forth in Interrogatories Nos. 8, 17 and 19.

Answering Interrogatory No. 23, which reads as follows:

Q. "State the total number of individual entries or registrations of renewals of expired copyrights of musical [fol. 1429] compositions and arrangements thereof, including renewals of copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., during the past twenty-eight years from January 1, 1909, to date, in the name of the estate or beneficiary of each deceased composer or author member of the American Society of Composers, Authors and Publishers, which renewed copyrights are included in the Society's representation by virtue of the Society's contract with the said estate or beneficiary of such deceased member."

A. I cannot answer this interrogatory for the same reasons embraced in answer to Interrogatory No. 17.

Answering Interrogatory No. 24, which reads as follows:

Q. "State the total number of individual entries or registrations of renewals of expired copyrights of musical compositions and arrangements thereof, including renewals of copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., during the past twenty-eight years from January 1, 1909, to date, in the name of each of the corporations, companies or catalogues described in your answer to Interrogatory No. 17 as being owned or controlled by the estate or beneficiary of a deceased member of the American Society of Composers, Authors and Publishers and which renewed copyrights are included in the Society's representation by virtue of the Society's contract with the said estate or beneficiary of such deceased member."

A. I cannot answer this interrogatory for the same reasons embraced in the answers to Interrogatory 17.

Answering Interrogatory No. 25, which reads as follows:

Q. "State the total number of individual entries or registrations of renewals of expired copyrights of musical compositions and arrangements thereof, including renewals of copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, [fol. 1430] D. C., during the past twenty-eight years from January 1, 1909, to date, in the name of each of the publisher members of an association or society located in a foreign country which is included in the representation of the American Society of Composers, Authors and Publishers by virtue of the agreements with such foreign association or society described in your answer to Interrogatories No. 5 and No. 6."

A. I cannot answer this interrogatory for the same reasons embraced in my answer to Interrogatories Nos. 4, 11, 12, 13, 17 and 19.

Answering Interrogatory No. 26, which reads as follows:

Q. "State the total number of individual entries or registrations of renewals of expired copyrights of musical compositions and arrangements thereof, including renewals of copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., during the past twenty-eight years from January 1, 1909, to date, in the name of each corporation, company, firm or catalogue described in your answer to Interrogatory No. 12 as owned or controlled by a publisher member of a foreign corporation or society, which renewed copyrights are included in the representation by the American Society of Composers, Authors and Publishers by virtue of the agreements with such foreign association or society described in your answer to Interrogatories No. 5 and No. 6."

A. I cannot answer this interrogatory for the same reasons embraced in my answer to Interrogatories Nos. 4, 11, 12, 13, 17 and 19.

Answering Interrogatory No. 27 which reads as follows:

Q. "State the total number of individual entries or registrations of renewals of expired copyrights of musical compositions and arrangements thereof, including renewals of copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., during the past twenty-eight years from January 1, 1909, to date, in the name of each composer or author member of a [fol. 1431] foreign association or society, which renewed copyrights are included in the representation by the American Society of Composers, Authors and Publishers by virtue of the agreements with such foreign association or society described in your answer to Interrogatories No. 5 and No. 6."

A. I cannot answer this interrogatory for the same reasons embraced in my answer to Interrogatories Nos. 4, 11, 12, 13, 17 and 19.

Answering Interrogatory No. 28, which reads as follows:

Q. "State the total number of individual entries or registrations of renewals of expired copyrights of musical compositions and arrangements thereof, including renewals of copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., during the past twenty-eight years from January 1, 1909, to date, in the name of each corporation, company, firm or catalogue described in your answer to Interrogatory No. 13 as owned or controlled by an author or composer member of a foreign association or society, which renewed copyrights are included in the representation of the American Society of Composers, Authors and Publishers by virtue of the agreements with such foreign association or society described in your answer to Interrogatories No. 5 and No. 6."

A. I cannot answer this interrogatory for the same reasons embraced in my answer to Interrogatories Nos. 4, 11, 12, 13, 17 and 19.

Answering Interrogatory No. 29, which reads as follows:

Q. "State the total number of individual entries or registrations of renewals of expired copyrights of musical compositions and arrangements thereof, including renewals of copyrighted arrangement of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C. during the past twenty-eight years from January 1, 1909, to date, in the name of each deceased composer or author member of a foreign association or society during the life-[fol. 1432] time of such deceased member, which renewed copyrights are included in the representation by the American Society of Composers, Authors and Publishers by virtue of the agreements with such foreign association or society described in your answer to Interrogatories No. 5 and No. 6."

A. I cannot answer this interrogatory for the same reasons embraced in my answer to Interrogatories Nos. 4, 11, 12, 13, 17 and 19.

Answering Interrogatory No. 30, which reads as follows:

Q. "State the total number of individual entries or registrations of renewals of expired copyrights of musical compositions and arrangements thereof, including renewals of copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., during the past twenty-eight years from January 1, 1909, to date, in the name of the estate or beneficiaries of each deceased composer or author member of a foreign association or society, or in the name of each corporation, company, firm or catalogue owned or controlled by the estate of beneficiary of a deceased author or composer member of a foreign association or society, which renewed copyrights are included in the representation by the American Society of Composers, Authors and Publishers by virtue of the agreements with such foreign association or society described in your answer to Interrogatories No. 5 and No. 6."

A. I cannot answer this interrogatory for the same reasons embraced in my answer to Interrogatories Nos. 4, 11, 12, 13, 17 and 19.

Answering Interrogatory No. 31, which reads as follows:

Q. "Will you voluntarily produce, upon the trial of this cause, without being required to do so by subpoena or other judicial process, a copy of the "Directory of Composers, Authors and Publishers of Musical Works and of Performing Rights Societies throughout the World" published by the American Society of Composers, Authors and Publishers as of January 1, 1936, together with any supplements and additions thereto and new editions thereof?"

A. Yes. This is annexed hereto as Exhibit "6".

[fol. 1433] Answering Interrogatory No. 32, which reads as follows:

Q. "Will you voluntarily produce, upon the trial of this cause, without being required to do so by subpoena or other judicial process, a copy of the book or record entitled "ASCAP Program Listings 1935" published by the American Society of Composers, Authors and Publishers?"

A. Yes. This is annexed hereto as Exhibit "5".

Answering Interrogatory No. 33, which reads as follows:

Q. "State in detail the manner in which and the purpose for which the book or record entitled "ASCAP Program Listings 1935" was compiled including (a) the name and address of the person in charge of the compilation, (b) the number of programs examined, (c) the source or sources from which the program information was obtained, (d) the symbols used in the compilation and the meaning of each symbol, (e) the rules adopted and used to govern the examination of the programs comprising the tabulation."

A. The person in charge of the compilation was E. C. Mills, 30 Rockefeller Plaza, New York City.

During the year 1935 ASCAP examined 33,461 programs as broadcast by the two principal networks, and the Program Listings show a title-by-title listing of the 20,939 different musical compositions shown thereon, with the number of renditions credited to each title, involving a total of 7,545,051 credit entries to accounts of composers, authors and publishers.

The tabulations also show the names of the writers and publisher of each title, their respective performing right

society affiliation, and the share of the program credit allocated to each.

The listing is separated into two sections, as follows:

[fol. 1434] (1) Copyrighted published works (pages A-1, etc.)

(2) Copyrighted arrangements of non-copyright (in U. S. A.) works (pages NC-A-1, etc.)

The following general rules govern the examination and analysis of Programs:

(1) When a composition is included in a network broadcast a credit is given for each connected station, thus: if 60 stations as a network broadcast the program, 60 credits are given to each original copyright.

(2) During 1935 only one credit was given to rendition of a copyrighted "theme" or "signature" number, regardless of the number of times played on the program. Commencing 1936 one credit was given for each partial or entire use.

(3) All works under original copyright in the U. S. A. are given an equal value, or credit, viz: one full point for each partial or complete rendition. This one point of credit is divided into halves—one of which is allotted to the publisher or publishers; and the other to the writer or writers, and divided equally among as many of each as there may be.

(4) Works listed as rendered from unpublished manuscripts are generally insufficiently identified, and are therefore not included.

(5) As to copyrighted arrangements of non-copyrights (in the U. S. A.), one-half point credit is given for each rendition. This is divided: one-fourth to the publisher (in U. S. A. only) and one-fourth to the writer (s) if members [fol. 1435] of ASCAP or a society with which ASCAP is affiliated.

(6) The symbols used in the listings have the following significance:

1. NM	Non-member of ASCAP or any affiliated Society.
2. NC	Non-Copyright (in U. S. A.)
3. ASCAP	American Society

4. ARGENTORES	Argentine	Society
5. AKM	Austrian	"
6. NAVEA	Belgian	"
7. SBAT	Brazilian	"
8. OSA	Czecho-Slovakian	Society
9. KODA	Danish	"
10. PRS	English	"
11. TEOSTO	Finnish	"
12. SACEM	French	"
13. STAGMA	German	"
14. MARS	Hungarian	"
15. SIAE	Italian	"
16. CZ	Jugo-Slavian	"
17. TONO	Norwegian	"
18. AUTORES	Portuguese	"
19. RUMANIA	Rumanian	"
20. STIM	Swedish	"
21. GEFA	Swiss	"

Programs analyzed are the programs actually broadcast [fol. 1436] according to the records of the stations—not the programs as advertised in advance in the public press. Analysis covers programs for the entire day of operation.

Answering Interrogatory No. 34, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, the stenographic report heretofore printed and distributed by the American Society of Composers, Authors and Publishers of the conferences held in the offices of the Society on or about September 20, 1922, and October 25, 1922, between officers of the Society and representatives of the Authors League of America, Music Industries Chamber of Commerce, Music Publishers Association of the United States, Department of Commerce of the United States, National Radio Chamber of Commerce and other radio broadcasting representatives?"

A. Yes, subject to the Court's ruling as to relevancy and materiality.

Answering Interrogatory No. 35, which reads as follows:

Q. "State the name of each representative of the American Society of Composers, Authors and Publishers present

at either of the conferences referred to in Interrogatory No. 34 and the official capacity of each such person.

[fol. 1437] A. All the information desired above, will appear from the stenographic report referred to in Interrogatory No. 4, and if the Court should rule that such report is relevant and material, it will be furnished upon the trial.

Answering Interrogatory No. 36, which reads as follows:

Q. "Will you produce voluntarily upon the trial of this cause, without being required to do so by subpoena or other judicial process a verbatim copy of the open letter dated June 28, 1922, directed by the American Society of Composers, Authors and Publishers to the Motion Picture Theatre Owners Association which was reproduced and distributed by the said Society?"

A. Yes.

Answering Interrogatory No. 37, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, a copy of the printed pamphlet entitled "How the Public Gets its Music" printed and distributed by the American Society of Composers, Authors and Publishers in or about April 1933 and reprinted and distributed under date of August 1934?"

A. Yes.

Answering Interrogatory No. 38, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, a copy of the printed pamphlet entitled "Who uses Music and Why" printed and distributed by the American Society of Composers, Authors and Publishers in or about May 1934 and reprinted and distributed in or about April 1935?"

A. Yes.

[fol. 1438] Answering Interrogatory No. 39, which reads as follows:

Q. "State the name and address of each officer, the general manager and the chairman or head of each committee

of the American Society of Composers, Authors and Publishers for each year from the date of the organization of the Society to and including the year 1937."

A. The names and addresses of the present officers, general manager, members of the board of directors and members of all committees of the American Society of Composers, Authors and Publishers are as follows:

Officers

Gene Buck, President, 30 Rockefeller Plaza, New York City.

Louis Bernstein, Vice-President, 1270 Sixth Avenue, New York City.

Otto A. Harbach, Vice-President, 244 Orienta Avenue, Mamaroneck, N. Y.

Joseph Young, Secretary, 17 Myrtle Drive, Great Neck, N. Y.

Gustave Schirmer, Treasurer, 3 East 43rd Street, New York City.

J. J. Bregman, Assistant Secretary, 1629 Broadway, New York City.

Sigmund Romberg, Assistant Treasurer, 1023 No. Roxbury Drive, Beverly Hills, California.

E. C. Mills, Chairman of Administrative Committee, 30 Rockefeller Plaza, New York City.

John G. Paine, General Manager, 30 Rockefeller Plaza, New York City.

Herman Greenberg, Assistant General Manager, 30 Rockefeller Plaza, New York City.

Schwartz and Frohlich, General Counsel, 1450 Broadway, New York City.

Board of Directors

Fred E. Ahlert, 10 West 96th Street, New York City.
Louis Bernstein, 1270 Sixth Avenue, New York City.
J. J. Bregman, 1629 Broadway, New York City.
Saul Bornstein, 799 Seventh Avenue, New York City.
Gene Buck, 30 Rockefeller Plaza, New York City.
Irving Caesar, 1619 Broadway, New York City.
Walter Douglas, 1619 Broadway, New York City.
Max Dreyfus, 1619 Broadway, New York City.
George Fischer, 119 West 40th Street, New York City.
Walter Fischer, 56 Cooper Square, New York City.

Otto A. Harbach, 244 Orienta Avenue, Mamaroneck, New York.

Raymond Hubbell, Lambs Club, 130 West 44th Street, New York City.

[fol. 1439] Jerome Kern, 917 Whittier Drive, Beverly Hills, California.

Edgar Leslie, 59 West 46th Street, New York City.

George W. Meyer, 205 West 57th Street, New York City.

Jack Mills, 1619 Broadway, New York City.

Edwin H. Morris, 1250 Sixth Avenue, New York City.

Sigmund Romberg, 1023 No. Roxbury Drive, Beverly Hills, California.

Gustave Schirmer, 3 East 43rd Street, New York City.

Oley Speaks, 5 Riverside Drive, New York City.

Deems Taylor, Essex House, 160 Central Park South, New York City.

Will Von Tilzer, 1619 Broadway, New York City.

Joseph Young, 17 Myrtle Drive, Great Neck, New York.

Finance Committee

Louis Bernstein, Chairman, 1270 Sixth Avenue, New York City.

Fred E. Ahlert, 10 West 96th Street, New York City.

Otto A. Harbach, 244 Orienta Avenue, Mamaroneck, New York.

Membership Committee

Raymond Hubbell, Chairman, Lambs Club, 130 West 44th Street, New York City.

George Fischer, 119 West 40th Street, New York City.

Deems Taylor, Essex House, 160 Central Park South, New York City.

Will Von Tilzer, 1619 Broadway, New York City.

Joseph Young, 17 Myrtle Drive, Great Neck, New York.

Song Sheet Committee

Walter Douglas, Chairman, 1619 Broadway, New York City.

Irving Caesar, 1619 Broadway, New York City.

Louis Bernstein, 1270 Sixth Avenue, New York City.

Jack Mills, 1619 Broadway, New York City.

Edgar Leslie, 59 West 46th Street, New York City.

Sigmund Romberg, 1023 No. Roxbury Drive, Beverly Hills, California.

Publishers' Committee on Availability

Jack Bregman, Chairman, 1629 Broadway, New York City.
Gustave Schirmer, 3 East 43rd Street, New York City.
Walter Fischer, 56 Cooper Square, New York City.
Saul Bornstein, 799 Seventh Avenue, New York City.
Max Dreyfus, 1619 Broadway, New York City.
Louis Bernstein, 1270 Sixth Avenue, New York City.
Walter Douglas, 1619 Broadway, New York City.

Writers' Relief Committee

Joseph Young, Chairman, 17 Myrtle Drive, Great Neck, New York.
Oley Speaks, 5 Riverside Drive, New York City.
Gene Buck, 30 Rockefeller Plaza, New York City.

[fol. 1440] Publishers' Relief Committee

Louis Bernstein, Chairman, 1270 Sixth Avenue, New York City.
Max Dreyfus, 1619 Broadway, New York City.
Gustave Schirmer, 3 East 43rd Street, New York City.

Foreign Relations Committee

Walter Fischer, Chairman, 56 Cooper Square, New York City.
Saul H. Bornstein, 799 Seventh Avenue, New York City.
Sigmund Romberg, 1023 No. Roxbury Drive, Beverly Hills, California.
George W. Meyer, 205 West 57th Street, New York City.
Irving Caesar, 1619 Broadway, New York City

Complaint Committee

Sigmund Romberg, Chairman, 1023 No. Roxbury Drive, Beverly Hills, California.
George Fischer, 119 West 40th Street, New York City.
Edgar Leslie, 59 West 46th Street, New York City.

Popular Publishers' Board of Appeal 1937

Edward B. Marks, Chairman, 1250 Sixth Avenue, New York City.
Henry Spitzer, 1270 Sixth Avenue, New York City.
Abe Olman, 799 Seventh Avenue, New York City.

Standard Publishers' Board of Appeal

W. Deane Preston, 88 St. Stephens Street, Boston, Massachusetts.

Max Winkler, Belwin, Inc., 43 West 23rd Street, New York City.

Dr. Renato Tasselli, G. Ricordi & Co., Inc., of New York, 12 West 45th Street, New York City.

Administrative Committee

L. C. Mills, Chairman, 30 Rockefeller Plaza, New York City.

Gene Buck, 30 Rockefeller Plaza, New York City.
Walter Fischer, 56 Cooper Square, New York City.
Louis Bernstein, 1270 Sixth Avenue, New York City.
Irving Caesar, 1619 Broadway, New York City.

Complainants object to the materiality and relevancy of the information requested as to the years prior to 1937.

Answering Interrogatory No. 40, which reads as follows:

Q. "State the name and address of each member of the Board of Directors of the American Society of Composers, Authors and Publishers for each year from the date of the organization of the Society to and including the year 1937."

[fol. 1441] A. This interrogatory has been answered in Interrogatory No. 39.

Complainants object to the other information requested in said interrogatory for the years prior to 1937, on the ground that the information requested is wholly immaterial and irrelevant to the present controversy and would needlessly conflict the issues herein.

Answering Interrogatory No. 41, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, the original Articles of Association of the American Society of Composers, Authors and Publishers adopted when the Society was first organized, together with a verbatim copy of each addition and amendment thereto showing the date of the adoption thereof?"

A. Yes.

Answering Interrogatory No. 42, which reads as follows:

Q. "State the meaning and interpretation applied by the American Society of Composers, Authors and Publishers of the word 'regularly' as used in Article III, Section 1 of the Articles of Association of the Society, with respect to eligibility to membership of music publishers '*regularly* engaged for a period of not less than one year in the music publishing business'."

A. The meaning and interpretation is in accordance the dictionary definition of the word in question.

Answering Interrogatory No. 43, which reads as follows:

Q. "State the meaning and interpretation applied by the American Society of Composers, Authors and Publishers of the word 'regularly' as used in Article III, Section 1 of the Articles of Association of the Society, with respect to the eligibility to membership of composers and/or authors [fol. 1442] who '*regularly*' practice the profession."

A. The meaning and interpretation is in accordance with the dictionary definition of the word in question.

Answering Interrogatory No. 44, which reads as follows:

Q. "State the meaning and interpretation applied by the American Society of Composers, Authors and Publishers to the words 'regularly published' as used in Article III, Section 1 of the Articles of Association of the Society, with respect to the eligibility to membership of composers and/or authors who 'have had not less than five works of his composition or writing *regularly published.*' "

A. The meaning and interpretation is in accordance with the dictionary definition of the word in question.

Answering Interrogatory No. 45, which reads as follows:

Q. "State the exact verbatim wording of the form of license contract entitled 'Operator's Broadcasting License for Newspaper-Owned Station' adopted by the American Society of Composers, Authors and Publishers on or about October 1, 1932, for licensing of music performance rights to radio broadcasting stations owned 51% or more by a newspaper."

A. Annexed hereto and marked Exhibit #7 is the verbatim copy of the form of license contract referred to in this interrogatory.

Answering Interrogatory No. 46, which reads as follows:

Q. "State the name, address and call letters of each radio broadcasting station in the State of Nebraska to which the American Society of Composers, Authors and Publishers has issued the license contract entitled "Operator's Broadcasting License for Newspaper-Owned Station'."

A. Huse Publishing Company, Norfolk, Nebraska, call letters WJAG.

[fol. 1443] Answering Interrogatory No. 47, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, all license contracts of the American Society of Composers, Authors and Publishers with radio broadcasting stations located in the State of Nebraska?"

A. Yes, subject to the Court's ruling as to relevancy and materiality.

Answering Interrogatory No. 48, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, all license contracts of the American Society of Composers, Authors and Publishers with all licensees located in the State of Nebraska other than radio broadcasting stations?"

A. Yes, subject to the ruling by the Court as to relevancy and materiality.

Answering Interrogatory No. 49, which reads as follows:

Q. "State the amount of gross receipts of the American Society of Composers, Authors and Publishers for each year from 1920 to 1937, inclusive, derived from licenses issued to proprietors of hotels, restaurants, dance halls cabarets and all other places of amusement in the United States except motion picture theatres and radio broadcasting stations."

A. This interrogatory is objected to on the ground that the receipts of the American Society of Composers, Authors and Publishers from states other than Nebraska has no relevancy or materiality to this controversy, and that in any event the receipts from 1920 to 1937 would serve no useful purpose and would merely becloud the issues in this case; that the purpose of this interrogatory is solely to annoy and harass the complainants and is oppressive and not within [fol. 1444] the scope of interrogatories as permitted by Rule 58 of the Federal Equity Rules.

Answering Interrogatory No. 50, which reads as follows:

Q. "State the amount of gross receipts of the American Society of Composers, Authors and Publishers for each year from 1920 to 1937, inclusive, derived from licenses issued to motion picture theatres in the United States."

A. This interrogatory is objected to on the ground that the receipts of the American Society of Composers, Authors and Publishers from states other than Nebraska has no relevancy or materiality to this controversy, and that in any event the receipts from 1920 to 1937 would serve no useful purpose and would merely becloud the issues in this case; that the purpose of this interrogatory is solely to annoy and harass the complainants and is oppressive and not within the scope of interrogatories as permitted by Rule 58 of the Federal Equity Rules.

Answering Interrogatory No. 51, which reads as follows:

Q. "State the amount of gross receipts of the American Society of Composers, Authors and Publishers for each year from 1920 to 1937, inclusive, derived from licenses issued to radio broadcasting stations in the United States."

A. This interrogatory is objected to on the ground that the receipts of the American Society of Composers, Authors and Publishers from states other than Nebraska has no relevancy or materiality to this controversy, and that in any event the receipts from 1920 to 1937 would serve no useful [fol. 1445] purpose and would merely becloud the issues in this case; that the purpose of this interrogatory is solely to annoy and harass the complainants and is oppressive and not within the scope of interrogatories as permitted by Rule 58 of the Federal Equity Rules.

Answering Interrogatory No. 52, which reads as follows:

Q. "State the total number of licenses issued by the American Society of Composers, Authors and Publishers for each year from 1920 to 1937, inclusive, to proprietors of hotels, restaurants, dance halls, cabarets and all other places of amusement in the United States except motion picture theatres and radio broadcasting stations."

A. This interrogatory is objected to on the ground that the number of licenses issued to users in states other than Nebraska by the American Society of Composers, Authors and Publishers has no relevancy or materiality to this controversy, and that in any event the number of licenses issued to users in states other than Nebraska from 1920 to 1937 would serve no useful purpose and would merely becloud the issues in this case; that the purpose of this interrogatory is solely to annoy and harass the complainants and is oppressive and not within the scope of interrogatories as permitted by Rule 58 of the Federal Equity Rules.

Answering Interrogatory No. 53, which reads as follows:

Q. "State the total number of licenses issued by the American Society of Composers, Authors and Publishers for each year from 1920 to 1937, inclusive, to motion picture theatres in the United States."

A. This interrogatory is objected to on the ground that [fol. 1446] the number of licenses issued to users in states other than Nebraska by the American Society of Composers, Authors and Publishers has no relevancy or materiality to this controversy, and that in any event the number of licenses issued to users in states other than Nebraska from 1920 to 1937 would serve no useful purpose and would merely becloud the issues in this case; that the purpose of this interrogatory is solely to annoy and harass the complainants and is oppressive and not within the scope of interrogatories as permitted by Rule 58 of the Federal Equity Rules.

Answering Interrogatory No. 54, which reads as follows:

Q. "State the total nur er of licenses issued by the American Society of Composers, Authors and Publishers for each year from 1920 to 1937, inclusive, to radio broad-

casting stations in the United States licensed under the Society's regular 'Operator's Broadcasting License.'"

A. This interrogatory is objected to on the ground that the number of licenses issued to users in states other than Nebraska by the American Society of Composers, Authors and Publishers has no relevancy or materiality to this controversy, and that in any event the number of licenses issued to users in states other than Nebraska from 1920 to 1937 would serve no useful purpose and would merely becloud the issues in this case; that the purpose of this interrogatory is solely to annoy and harass the complainants and is oppressive and not within the scope of interrogatories as permitted by Rule 58 of the Federal Equity Rules.

Answering Interrogatory No. 55, which reads as follows:

[fol. 1447] Q. "State the total number of licenses issued by the American Society of Composers, Authors and Publishers for each year from 1932 to 1937, inclusive, to radio broadcasting stations in the United States licensed under the Society's special 'Operator's Broadcasting License for Newspaper-Owned Station.'"

A. This interrogatory is objected to on the ground that the number of licenses issued to users in states other than Nebraska by the American Society of Composers, Authors and Publishers has no relevancy or materiality to this controversy, and that in any event the number of licenses issued to users in states other than Nebraska from 1932 to 1937 would serve no useful purpose and would merely becloud the issues in this case; that the purpose of this interrogatory is solely to annoy and harass the complainants and is oppressive and not within the scope of interrogatories as permitted by Rule 58 of the Federal Equity Rules.

Answering Interrogatory No. 56, which reads as follows:

Q. "State the schedule of license fees or rates required by the American Society of Composers, Authors and Publishers to be paid by hotels prior to the year 1928."

A. This interrogatory is objected to on the ground that schedule of license fees or rates paid prior to 1928 can have no bearing upon this controversy and is an attempt to introduce a collateral issue, and is not within the proper scope of interrogatories as defined by Equity Rule 58.

Answering Interrogatory No. 57, which reads as follows:

Q. "State the schedule of license fees or rates required [fol. 1448] by the American Society of Composers, Authors and Publishers to be paid by hotels after the year 1928 and prior to January 1, 1934."

A. This interrogatory is objected to on the ground that schedule of license fees or rates paid prior to 1934 can have no bearing upon this controversy and is an attempt to introduce a collateral issue, and is not within the proper scope of interrogatories as defined by Equity Rule 58.

Answering Interrogatory No. 58, which reads as follows:

Q. "State the revised schedule of license fees or rates for hotels issued by the American Society of Composers, Authors and Publishers as of approximately January 1934."

A. Annexed hereto and marked Exhibit 8, is a schedule of license fees paid by hotels in the State of Nebraska from the year 1921 to 1937, inclusive. Prior to 1921, no fees were paid in spite of the fact that the copyrighted music of members of the Society was constantly used in such hotels, and the hotels have been held liable for infringement for unauthorized performance for profit, of such music by the Supreme Court of the United States in the case of Herbert v. Shanley. When Prohibition was repealed in December 1933, there was a decided increase in the operations of the hotels throughout the country. A great many hotels that had never employed an orchestra, employed one for the first time. Many hotels employed two and even three orchestras. Some hotels provided artists in addition to orchestras, for the entertainment of their guests. The hotels opened bars and sold liquor on the premises and the music furnished to the patrons was an additional inducement to bring them in [fol. 1449] and to keep them there. The business of the hotels expanded considerably with the repeal of Prohibition and the Society felt justified in increasing the rates that had theretofore been paid by the hotels.

Even so, with the increased amounts, the rates paid by the hotels are pitifully small in comparison with the business done. For example, the two largest hotels in Omaha, the Fontenelle and the Paxton, pay $360.00 per year. They employ orchestras and furnish music to their patrons both

at lunch and dinner time. For the privilege of performing the musical compositions licensed by the Society, these hotels are paying a little less than $1.00 per day. I venture to say that there is no room in these two hotels that rents for $1.00 per day, and that there is not a refreshment check in the dining room per person, less than $1.00.

Answering Interrogatory No. 59, which reads as follows:

Q. "State the schedule of license fees or rates required by the American Society of Composers, Authors and Publishers to be paid by motion picture theatres prior to October 1, 1934."

A. The license fees paid by motion picture theatres in Nebraska prior to October 1, 1934, were as follows: Ten cents per seat per year except that if the theatre were open for only three days a week, the rate was five cents per seat per year.

In 1934, we thought that these rates needed revision. Many large and elaborate motion picture theatres had been built, some seating as many as 3,000 people. The program [fol. 1450] for entertainment in these theatres was most elaborate, consisting of ballet, vaudeville acts, revues, large orchestras and other forms of entertainment, in addition to the motion pictures, which of course, contained music as well.

The admission prices in these large theatres had gone up in the intervening years and in many cases they were as high as $1.00. There was a readjustment of rates in 1934, for the purpose of equalizing the rates and taking some of the burden off the little fellow and putting it on the shoulders of the big fellow. The Society was justified in charging more than ten cents a seat in 1934 because there had been an average increase in the general admission of theatres over a period of years. They originally charged a nickle, but even the smaller theatres were charging 25¢ and 30¢ throughout the country, in 1934. Consequently, the new rates in 1934, which were made after discussions and negotiations had with the Motion Picture Exhibitors' Associations, were made as follows: ten cents per seat per year for theatres containing 800 or less; fifteen cents for theatres containing 801 to 1599 seats; twenty cents per seat above that; five cents per seat for all theatres operating only three days per week. Attached hereto and

marked Exhibit 9, is a schedule of license fees paid by the motion picture theatres in the State of Nebraska from 1923 down to 1937. The largest sum collected, as appears from a glance at this schedule, is $560.00 per year. Even taking that theatre as a criterion, the proprietor pays at the rate of about $1.60 a day. Of course, that is an excep-
[fol. 1451] tional theatre. A great majority of the theatres pay less than $100.00 per year.

Answering Interrogatory No. 60, which reads as follows:

Q. "State the exact wording of the undated new schedule of fees or rates to be required of motion picture theatres prepared by the American Society of Composers, Authors and Publishers during the summer of 1934 captioned 'License Fee Tariff for Motion Picture Theatres (Effective on and after October 1, 1934)' and ending with the initials 'ECM:AWK'."

A. I have not located this particular document in the Society's file and am not personally familiar with the same, but will endeavor to identify such document if produced by defendant.

Answering Interrogatory No. 61, which reads as follows:

Q. "State the schedule of license fees or rates required by the American Society of Composers, Authors and Publishers to be paid by radio broadcasting stations prior to September 1, 1932."

A. From the commencement of the broadcasting industry in 1922, it was contended by broadcasters that no profit was made from radio broadcasting and indeed, that broadcasting stations actually operated at a loss. At first broadcasters refused to pay any royalties whatsoever for the broadcasting of their works, but after the Courts had decided in a number of cases that radio broadcasts were public performances for profit, the stations commenced paying for such performance but insisted upon paying at a rate that was rather nominal, in view of the tremendous number of copyrighted musical compositions performed by them.

Prior to 1925, the only broadcasting station in Nebraska
[fol. 1452] which paid royalties to the Society was Station WOW in Omaha, paying a royalty of $200.00 annually. In 1925, two additional stations commenced paying royalties,

the largest payment being $500.00 annually by Station KMMJ, located at Clay Centre.

When radio definitely became a profitable industry and when the constant repetition of musical compositions by means of radio broadcasting, resulted in a serious decrease in sales of sheet music, it was felt that radio should pay a sum commensurate with the profit made by it, as well as for the injuries suffered by the copyrighted owners because of the reduction of income from other sources.

In 1926, a committee of broadcasters suggested to the Society, that license fees be based on the power of the stations as fixed by the United States Government licenses, and the number of hours of operation, regardless of whether or not compositions of the members of the Society were used during the entire period of operation. A contract was submitted to the Society by this committee of broadcasters, to be effective for three years and applicable not only to the members of the National Association of Broadcasters but to all broadcasters.

The proposal was not supported because of friction arising within the ranks of the broadcasters themselves. Stations with higher power in the less urban communities did not wish to pay the same rate as stations having the same power located in the more densely populated areas.

During this period licenses were being issued by the Society to various radio broadcasting stations for periods [fol. 1453] of one or two years at varying fees.

In 1929 a committee of the National Association of Broadcasters, met with representatives of the Society, and it was suggested that instead of the Society dealing with broadcasters individually, any grievance by a broadcaster be presented to the National Association of Broadcasters, which in turn would take it up with the Society.

The National Association of Broadcasters was informed of the rates paid by all of its members and distributed a list to all of its members, showing the amounts paid to the Society by each.

At this time the managing director of the National Association of Broadcasters suggested the following three factors to the Society as a basis for determining the rates:

(1) the power input of a station;
(2) the average number of hours of operation per week;

(3) the potential listening audience within the service range of the station.

In response to this suggestion, the Society replied on June 13, 1929—

"We have carefully noted the contents * * * and assure you that we will welcome any practicable plan, acceptable to all of the broadcasters for fixing a rate of license fees charged in respect of public performance of music copyrighted by our members, under some more definite and scientific formula than we have thus far found it possible to apply.

"Please therefore do not hesitate to present any suggestions which you may have * * *."

The broadcasters themselves were unable to agree upon this specific formula and as a result the situation regarding a uniform license for all remained unsettled.

In 1930, in a speech made before the 8th Annual Conference [fol. 1454] of the National Association of Broadcasters held at Cleveland, Ohio, William S. Hedges, President, states (at p. 7 of the printed minutes).

"The New York Office * * * has in many instances represented members in negotiations for license renewals with the American Society of Composers, Authors and Publishers, and has been in the majority of cases successful in securing fees that were mutually satisfactory * * *."

Hedges stated at Page 5:

"I believe we are getting closer to the time when a definite basis for fixing fees may be arrived at. In fact your Association has been working with that problem during the past year. Several formulae have been worked out but none of them has been completely satisfactory. Charges based upon card rates of broadcasting stations, which seems the most equitable plan, would have thrust a burden upon the smaller stations by increasing their fees and would have reduced the fees charged to the larger stations, which can better afford to pay even the exorbitant sums demanded."

On August 15, 1931, Mr. Loucks, representing the National Association of Broadcasters, advised the Society that the President of the National Association of Broadcasters had appointed a committee consisting of Messrs. Hedges,

Frank M. Russell, Henry A. Bellows and Loucks to meet representatives of the Society "to discuss a uniform basis for fixing music license fees."

The Broadcasters Committee did not agree as to what should be the proper norm or basis for determining uniform license rates for the use of music copyrighted by members of the Society. Conferences, discussions and negotiations were unsuccessful.

During 1931, 400 broadcasting stations sold $60,000,000 worth of "time on the air" to advertisers. The profit resulting from this income showed very definitely that radio was [fol. 1455] no longer in its experimental stages. While the radio income increased rapidly, the income of copyright owners from sale of sheet music declined precipitously, due to the inroads made by radio. The broadcasters insisted on a uniform license for all stations negotiated through their trade association, the National Association of Broadcasters. Since all then existing licenses had been negotiated individually with the several broadcasting stations, and lacked uniformity, and since the payments thereunder were not commensurable with the rapid growth of the industry and its tremendous use of music, the Society notified the broadcasters that all contracts expiring after June 1, 1932, would be renewed upon a basis to be agreed upon. Since the broadcasters failed to agree upon a uniform rate, the Society proposed one. As a matter of fact negotiations looking toward a uniform rate were carried on over a period of several months, the broadcasters being represented by a Committee chosen by the National Association of Broadcasters. A rate was finally agreed upon, to become effective as to contracts expiring on and after September 1, 1932. The letter referred to in Interrogatory No. 62 was only one step in all these comprehensive negotiations, and would have no meaning apart from the other correspondence and conferences. Accordingly we object to its introduction at this time.

Annexed hereto is the Schedule of all fees paid by radio stations in Nebraska to and including the year 1937 as Exhibit "10".

Answering Interrogatory No. 62, which reads as follows:

[fol. 1456] Q. "State the exact wording of the notification to radio broadcasting stations under date of April 11, 1932, by the American Society of Composers, Authors and Pub-

lishers that all licenses to broadcasting stations would be cancelled as of June 1, 1932, and the fees to be required by the Society on and after June 1, 1932."

A. This Interrogatory is objected to on the grounds set forth in answer to Interrogatory No. 61.

Answering Interrogatory No. 63, which reads as follows:

Q. "State the names or titles of all musical compositions and arrangements thereof, including copyrighted arrangements of musical compositions the melodies of which are in the public domain, entered or registered pursuant to the Copyright Laws of the United States with the Register of Copyrights in Washington, D. C., to which the American Society of Composers, Authors and Publishers now has control of the public performance rights in the United States.

"This Interrogatory No. 63 may be complied with by the complainant American Society of Composers, Authors and Publishers, either (a) by filing in response to said interrogatory (1) any printed or typewritten compilation which said Society now has of said names or titles of said musical compositions, toegther with an explanatory statement of the limitations of such compilation and (2) a statement of the approximate percentage which the total number of separate registrations of copyrights in such compilation bears to the total number of registrations of copyrighted musical compositions coming under the performance licenses issued by said Society, or (b) if said Society does not have such compilation, by furnishing (1) a statement of the total number of cards contained in the general card index of copyrighted musical compositions, including copyrighted arrangements the melodies of which are in the public domain, coming under the performance license of said Society which have been compiled by said Society to date, together with an explanatory statement of the limitations of such card index, (2) a statement of the approximate percentage which the total number of separate registrations of copyrights contained in such general card index bears to the total number of registrations of copyrighted musical compositions coming under the performance license issued by said Society, and (3) agreement to produce the aforesaid general card index at the time of the trial herein, without further subpoena or other judicial process."

A. Exhibit "11" is an accurate list of the musical compositions licensed by the American Society of Composers, [fol. 1457] Authors and Publishers, which have a substantial current use. It is difficult to say just what percentage this list bears to the entire number of compositions in the repertoire of the Society because it would not be feasible, and in fact, it would be impossible to make a list of those compositions which have no substantial use. Any attempt to make such a list, would cost far more than any possible income that might be derived from the public performance for profit of such compositions. Nevertheless, those compositions when performed, are subject to the Copyright Laws, and all copies of such compositions, contain copyright notices which inform users of such music, of the fact that such works are copyrighted, and the copyright notice also specifies who is the owner of the copyright. Thus it can be easily ascertained whether the owner of such copyright is or is not a member of the Society.

[fol. 1458] Southern District of New York,
State of New York,
City and County of New York, ss:

Gene Buck, being duly sworn, deposes and says that he is one of the complainants in the within action; that he has read the foregoing answers to the defendants' interrogatories and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Gene Buck.

Sworn to before me this 31st day of March, 1938.
Belle G. Balston, Notary Public. Queens Co. Cert. filed in N. Y. C. Comm. Expires March 30, 1940.

[fol. 1459] Gene Buck Interrogatories

Mr. Joseph Achron
2621 N. Beachwood Drive
Hollywood, Calif.

Mr. Frank R. Adams
2739 Forrester Drive
Los Angeles, Calif.

Mr. B. D. Ackley
124 N. 15th St.
Philadelphia, Pa.

Mr. R. Stanley Adams
760 West End Ave.
New York, N. Y.

Mr. Harold Adamson
10981 Bellagio Road
Bel Air
Los Angeles, Calif.

Mr. Basil G. Adlam
45 Prospect Place
New York, N. Y.

Mr. Milton Ager
Salisbury Hotel
123 W. 57th St.
New York, N. Y.

Mr. Fred E. Ahlert
10 West 96th St.
New York, N. Y.

Mr. Harry Akst
222 S. Bedford Drive
Beverly Hills, Calif.

Mr. Thornton W. Allen
74 Riverside Drive
New York, N. Y.

Mr. Louis Alter
% Robbins Music Corp.
9115 Sunset Blvd.
West Hollywood, Calif.

Mr. Arthur Altman
45 Ocean Ave.
Brooklyn, N. Y.

Mr. Frank H. Anderson, Jr.
Hotel Oaks
587 15th St., Rm. 602
Oakland, Calif.

Mrs. Lily Strickland Anderson
171 Bayview Ave.
Great Neck, L. I.

Mr. Mark Andrews
295 Claremont Ave.
Montclair, N. J.

Mr. Harry Archer
404 E. 55th St.
New York, N. Y.

Mr. Harold Arlen
Essex House
160 Central Park South
New York, N. Y.

Mr. Harry Armstrong
2847 Grand Central Terminal Bldg.
New York, N. Y.

Mr. Gus Arnheim
102 S. Orange Dr.
Los Angeles, Calif.

Mr. Harold Atteridge
48 Canterbury Gate
Lynbrook, L. I.

Mr. Gene Austin
181 S. Poinsetta Place
Hollywood, Calif.

Mr. William Axt
% Metro Goldwyn Mayer
Culver City, Calif.

Mr. Abel Baer
10 W. 96th St.
New York, N. Y.

Mrs. Katherine Bainbridge
1775 N. Orange Drive
Hollywood, Calif.

Mr. Phil Baker
Harmon Parkway
Mamaroneck, N. Y.

Mr. Pat Ballard
145 W. 55th St.
New York, N. Y.

Mr. Erno Balogh
50 W. 67th St.
New York, N. Y.

Mrs. Alice Barnett Stevenson
1816 Sheridan Avenue
San Diego, Calif.

Mr. Maurice Baron
14 Myrtle Drive
Great Neck Estates, L. I.

Mr. Harry Barris
248 N. Windsor
Los Angeles, Calif.

Mr. Ted Barron
Flushing, New York

Mr. Philip Bartholomae
604 North Rodeo Drive
Beverly Hills, Calif.

Mr. Marshall Bartholomew
Stanwich Road
Greenwich, Conn.

Mr. Billy Baskette
% General Delivery
Jacksonville, Fla.

Mr. Phil Baxter
3705 Hall St.
Dallas, Texas

[fol. 1460] Mr. Charles A. Bayha
62-30 Saunders St.
Rego Park, L. I.

Mr. H. H. A. Beach
The A. W. A. House
353 West 57th Street
New York, N. Y.

Mr. George J. Bennett
1027 Leggett Ave.
Bronx, N. Y.

Mr. Robert Russell Bennett
260 So. Rodeo Drive
Beverly Hills, Calif.

Lieut. Chas. Benter
Leader of U. S. Navy Band
Navy Yard
Washington, D. C.

Mr. David Berg
601 W. 168th St.
New York, N. Y.

Mr. Harold Berg
Hotel Webster Hall
5050 Cass Ave.
Detroit, Mich.

Mr. Arthur Bergh
312 So. Linden Drive
Beverly Hills, Calif.

Mr. Irving Berlin
799 Seventh Ave.
New York, N. Y.

Mr. Al Bernard
245 W. 51st St.
New York, N. Y.

Mr. Felix Bernard
9319 Olympic Blvd.
Beverly Hills, Calif.

Mr. Ben Bernie
1619 Broadway
New York, N. Y.

Mr. Buddy Bernier
% Crawford Music Corp.
1619 Broadway
New York, N. Y.

Mr. Irving Bibo
251 Veteran Ave.
Westwood
Los Angeles, Calif.

Mr. Anton Bilotti
344 W. 72nd St., Apt. 9A
New York, N. Y.

Mr. Ben Black
% Fanchon & Marco, Inc.
5600 Sunset Blvd.
Hollywood, Calif.

Mr. Frank J. Black
Apt. 8 West
447 East 57th Street
New York, N. Y.

Mr. Eubie Blake
236 W. 138th St.
New York, N. Y.

Mr. Walter Blaufuss
666 Irving Park Bldg.
Chicago, Ill.

Mr. Ernest Bloch
% Dominick & Dominick
115 Broadway
New York, N. Y.

Mr. Marty Bloom
Hotel Sherman
Randolph, Clark, Lake & La Salle Sts.
Chicago, Ill.

Mr. Rube Bloom
1025 St. John's Place
Brooklyn, N. Y.

Mr. Clay A. Boland
Medical Arts Bldg.
16th & Walnut Sts.
Philadelphia, Pa.

Mrs. Carrie Jacobs Bond
6855 Bonita Terrace
Hollywood, Calif.

Mr. Joseph Piastro Borisoff
4918 Maplewood Ave.
Hollywood, Calif.

Mr. Franz C. Bronschein
708 East 20th Street
Baltimore, Maryland

Mr. George Botsford
610 W. 145th St.
New York, N. Y.

Mr. Phil Boutelje
1016 Westholme Ave.
Westwood
West Los Angeles, Calif.

Mr. Frederick V. Bowers
1627½ N. Kingsley Drive
Hollywood, Calif.

Mr. Robert Hood Bowers
40 W. 55th St., Apt. 9C
New York, N. Y.

Mr. James C. Bradford
120 W. 44th St.
New York, N. Y.

Miss Gena Branscombe
611 West 114 Street
New York, N. Y.

Mr. John W. Bratton
1404 Glenwood Road
Brooklyn, N. Y.

Mr. James A. Brennan
% Morgan Cottage
Treasure Island
Route 2—Box 656
St. Petersburg, Fla.

[fol. 1461] Mr. J. Keirn Brennan
% Morgan Cottage
Treasure Island
Route 2—Box 656
St. Petersburg, Fla.

Mr. Ernest Breuer
80 Highwood Terrace
Weehawken, N. J.

Mrs. R. M. Winfield
% Major R. M. Winfield
21st Inf. Schofield Bks.
Territory of Hawaii

Mr. Addy Britt
345 E. 57th St.
New York, N. Y.

Mr. James Brockman
610 S. Oxford
Los Angeles, Calif.

Mr. Harry Brooks
% Tisdale
133 W. 138th St.
New York, N. Y.

Mr. Shelton Brooks
16016 108th Avenue
Jamaica, L. I.

Mr. A. Seymour Brown
Eleventh and Tasker
1602 S. 11th St.
Philadelphia, Pa.

Miss Barnetta Brown
304 W. 75th St.
New York, N. Y.

Mr. Bertrand-Brown
30 Rockefeller Plaza—Rm. 1836
New York, N. Y.

Mr. Keith Crosby Brown
725 Boylston St.
Boston, Mass.

Mr. Lew Brown
% Wm. Morris Agency
Sunset Blvd.
Hollywood, Calif.

Mr. Nacio Herb Brown
Metro-Goldwyn Studios
Culver City, Calif.

Mr. Mortimer Browning
425 E. 86th St.
New York, N. Y.

Mr. George F. W. Bruhns
20 Myrtle Street
Cranford, New Jersey

Mr. Alfred Bryan
12 Grove Pl.
East Orange, N. J.

Mr. J. Tim Brymn
111 W. 49th St.
New York, N. Y.

Mrs. Annabel Morris Buchanan
16 So. Boulevard
Richmond, Va.

Mr. Simon Bucharoff
1315 N. Fuller St.
Hollywood, Calif.

Mr. Gene Buck
Kensington
Great Neck, Long Island

Mr. Walter Bullock
% 20th Century Fox Film Corp.
Beverly Hills, Calif.

Mr. Boyd Bunch
Roosevelt Hotel
45th & Madison Ave.
New York, N. Y.

Mr. Johnny Burke
623 N. Rexford Drive
Beverly Hills, Calif.

Mr. Joseph A. Burke
444 Fairfax Road
Drexal Park, Pa.

Mr. Harry T. Burleigh
823 East 166th Street
New York, N. Y.

Mr. Ernie Burnett
60 W. 85th St.
New York, N. Y.

Miss Annelu Burns
P. O. Box 413
Pleasantville, N. Y.

Mr. R. H. Burnside
1767 No. Orchid Ave.
Hollywood, Calif.

Mr. Benjamin H. Burt
112 West 71st St.
New York, N. Y.

Mr. Nat Burton
1225 Sherman Ave.
Bronx, N. Y.

Mr. Val Burton
6618 Moore Drive
Los Angeles, Calif.

Mr. A. Buzzi-Peccia
26 W. 68th Street
New York, N. Y.

Mr. James Andrew Byrnes
P. O. Box 348
Bay Shore, L. I.

Mr. Richard Byron
46 W. 95th St., Apt. 38
New York, N. Y.

Mr. Jack J. Caddigan
355 Chapman St.
Canton, Massachusetts

[fol. 1462] Mr. Charles Wakefield Cadman
3629 7th St.
San Diego, Calif.

Mr. Irving Caesar
1619 Broadway
New York, N. Y.

Mr. Sammy Cahn
1393 Sixth Ave.
New York, N. Y.

Mr. J. Will Callahan
Box 322
New Smyrna, Fla.

Mr. J. Will Callahan
Box 322
Bayview, Mich.

Mr. Frank Capano
1011 Chestnut St.
Philadelphia, Pa.

Mr. Monte Carlo
150 W. 55th St.
New York, N. Y.

Mr. Hoagy Carmichael
225 So. Linden Drive
Beverly Hills, Calif.

Mr. John Alden Carpenter
440 N. Wells Street
Chicago, Ill.

Mr. Earl Carroll
7 W. 44th St.
New York, N. Y.

Mr. Harry Carroll
3351 73rd St.
Jackson Heights, L. I.

Mr. Irwin Cassell
410 N. E. 17th St.
Miami, Fla.

Mr. James Cavanaugh
316 E. 184th St.
Bronx, N. Y.

Mr. Saul Chaplin
1685 Ocean Ave.
Brooklyn, N. Y.

Mr. Philip Charig
393 West End Ave.
New York, N. Y.

Mr. Ernest Charles
Belmont Plaza Hotel
49th & Lexington Ave.
New York, N. Y.

Mr. Newell Chase
1354 N. Harper Ave.
Hollywood, Calif.

Mr. Abram Chasins
115 Central Park West
New York, N. Y.

Mr. Thurland Chattaway
35 Baldwin Avenue
Milford, Conn.

Mr. Wilbur Chenoweth
1140 South 20th St.
Lincoln, Nebraska

Mr. Sidney Clare
20th Century-Fox Film
Corp. Studios
Beverly Hills, Calif.

Miss Amy Ashmore Clark
44 W. 44th St.
New York, N. Y.

Mr. Edward B. Claypoole
3515 Wabash Avenue
Ashburton, Baltimore, Md.

Mr. Michael H. Cleary
% Southern Music Co.
1619 Broadway
New York, N. Y.

Mr. Gordon Clifford
422 S. La Peer
Beverly Hills, Calif.

Mr. Larry Clinton
90-31 Whitney Ave.
Elmhurst, N. Y.

Mr. Richard Coburn
1342 N. Catalina St.
Hollywood, Calif.

Mr. George M. Cohan
% E. C. Raftery
152 W. 42nd St.
New York, N. Y.

Mr. Chester Cohn
% Leo Feist, Inc.
1629 Broadway
New York, N. Y.

Mr. Will Collins
Fuller Hotel
Detroit, Mich.

Mr. Edward E. Confrey
3623 Greystone Ave.
Riverdale, N. Y.

Mr. Larry Conley
1545 Broadway
New York, N. Y.

Rev. Pierre Connor
1 Eagle Rock Avenue
West Orange, N. J.

Mr. Con Conrad
P. O. Box 267
Palm Springs, Calif.

Mr. Phil Cook
25 Central Park West
New York, N. Y.

Mr. W. Mercer Cook
1402 Druid Hill Ave.
Baltimore, Md.

[fol. 1463] Mr. Will Marion
Cook
107-18 171st St.
Jamaica, L. I.

Mr. James Francis Cooke
1713 Sansom St.
Philadelphia, Pa.

Mr. Harold Cool
556 West 181st St.
New York, N. Y.

Mr. C. Whitney Coombs
% Mr. John J. Gillies
% The Manager
Corn Exchange Bk. & Tr. Co.
Amsterdam Ave. & 143rd St.
New York, N. Y.

Mr. Bud Cooper
% Milton Weil Music Co., Inc.
54 W. Randolph St.
Chicago, Ill.

Mr. Joe Cooper
175 East 79th St.
New York, N. Y.

Mr. J. Fred Coots
10 Maple Hill Drive
Larchmont, N. Y.

Mr. Sam Coslow
Paramount Studios
Hollywood, Calif.

Mr. Bartley Costello
3300 W. Queen Lane
Falls of Schuylkill, Pa.

Mr. Robey Cowan
% Paramount Pictures, Inc.
5451 Marathon St.
Hollywood, Calif.

Mr. Ralph Cox
10 Sheridan Square
New York, N. Y.

Mr. Bainbridge Crist
Pleasant Street
So. Yarmouth, Mass.

Mr. Bing Crosby
% Paramount Studio
Hollywood, Calif.

Mr. Frank Crumit
154 Colony Road
Longmeadow, Mass.

Mr. Paul Cunningham
1445 River Rd.
Edgewater, N. J.

Mrs. Pearl G. Curran
Pelham Manor Gardens
Pelham Manor, N. Y.

Mr. Billy Curtis
51 Summer Street
New Bedford, Mass.

Mr. Loyal Curtis
1595 Broadway
New York, N. Y.

Mrs. Catherine C. Cushing
Hotel Spencer Arms
140 West 69th St.
New York, N. Y.

Mr. Ford Dabney
318 W. 139th St.
New York, N. Y.

Mr. Walter Damrosch
133 East 80th St.
New York, N. Y.

Mr. Charles N. Daniels
6142 West 6th St.
Los Angeles, Calif.

Miss Mabel Daniels
164 Riverway
Boston, Mass.

Mr. Banjamin David
8555 Sunset Blvd.
Hollywood, Calif.

Mr. Lee David
441 Brooklyn Avenue
Brooklyn, N. Y.

Mr. Mack David
363 Wyona St.
Brooklyn, N. Y.

Mr. Morrey Davidson
838 B. F. Keith Bldg.
Cleveland, Ohio

Mr. Benny Davis
4 Oak Lane
Douglaston, L. I.

Mr. John Carlyle Davis
15 West Hill Lane
Wyoming, Ohio

Mr. Lou Davis
161 West 45th St.
New York, N. Y.

Mr. Eli Dawson
578 West 193rd St.
New York, N. Y.

Mr. Harry De Costa
Hotel Belvedere
319 W. 48th St.
New York, N. Y.

Mr. L. E. De Francesco
618 No. Crescent Drive
Beverly Hills, Calif.

Mr. Edgar De Lange
514 Beach 137th St.
Belle Harbor, L. I.

Miss Vaughn De Leath
Parc Vendome—W. 57th St.
New York, N. Y.

[fol. 1464] Mr. Francesco B. De Leone
64 S. Portage Path
Akron, Ohio

Mr. Harry Delf
601 West End Ave.
New York, N. Y.

Mr. Lucien Denni
1807 N. Kenmore Ave.
Los Angeles, Calif.

Mr. Paul Denniker
The Billboard
1564 Broadway
New York, N. Y.

Miss Jesse L. Deppen
% Mrs. Keith McLeod
444 E. 52nd St.
New York, N. Y.

Mr. Peter De Rose
240 W. 73rd St.
New York, N. Y.

Mr. Bud De Sylva
Universal Pictures Corp.
Universal City, Calif.

Mr. R. Nathaniel Dett
Bennett College
Greensboro, N. C.

Mr. Emery Deutch
109-38 Lefferts Ave.
Richmond Hill, L. I.

Mr. Cal De Voll
514-16 College Ave.
Fort Worth, Texas

Miss Dorothy Dick
Essex House
160 Central Park South
New York, N. Y.

Mr. Howard Dietz
1540 Broadway
New York, N. Y.

Mr. Will Dillon
209 Hudson St.
Ithaca, N. Y.

Mr. Mort Dixon
308 Central Parkway
Mount Vernon, N. Y.

Mr. Walter Donaldson
305 S. Roxbury Drive
Beverly Hills, Calif.

Mr. Will Donaldson
360 E. 55th St.
New York, N. Y.

Mr. Andrew Donnelly
60 Hudson Ave.
Ridgefield Park, N. J.

Mr. Dan Dougherty
55 N. Owen Ave.
Lansdowne, Pa.

Mr. Eddie Dowling
St. James Theatre
New York, N. Y.

Mr. Milton Drake
1808½ N. Harvard Blvd.
Hollywood, Calif.

Mr. Dave Dreyer
780 Gower St.
Hollywood, Calif.

Mr. George Drumm
300 East 163rd Street
New York, N. Y.

Mr. Arcady Dubensky
310 W. 106th St.
New York, N. Y.

Mr. Al Dubin
Warner Bros. Studios
Burbank, Calif.

Mr. Vernon Duke
315 W. 57th St.
New York, N. Y.

Mr. William C. Duncan
North Brookfield
Massachusetts

Mr. Hal Dyson
% J. Dyson
30 Cornish St.
Great Kills, S. I., N. Y.

Mrs. Nelle Richmond Eberhart
3059 Washington Blvd.
Chicago, Ill.

Mr. Harry Edelheit
427 Fort Washington Ave.
New York, N. Y.

Mr. Shepard N. Edmonds
169 Hamilton Ave.
Columbus, Ohio

Miss Clara Edwards
194 Riverside Drive
New York, N. Y.

Mr. Gus Edwards
El Royale Apts.
450 N. Rossmore Ave.
Hollywood, Calif.

Mr. Leo Edwards
1523 No. McCadden Place
Hollywood, Calif.

Mr. John C. Egan
331 East 188th St.
New York, N. Y.

[fol. 1465] Mr. Raymond B. Egan
Pelhamdale Lodge
124 Pelhamdale Ave.
Pelham, N. Y.

Capt. Philip Egner
57 Warrington Pl.
East Orange, N. J.

Mr. Edward Eliscu
514 No. Foothill Road
Beverly Hills, Calif.

Mr. Duke Ellington
799 Seventh Ave.
New York, N. Y.

Mr. Mischa Elman
262 Central Park West
New York, N. Y.

Mr. Bob Emerich
448 W. 57th St.
New York, N. Y.

Mr. Harvey Enders
430 E. 86th St.
New York, N. Y.

Mr. Carl Engel
3 E. 43rd St.
New York, N. Y.

Mr. Granville English
140 W. 72nd St.
New York, N. Y.

Mr. Ernie Erdman
4837 No. Kildare Avenue
Chicago, Ill.

Mr. Sammy Fain
Park Central Hotel
55th St. & 7th Ave.
New York, N. Y.

Miss Geraldine Farrar
West Lane
Ridgefield, Conn.

Mr. G. H. Federlein
43-36 193rd St.
Flushing, L. I., N. Y.

Mr. Arthur Fields
156 W. 44th St.
New York, N. Y.

Mr. Buddy Fields
2496 Tyler
Detroit, Mich.

Miss Dorothy Fields
516 N. Hillcrest Drive
Beverly Hills, Calif.

Mr. Henry Fillmore
528 Elm St.
Cincinnati, Ohio

Miss Lorraine N. Finley
Warwick Hotel
54th St. & 6th Ave.
New York, N. Y.

Mr. Ted Fio-Rito
% Wm. S. Cantalupo
1172 Raymond Blvd.
Newark, N. J.

Mr. Fred Fisher
677 West End Ave.
New York, N. Y.

Mr. Mark Fisher
5555 Sheridan Road
Chicago, Ill.

Mr. William Arms Fisher
359 Boylston Street
Boston, Mass.

Mr. Leon Flatow
140 W. 71st St.
New York, N. Y.

Mr. Neville Fleeson
657 N. Walton Place
Hollywood, Calif.

Mr. Archie Fletcher
280 Riverside Drive
New York, N. Y.

Mr. Allan Flynn
2525 Morris Ave.
Bronx, N. Y.

Miss Dorothy Forster
24 Hans Road
London, S. W. 3
England

Mr. Cecil Forsyth
251 Lexington Ave.
New York, N. Y.

Mr. B. Sherman Fowler
% Bank of New York and Trust Co.
63rd & Madison Ave.
New York, N. Y.

Mr. J. Bertram Fox
853 Seventh Ave.
New York, N. Y.

Mr. Oscar J. Fox
132 Harrison Ave.
San Antonio, Texas

Mr. Dave Franklin
% Harms, Inc.
1250 Sixth Ave.
New York, N. Y.

Miss Blanche Franklyn
620 W. 147th St.
New York, N. Y.

Mr. Arthur Freed
Metro-Goldwyn Studios
Culver City, Calif.

[fol. 1466] Mr. Ralph Freed
8670 Olympic Blvd.
Los Angeles, Calif.

Mrs. Eleanor Everest Freer
33 Bellevue Place
Chicago, Illinois

Mr. Josef Freudenthal
235 W. 71st St.
New York, N. Y.

Mr. Hugo Frey
560 W. 171st St.
New York, N. Y.

Mr. Martin Fried
% Warner Bros.
First National Studios
Music Dept.
Burbank, Calif.

Mr. Anatol Friedland
Ritz Carlton Hotel
Atlantic City, N. J.

Mr. Cliff Friend
439 Hillside
Lockland, Ohio

Mr. Rudolph Friml
% Obrien, Malevinsky & Driscoll
152 W. 42nd St.
New York, N. Y.

Mr. Billy Frisch
147-18 84th Avenue
Jamaica, L. I.

Mr. Samuel R. Gaines
115 Newbury St.
Boston, Mass.

Mr. Samuel Gardner
106 Danbury Ave.
Westport, Conn.

Mr. Lloyd Fry Garrett
Hunting Ridge
Stamford, Connecticut

Mr. Clarence Gaskill
6165 Amboy Road
Pleasant Plains
Staten Island, N. Y.

Mr. Harvey B. Gaul
12 Dunmoyle Place
Pittsburgh, Pa.

Mr. Byron Gay
Fleur De Lis Apts.
1825 N. Whitley Ave.
Los Angeles, Calif.

Mr. Lewis E. Gensler
718 N. Alpine Drive
Beverly Hills, Calif.

Mr. Richard H. Gerard
164-25 Grand Central Parkway
Jamaica, N. Y.

Mr. Alex Gerber
507 Fifth Ave.
New York, N. Y.

Mr. Ira Gershwin
% Chappell & Co.
R. K. O. Bldg.
New York, N. Y.

Mr. Vittorio Giannini
309 W. 85th St.
New York, N. Y.

Mr. Robert W. Gibb
142 Oakdale Ave.
East Dedham, Mass.

Mr. Arthur H. Gibbs
352 W. 118th St.
New York, N. Y.

Mr. H. Eugene Gifford
653 National St.
Memphis, Tenn.

Mr. Haven Gillespie
509 Montgomery St.
Covington, Ky.

Miss Marian Gillespie
The Royalton
44 W. 44th St.
New York, N. Y.

Mr. L. Wolfe Gilbert
6912 Hollywood Blvd.
Hollywood, Calif.

Mr. Sol Ginsberg
Regent Hotel
6162 Hollywood Blvd.
Hollywood, Calif.

Mr. Jesse G. M. Glick
% Sherman Clay & Co.
165 Kearny St.
San Francisco, Calif.

Mr. Jack Glogau
9320 92nd Avenue
Woodhaven, Long Island

Mr. Leopold Godowsky
270 Riverside Dr.
New York, N. Y.

Mr. Al Goering
1236 No. Flores
Apt 401
Hollywood, Calif.

Mr. E. Ray Goetz
% Mr. Gilbert Miller
Henry Miller Theatre
124 W. 43rd St.
New York, N. Y.

Mr. Joe Gold
% T. B. Harms, Inc.
1250 Sixth Ave.
New York, N. Y.

Mr. Ernie Golden
% United States Veterans' Hospital
Bedford, Mass.

[fol. 1467] Mr. John Golden
St. James Theatre
246 W. 44th St.
New York, N. Y.

Mr. Edwin Franko Goldman
194 Riverside Drive
New York, N. Y.

Mr. W. A. Goldsworthy
234 E. 11th St.
New York, N. Y.

Mr. Al Goodhart
43-44 S. 168th St.
Flushing, L. I.

Mr. Alfred Goodman
115 Central Park West
New York, N. Y.

Mr. Frank Goodman
4611 12th Avenue
Brooklyn, N. Y.

Mrs. Lillian Rosedale Goodman
Surf Hotel
Pinegrove & Surf Sts.
Chicago, Ill.

Mr. Joe Goodwin
1583 N. Gower St.
Hollywood, Calif.

Mr. Mack Gordon
20th Century Fox Film Studios
Beverly Hills, Calif.

Mr. Jay Gorney
506 N. Alta Drive
Beverly Hills, Calif.

Mr. Archie Gottler
Hotel Salisbury
123 W. 57th St.
New York, N. Y.

Mr. Morton Gould
115-25 Metropolitan Ave.
Kew Gardens, L. I.

Mr. George Graff
3301 164th St.
Flushing, L. I.

Mr. Percy Aldridge Grainger
7 Cromwell Place
White Plains, N. Y.

Mr. Bert Grant
Hotel Somerset
150 West 47th St.
New York, N. Y.

Mr. Bud Green
319 Lee Ave.
Yonkers, N. Y.

Mr. John W. Green
1438 N. Kings Road
Hollywood, Calif.

Mr. Jesse Greer
29 Wellyn Rd.
Bronxville, N. Y.

Mr. Eliseo Grenet
314 W. 49th St.
New York, N. Y.

Mme. Maria Grever
48 W. 52nd St.
New York, N. Y.

Mr. Clifford Grey
6A Bickenhall Mansions
London, N. W. 1
England

Mr. Frank H. Grey
Harvard Club
27 West 44th St.
New York, N. Y.

Mr. Jimmie Grier
220 S. Cliffwood Ave.
Los Angeles, Calif.

Mr. Gerald Griffin
3544 Broadway
New York, N. Y.

Mr. Elliot Griffis
Smith Ridge Road
New Canaan, Conn.

Mr. Thomas Griselle
1800 N. El Cerrita Place
Hollywood, Calif.

Mr. Ferde Grofe
195 Norma Road
Teaneck, N. J.

Mr. Bernie Grossman
4518 Agnes Ave.
North Hollywood, Calif.

Mr. Ralph L. Grosvenor
75 Central Park West
New York, N. Y.

Mr. Louis Gruenberg
6060 Scenic Ave.
Hollywood, Calif.

Mr. Jacques Grunberg
207 West 110th St.
New York, N. Y.

Mr. Homer Grunn
911 Westchester Place
Los Angeles, Calif.

Mr. David Guion
14 Washington Place East
New York, N. Y.

Mrs. M. H. Gulesian
85 Commonwealth Ave.
Chestnut Hill, Mass.

Mr. Albert Gumble
601 West 160th St.
New York, N. Y.

Mr. Maurice Gunsky
726 Balboa St.
San Francisco, Calif.

[fol. 1468] Mr. Jascha Gurewich
107 West 75th St.
New York, N. Y.

Mr. Meyer Gusman
314 West 77th St.
New York, N. Y.

Mr. Walter Haenschen
444 Madison Ave.
New York, N. Y.

Mr. Richard Hageman
53 W. 57th St.
New York, N. Y.

Mr. Milt Hagen
The Press Club
449 Powell Street
San Francisco, Calif.

Mr. Clyde Hager
1544 N. Curson Ave.
Hollywood, Calif.

Mr. William Haid
3548 95th St.
Jackson Heights, L. I.

Mr. Karl Hajos
7360 Hollywood Blvd.
Hollywood, Calif.

Mr. Wendell Hall
Thompson-Hall Apts.
4351 N. Pauline St.
Chicago, Ill.

Mr. Bernard Hamblen
% The Lambs
130 W. 44th St.
New York, N. Y.

Mr. Oscar Hammerstein, 2nd
% Howard E. Renheimer, Esq.
11 East 44th St.
New York, N. Y.

Mr. Lou Handman
8920 63rd Ave.
West Forest Hills, L. I.

Mr. W. C. Handy
1587 Broadway
New York, N. Y.

Mr. Bernard D. Hanighen
27 W. 44th St.
New York, N. Y.

Mr. James F. Hanley
242-01 Alameda Ave.
Douglaston, L. I.

Mr. Bert Hanlon
Hollywood Knickerbocker Hotel
Hollywood, Calif.

Mr. Otto A. Harbach
244 Orienta Avenue
Mamaroneck, N. Y.

Mr. E. Y. Harburg
933 N. Rexford Drive
Beverly Hills, Calif.

Mr. W. Franke Harling
Madison Square Hotel
26th St. & Madison Ave.
New York, N. Y.

Miss Marjorie Harper
146 Belmont Ave.
Jersey City, N. J.

Mr. Edward Harris
111 East 37th St.
New York, N. Y.

Mr. Harry Harris
51st St. & 7th Ave.
New York, N. Y.

Mr. Victor Harris
140 West 57th St.
New York, N. Y.

Mr. Will J. Harris
426 Briar Place
Chicago, Ill.

Mr. C. F. Harrison
54 W. Randolph St., Rm. 1003
Chicago, Ill.

Mr. Lorenz Hart
211 Central Park, West
Apt. 7 K
New York, N. Y.

Mr. Don Hartman
710 No. Rexford Drive
Beverly Hills, Calif.

Mr. Arthur Hartmann
68 E. 80th St.
New York, N. Y.

Mr. Charles Haubiel
1211 Ditmas Ave.
Brooklyn, N. Y.

Mr. William H. Heagney
8922 213th St.
Bellaire, L. I.

Mrs. Ann Hein
101 S. 13th St.
Terre Haute, Indiana

Mr. Jascha Heifetz
Redding, Conn.

Mr. Charles E. Henderson
% Music Dept.
Universal Pictures
Universal City, Calif.

Mr. Ray Henderson
% A. L. Berman, Atty.
551 Fifth Ave.
New York, N. Y.

Mr. Jean Herbert
3572 Bronx Boulevard
New York, N. Y.

Mr. Louis Herscher
1218 Gower St.
Hollywood, Calif.

[fol. 1469] Mr. Franke E. Hersom
53 Blake St.
Jamaica, N. Y.

Mr. Cliff Hess
196-32 Forty Second Ave.
Flushing, L. I.

Mr. Edward Heyman
333 W. 86th St., Apt. 2006
New York, N. Y.

Mr. Du Bose Heyward
Folly Beach
South Carolina

Mr. Donald Heywood
5329 Wabash Ave.
Chicago, Ill.

Mr. J. Vincent Higginson
44 Second St.
New York, N. Y.

Mr. Wm. J. Hill
% Shapiro, Bernstein & Co.
1270 Sixth Ave.
New York, N. Y.

Mr. Walter Hirsch
309 W. 72nd St.
New York, N. Y.

Mr. Al Hoffman
% Kronnberg
65 Summit Ave.
Jersey City, N. J.

Mr. Sidney Holden
1811 Las Palmas Court, N.
Hollywood, Calif.

Mr. Mann Holiner
25 Fifth Ave.
New York, N. Y.

Mr. Frederick Hollander
7357 Woodrow Wilson Drive
Hollywood, Calif.

Miss Thekla Hollingsworth
% Mrs. Jos. Kurzmann
114 W. 16th St.
New York, N. Y.

Mr. Abraham Holzmann
77 S. Munn Ave.
East Orange, N. J.

Mr. Sidney Homer
Greenfield Hill
Fairfield, Conn.

Mr. Brian Hooker
Old Lyme
Conn.

Mr. Will M. Hough
% F. Mac Donald Lowe
7 S. Dearborn St.
Chicago, Ill.

Mr. John Tasker Howard
47 Lincoln St.
Glen Ridge, N. J.

Mr. Joseph E. Howard
42 Edna St.
Baldwin, L. I.

Mr. Raymond Hubbell
P. O. Box 842
Southern Pines, N. C.

Mr. Will Hudson
% Mills Music, Inc.
1619 Broadway
New York, N. Y.

Mr. Charles Huerter
318 Allen Street
Syracuse, N. Y.

Mr. Billy Hueston
101 W. 52nd St.
New York, N. Y.

Mr. Langston Hughes
2256 E. 86th St.
Cleveland, Ohio

Mr. Rupert Hughes
4751 Los Feliz Boulevard
Los Angeles, Calif.

Mr. Bruno Huhn
205 West 57th St.
New York, N. Y.

Mr. Herman Hupfeld
Garden of Allah
8152 Sunset Blvd.
Hollywood, Calif.

Mr. William C. K. Irwin
3007 89th St.
Jackson Heights, L. I.

Mr. Frederick Jacobi
% Herzog & Glazier
24 Broad Street
New York, N. Y.

Mr. Al Jacobs
101 W. 55th St.
New York, N. Y.

Mr. Moe Jaffe
3236 Norris St.
Philadelphia, Pa.

Mr. Billy James
7801 Loretto Avenue
Philadelphia, Pa.

Mr. Philip James
75 Central Park West
New York, N. Y.

Miss Elsie Janis
Tarrytown
New York

Mr. Werner Janssen
% J. Walter Thompson Co.
6331 Hollywood Blvd.
Hollywood, Calif.

Miss Joan Jasmyn
6358 Yucca
Hollywood Yucca Apts.
Hollywood, Calif.

[fol. 1470] Mr. Will Jason
6533 Olympia Place
Los Angeles, Calif.

Mr. Gordon Jenkins
% Music Dept.
Paramount Studios
Hollywood, Calif.

Mr. Harry Jentes
395 Fort Washington Ave.
New York, N. Y.

Mr. Jerome Jerome
46 W. 95th St. Apt. 3B
New York, N. Y.

Mr. M. K. Jerome
% Warner Bros., Music Dept.
First National Studios
Burbank, Calif.

Mr. George Jessel
% Warner Bros.
Burbank, Calif.

Mr. Arnold Johnson
15 West 55th St.
New York, N. Y.

Mr. Horace Johnson
400 E. 49th St., Apt. 12A
New York, N. Y.

Mr. Howard E. Johnson
245 West 74th St.
New York, N. Y.

Mr. J. C. Johnson
% Broadway Music Corp.
1619 Broadway
New York, N. Y.

Mr. James P. Johnson
171-38 108th Avenue
Jamaica, L. I.

Mr. J. Rosamond Johnson
154 West 131st St.
New York, N. Y.

Mr. James Weldon Johnson
413 West 148th St.
New York, N. Y.

Mr. Arthur Johnston
70 Park Ave.
New York, N. Y.

Mr. Thomas A. Johnstone
33 Midland Ave.
E. Orange, N. J.

Mr. Will B. Johnstone
214 Sherwood Ave.
East Orange, N. J.

Mr. Al Jolson
P. O. Box 71
Van Nuys, Calif.

Mr. Isham Jones
Lincoln Hotel
8th Ave. & 44th St.
New York, N. Y.

Mr. Stephen Jones
507 S. Edgemere Drive
West Allenhurst, N. J.

Mr. Irving Kahal
Essex House
160 Central Park South
New York, N. Y.

Mrs. Grace Le Boy Kahn
917 No. Benedict Canon
Beverly Hills, Calif.

Mr. Gus Kahn
917 No. Benedict Canon
Beverly Hills, Calif.

Mr. Bert Kalmar
% M. E. Levee
1300 N. Crescent Heights
Blvd.
Hollywood, Calif.

Mr. Art Kassel
1615 Hyde Park Blvd.
Chicago, Ill.

Mr. E. Clinton Keithley
7610 Yates Avenue
Chicago, Ill.

Mr. Leo Kempinski
43-01 169th St.
Flushing, N. Y.

Mr. James Kendis
1587 Broadway
New York, N. Y.

Mr. Charles F. Kenny
% Daily Mirror
235 East 45th St., Rm. 604
New York, N. Y.

Mr. Nick Kenny
% The Daily Mirror
235 East 45th St.
New York, N. Y.

Mr. Walter Kent
% H. B. Samuel
1102 So. Heyworth Ave.
Los Angeles, Calif.

Mr. Jerome Kern
917 Whittier Drive
Beverly Hills, Calif.

Mr. William B. Kernell
721 N. Linden Drive
Beverly Hills, Calif.

Mr. Marshall Kernochan
Steinway Hall
113 West 57th St.
New York, N. Y.

Mr. Harry D. Kerr
Suite 503
430 South Broadway
Los Angeles, Calif.

Mr. Edward Kilenyi
6075 Franklin Ave.
Hollywood, Calif.

[fol. 1471] Mr. Jack King
2085 Mound St.
Hollywood, Calif.

Mr. Wayne King
5555 N. Sheridan Road
Chicago, Ill.

Mr. Chas. Kisco
1900 Hillcrest Road
Hollywood, Calif.

Mr. Raymond W. Klages
4915 Broadway, Apt. 4N
New York, N. Y.

Mr. Lou Klein
731 Gerard Ave.
Bronx, N. Y.

Mr. Gustav Klemm
920 St. Paul Street
Baltimore, Md.

Mr. John Klenner
204 West 108th St.
Apt. 53
New York, N. Y.

Mr. F. Henri Klickmann
583 Riverside Drive
New York, N. Y.

Mrs. Helen Knox
Pebble Hill Rd.
Doylestown, Pa.

Mr. Ted Koehler
616 N. Bedford Drive
Beverly Hills, Calif.

Mr. Harry Kogen
1227 Lunt Ave.
Chicago, Ill.

Mr. Max Kortlander
Imperial Industrial Corp.
136th St. & Willow Ave.
New York, N. Y.

Mr. Richard Kountz
200 West 86th St.
New York, N. Y.

Mr. Walter Kramer
17 West 46th St.
New York, N. Y.

Mr. Fritz Kreisler
% Charles Foley
56 Cooper Square
New York, N. Y.

Mr. H. Sylvester Krouse
42 Bishop Ave.
New Dorp, S. I., N. Y.

Miss Clare Kummer
136 East 67th St.
New York, N. Y.

Mr. Emanuel Kurtz
595 Midwood St.
Brooklyn, N. Y.

Mr. Anton Lada
751 N. Dearborn St.
Chicago, Ill.

Mr. Frank La Forge
14 West 68th Street
New York, N. Y.

Miss Emma P. La Freniere
119-03 Springfield Blvd.
St. Albans, L. I.

Mr. Mayhew Lester Lake
1021 Edgewood Lane
Palisade, N. J.

Mr. Burton Lane
9931 Durant Drive
Beverly Hills, Calif.

Mr. Eastwood Lane
26 East 10th St.
New York, N. Y.

Mr. Arthur Lange
1339 N. Doheny Drive
Beverly Hills, Calif.

Mr. Henry W. Lange
W. H. I. O.
39 S. Ludlow
Dayton, Ohio

Mr. Paul Lannin
Hilton Avenue
Garden City, Long Island

Mr. James D. La Rocca
928 Jackson Ave.
New Orleans, La.

Mr. Edward Laska
347 West 87th St.
New York, N. Y.

Miss Vee Lawnhurst
155 Riverside Drive
New York, N. Y.

Mr. Jack Lawrence
1745 No. Gramercy Place
Hollywood, Calif.

Mr. Turner Layton
19 Aberdare Gardens
N. W. 6 Hampstead
London, England

Mr. William Le Baron
% Paramount Publix Corp.
5451 Marathon Street
Hollywood, Calif.

Mr. Marvin Lee
630 Wellington Ave.
Chicago, Ill.

Mrs. Norah Lee
% Bradley
Park Drive, South
Rye, N. Y.

Mr. Eddie Leonard
West 44th St. Hotel
120 W. 44th St.
New York, N. Y.

[fol. 1472] Mr. Sammy Lerner
Fifth Avenue Hotel
Fifth Ave. & Ninth St.
New York, N. Y.

Mr. Edgar Leslie
59 West 46th St.
New York, N. Y.

Mr. Oscar Levant
Beverly Wilshire Hotel
Beverly Hills, Calif.

Mr. Raymond Leveen
Apt. 103
782 West End Ave.
New York, N. Y.

Mr. Boris Levenson
63 West 70th St.
New York, N. Y.

Mr. Harold Levey
200 West 86th St.
New York, N. Y.

Mr. Jerry Levinson
37-21 80th St.
Jackson Heights, L. I.

Mr. Al Lewis
1333 President St.
Brooklyn, N. Y.

Mr. Harold Lewis
601 N. Rossmore St.
Hollywood, Calif.

Mr. Roger Lewis
2558 E. 79th St.
Chicago, Ill.

Mr. Samuel M. Lewis
% Shapiro, Bernstein & Co.
1270 Sixth Ave.
New York, N. Y.

Mr. Max Lief
162 Beach 133rd St.
Belle Harbor, L. I.

Mr. Nathaniel Lief
200 Central Park South
New York, N. Y.

Mr. Thurlow Lieurance
University of Wichita
Wichita, Kansas

Mr. Harry Link
Essex House
160 Central Park South
New York, N. Y.

Mr. George A. Little
21-15 27th St.
Astoria, L. I.

Mr. Jack Little
Hotel Lexington, Suite 2705
Lexington Ave. at 48th St.
New York, N. Y.

Mr. Bill Livingston
147 W. 48th St.
New York, N. Y.

Miss Mabel Livingstone
57 West 58th St.
New York, N. Y.

Mr. Eugene Lockhart
Hotel San Carlos
150 East 50th St.
New York, N. Y.

Mr. John Jacob Loeb
28 East 10th St.
New York, N. Y.

Mr. Frank Loesser
910 Masselin
Hollywood, Calif.

Mrs. Virginia Knight Logan
416 B Avenue East
Oskaloosa, Iowa

Mr. Jules Loman
1218 North Gower
Hollywood, Calif.

Mr. Carmen Lombardo
375 Park Ave.
New York, N. Y.

Mr. Abe Lyman
Warwick Hotel
65 West 54th St.
New York, N. Y.

Mr. Darl MacBoyle
Hotel Markwell
222 West 49th St.
New York, N. Y.

Mr. James G. MacDermid
160 West 73rd St.
New York, N. Y.

Mr. Edward Madden
% Richard Madden
Paramount Bldg.
1501 Broadway
New York, N. Y.

Mr. Charles Maduro
Curacao
The Netherlands
West Indies

Mr. Quinto Maganini
Greenwich, Conn.

Mr. Herb Magidson
839 So. Shenandoah
Los Angeles, Calif.

Mr. Frank Magine
5041 Maypole Avenue
Chicago, Ill.

Mr. Jack Mahoney
% Denton & Haskins Music Pub.
1619 Broadway
New York, N. Y.

[fol. 1473] Mrs. Florence Turner Maley
Studio 801-802
113 West 57th St.
New York, N. Y.

Mr. Matt Malneck
149 S. Canon Dr.
Beverly Hills, Calif.

Mr. Albert Hay Malotte
Walter Disney Studios
2719 Hyperion Ave.
Hollywood, Calif.

Mr. Bernard Maltin
201 West 77th St.
New York, N. Y.

Mme. Mana-Zucca
410 N. E. 17th St.
Miami, Fla.

Mr. Charles F. Manney
118 East 18th St.
New York, N. Y.

Mrs. Kathleen L. Manning
2811 Westshire Drive
Hollywood, Calif.

Mr. George Marion, Jr.
605 N. Alpine Drive
Beverly Hills, Calif.

Mr. Gerald Marks
Alamac Hotel
71st & Broadway
New York, N. Y.

Mr. Henry I. Marshall
680 Center St.
Riveredge, N. J.

Mr. Daniel Gregory Mason
Department of Music
Columbia University
New York, N. Y.

Mr. H. Alexander Matthews
Studio 317-319 Presser Bldg.
1714 Chestnut St.
Philadelphia, Pa.

Mr. Joseph McCarthy
Wild River Farm
Hadley, N. Y.

Mr. George B. McConnell
2517 N. Main St.
Bridgeport, Conn.

Mr. Harl McDonald
University of Pennsylvania
Philadelphia, Pa.

Mr. Jimmie McHugh
1433 N. Beverly Drive
Beverly Hills, Calif.

Mr. Frank W. McKee
% Chateau Des Fleurs
6626 Franklin Ave.
Los Angeles, Calif.

Mr. William J. McKenna
131 Tuers Ave.
Jersey City, N. J.

Mr. John McLaughlin
% Sam Fox Publishing Co.
1250 Sixth Ave.
New York, N. Y.

Mr. Lindsay McPhail
150 Riverside Drive
New York, N. Y.

Mr. R. C. McPherson
188 West 135 Street
New York, N. Y.

Mr. Walter Melrose
536 Lake Shore Drive
Chicago, Ill.

Mr. Murray Mencher
4500 Broadway
New York, N. Y.

Mr. David Mendoza
277 West End Ave.
New York, N. Y.

Mr. John Mercer
8218 De Longpre Ave.
Hollywood, Calif.

Mr. George Merle
6048 Woodbine Street
Brooklyn, N. Y.

Miss Blanche Merrill
35-55 80th St.
Jackson Heights, L. I.

Mr. Jack Meskill
% Babker
2528 Broadway, Apt. 922
New York, N. Y.

Mr. George Meyer
205 West 57th St.
New York, N. Y.

Mr. Joseph Meyer
451 West End Ave.
New York, N. Y.

Mr. Billy Meyers
900 Home Ave.
Oak Park, Ill.

Mr. Walter E. Miles
1230 Taylor Ave.
Grand Rapids, Mich.

Miss Edna St. Vincent Millay
Austerlitz
New York

Mr. Bob Miller
Hotel Manhatten
157 West 47th St.
New York, N. Y.

[fol. 1474] Mr. Ned Miller
1528 Birchwood Ave.
Chicago, Ill.

Mr. F. A. Mills
5961 Melrose Ave.
Hollywood, Calif.

Mr. Irving Mills
799 Seventh Ave.
New York, N. Y.

Mr. Sidney D. Mitchell
1614 N. Cherokee Ave.
Hollywood, Calif.

Mr. Billy Moll
112 N. Page St.
Stoughton, Wisc.

Mr. James V. Monaco
506 N. Elm Drive
Beverly Hills, Calif.

Mr. Nicola A. Montani
1705 Rittenhouse Square
Philadelphia, Pa.

Mr. Harold Mooney
1601 N. Sierra Bonita Ave.
Hollywood, Calif.

Miss Elizabeth Evelyn Moore
3789 Richmond Ave.
Eltingville, S. I., N. Y.

Mr. Francis Moore
572 Manor Lane
Pelham Manor, N. Y.

Mr. Leslie F. Moore
112 W. 75th St.
New York, N. Y.

Mr. McElbert Moore
799 Madison Ave.
New York, N. Y.

Mr. Edward P. Moran
1116 N. Mariposa Ave.
Hollywood, Calif.

Mr. Carey Morgan
161 West 16th St.
New York, N. Y.

Mr. Edward Morris
Morris-Hummel Conservatory of Music
340 State St.
Albany, N. Y.

Mr. Melville Morris
214 W. 92nd St.
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New York, N. Y.

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320 West End Ave., Apt. 12B
New York, N. Y.

Mr. Walter C. Schad
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Box 118
Brentwood, L. I.

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Hillsdale, N. J.

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Essex House
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Los Angeles, Calif.

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Los Angeles, Calif.

Mr. Al Stillman
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Mr. Larry Stock
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Westport, Conn.

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4516 Edmondson
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483 Dalehurst Ave.
West Los Angeles, Calif.

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New York, N. Y.

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237 Linwood Ave.
Buffalo, N. Y.

Mr. Larry Yoell
Corte Madera
Marin County, Calif.

Mr. Pietro A. Yon
Room 852, Carnegie Hall
New York, N. Y.

Mr. Vincent Youmans
Maryland Rd.
Broadmoore
Colorado Springs, Colo.

Mr. Joseph Young
17 Myrtle Drive
Great Neck, L. I.

Mr. Victor Young
526 N. Elm Dr.
Beverly Hills, Calif.

Mr. Victor Young
41 West 54th St.
New York, N. Y.

Mr. J. S. Zamecnik
902 So. Dunsmuir Ave.
Los Angeles, Calif.

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New York, N. Y.

Chappell & Co., Inc.,
1270 Sixth Avenue,
New York, N. Y.

The John Church Co.,
1712 Chestnut Street,
Philadelphia, Pa.

Robert H. Coleman,
Burt Building,
Dallas, Texas

Composers' Music Corp.,
P. O. Box 35, Station H,
Broadway at 104th Street,
New York, N. Y.

Con Conrad Music Publishers, Ltd.,
7250 Santa Monica Boulevard,
Hollywood, California

Crawford Music Corporation,
Brill Building,
1619 Broadway,
New York, N. Y.

L. B. Curtis Music Publishers,
1595 Broadway,
New York, N. Y.

Joe Davis, Inc.,
1619 Broadway,
New York, N. Y.

[fol. 1485] Denton & Haskins Corp.,
1658 Broadway,
New York, N. Y.

Oliver Ditson Co., Inc.,
359 Boylston Street,
Boston, Massachusetts

Donaldson, Douglas & Gumble, Inc.,
1619 Broadway,
New York, N. Y.

Elkan-Vogel Co., Inc.,
1716 Sansom Street,
Philadelphia, Pa.

Evans Music Company,
86 Essex Street,
Boston, Massachusetts

Exclusive Publications Inc.,
1619 Broadway,
New York, N. Y.

Famous Music Corporation,
1619 Broadway,
New York, N. Y.

Leo Feist, Inc.,
1629 Broadway,
New York, N. Y.

Fillmore Music House,
528 Elm Street,
Cincinnati, Ohio

Carl Fischer, Inc.,
56 Cooper Square,
New York, N. Y.

J. Fischer & Bro.,
119 West 40th Street,
New York, N. Y.

Fred Fisher Music Co., Inc.,
1658 Broadway,
New York, N. Y.

H. T. Fitzsimons Company,
23 East Jackson Boulevard,
Chicago, Illinois

Harold Flammer, Inc.,
10 East 43rd Street,
New York, N. Y.

Charles J. Foley,
56 Cooper Square,
New York, N. Y.

[fol. 1486] Forster Music Publisher, Inc.,
218 South Wabash Avenue,
Chicago, Illinois

Sam Fox Publishing Co.,
1250 Sixth Avenue,
New York, N. Y.

Galaxy Music Corp.,
17 West 46th Street,
New York, N. Y.

Gamble Hinged Music Co.,
228 South Wabash Avenue,
Chicago, Illinois

Evan Georgeoff Music Publishing Co.,
229 The Arcade,
Cleveland, Ohio

Gershwin Publishing Corp.,
R. K. O. Building,
Rockefeller Center,
New York, N. Y.

Goodman Music Co., Inc.,
1587 Broadway,
New York, N. Y.

Hamilton S. Gordon, Inc.,
Care of Edward B. Marks Corp.,
1250 Sixth Avenue,
New York, N. Y.

H. W. Gray Company,
159 East 48th Street,
New York, N. Y.

Green & White, Inc.,
Care of Buddy Green,
319 Lee Avenue,
Yonkers, New York

Hall-Mack Company,
124 North 15th Street,
Philadelphia, Pa.

Handy Bros. Music Co., Inc.,
1595 Broadway,
New York, N. Y.

Harms, Inc.,
1250 Sixth Avenue,
New York, N. Y.

T. B. Harms Company,
1250 Sixth Avenue,
New York, N. Y.

[fol. 1487] Charles K. Harris Music Publisher,
Mayfair Theatre Building,
701 Seventh Avenue,
New York, N. Y.

Chas. W. Homeyer & Co., Inc.,
458 Boylston Street,
Boston, Massachusetts

Hope Publishing Company,
5707 West Lake Street,
Chicago, Illinois

R. L. Huntzinger, Inc.,
137 West Fourth Street,
Cincinnati, Ohio

Italian Book Co.,
147 Mulberry Street,
New York, N. Y.

Walter Jacobs, Inc.,
120 Boylston Street,
Boston, Massachusetts

Jenkins Music Company,
1217 Walnut Street,
Kansas City, Missouri

Isham Jones Music Corp.,
1619 Broadway,
New York, N. Y.

Ross Jungnickel, Inc.,
200 West 85th Street,
New York, N. Y.

Kay & Kay Music Publishing Corp.,
1658 Broadway,
New York City.

Kendis Music Corporation,
1587 Broadway,
New York, N. Y.

Edgar Leslie, Inc.,
59 West 46th Street,
New York, N. Y.

Lewis Music Publishing Co., Inc.,
1587 Broadway,
New York, N. Y.

Lincoln Music Corp.,
1619 Broadway,
New York, N. Y.

Lorenz Publishing Co.,
501 East Third Street,
Dayton, Ohio

[fol. 1488] Ludwig Music Publishing Co.,
Century Building,
414 West Superior Avenue,
Cleveland, Ohio

Edward B. Marks Music Corp.,
1250 Sixth Avenue,
New York, N. Y.

Marlo Music Corp.,
1619 Broadway,
New York, N. Y.

McKinley Music Co.,
1501 East 55th Street,
Chicago, Illinois

Melo-Art Music Publishers,
1674 Broadway,
New York, N. Y.

Melrose Brothers Music Co., Inc.,
536 Lake Shore Drive,
Chicago, Illinois

Bob Miller, Inc.,
157 West 47th Street,
New York, N. Y.

Miller Music, Inc.,
1619 Broadway,
New York, N. Y.

Mills Music, Inc.,
1619 Broadway,
New York, N. Y.

Joe Morris Music Co.,
1619 Broadway,
New York, N. Y.

Movietone Music Corp.,
444 West 56th Street,
New York, N. Y.

Nazarene Publishing House,
2923 Troost Avenue,
Kansas City, Missouri

New World Music Corp.,
1250 Sixth Avenue,
New York, N. Y.

Olman Music Corporation,
745 Seventh Avenue,
New York, N. Y.

Paramount Music Corporation,
1501 Broadway,
New York, N. Y.

[fol. 1489] Paull-Pioneer Music Co.,
1657 Broadway,
New York, N. Y.

Photo Play Music Co., Inc.,
1674 Broadway,
New York, N. Y.

Piedmont Music Co., Inc.,
156 West 44th Street,
New York, N. Y.

William A. Pond & Company,
15 Euclid Avenue,
Ridgefield Park, New Jersey

Theodore Presser Company,
1712 Chestnut Street,
Philadelphia, Pa.

W. A. Quincke & Company,
430 South Broadway,
Los Angeles, California

Red Star Songs, Inc.,
1619 Broadway,
New York, N. Y.

Remick Music Corp.,
1250 Sixth Avenue,
New York, N. Y.

G. Ricordi & Co., Inc., of New York,
12 West 45th Street,
New York, N. Y.

Dave Ringle,
1607 Broadway,
New York, N. Y.

Robbins Music Corporation,
799 Seventh Avenue,
New York, N. Y.

The Rodeheaver Co.,
Steele Building,
124 North 15th Street,
Philadelphia, Pa.

Will Rossiter,
173 West Madison Street,
Chicago, Illinois

Roy Music Co., Inc.,
1619 Broadway,
New York, N. Y.

Rubank, Inc.,
Campbell Avenue & Lexington Street,
Chicago, Illinois

[fol. 1490] Santly Bros.-Joy, Inc.,
Brill Building,
1619 Broadway,
New York, N. Y.

Saunders Publications,
5617 Hollywood Boulevard,
Hollywood, California

G. Schirmer, Inc.,
3 East 43rd Street,
New York, N. Y.

Schroeder & Gunther, Inc.,
6 East 45th Street,
New York, N. Y.

Schuster & Miller, Inc.,
1619 Broadway,
New York, N. Y.

Select Music Publications, Inc.,
1619 Broadway,
New York, N. Y.

Shapiro, Bernstein & Co., Inc.,
1270 Sixth Avenue,
New York, N. Y.

Skidmore Music Co., Inc.,
1270 Sixth Avenue,
New York, N. Y.

Southern Music Publishing Co., Inc.,
1619 Broadway,
New York, N. Y.

Stasny Music Corp.,
1619 Broadway,
New York, N. Y.

Clayton F. Summy Co.,
429 South Wabash Avenue,
Chicago, Illinois

Superior Music, Inc.,
1619 Broadway,
New York, N. Y.

P. Tesio & Sons,
353 Eighth Avenue,
New York, N. Y.

Victoria Publishing Co.,
Care of Harms, Inc.,
1250 Sixth Avenue,
New York, N. Y.

Villa Moret, Inc.,
26 O'Farrell Street,
San Francisco, California

[fol. 1491] Jerry Vogel Music Co., Inc.,
114 West 44th Street,
New York, N. Y.

Volkwein Bros., Inc.,
632-4 Liberty Avenue,
Pittsburgh, Pa.

Harry Von Tilzer Music Publishing Co.,
1587 Broadway,
New York, N. Y.

Milton Weil Music Co., Inc.,
54 West Randolph Street,
Chicago, Illinois

White-Smith Music Publishing Co.,
40 Winchester Street,
Boston, Massachusetts

Clarence Williams Music Publishing Co.,
145 West 45th Street,
New York, N. Y.

Willis Music Company,
3 East 43rd Street,
New York, N. Y.

M. Witmark & Sons,
1250 Sixth Avenue,
New York, N. Y.

B. F. Wood Music Co.,
88 St. Stephens Street,
Boston 17, Massachusetts

Words & Music, Inc.,
1619 Broadway,
New York, N. Y.

L. Wolfe Gilbert Music Publishing Company,
6912 Hollywood Boulevard,
Hollywood, California

[fol. 1492]

Sociedad Argentina de Autores Y Compositores de Musica,
137 Calle Suipacha,
Buenos Aires, Argentina.

Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger,
Baumannstrasse 8,
Wien, III, Austria.

Nationale Vereeniging Voor Auteursrecht,
177 Avenue de la Foret,
Bruxelles, Belgium.

Sociedade Brasileira de Autores Teatraes,
Rua Pedro 1, Nr. 7,
Rio de Janeiro, Brasil.

Association Coopérative Bulgare Pour la Protection des Droits d'Auteurs,
Ulitza Alexandere 1, Nr. 14,
Sofia, Bulgaria.

The Canadian Performing Right Society, Ltd.,
1704 Royal Bank Building,
Toronto, Ontario, Canada.

Ochranné Sdruzeni Autorske Csl. Skladatelu Spisovatelu a Nakladatelu Hudebnich,
Ulice Dra Albina Brafa 20,
Praha II, Czecho Slovakia.

Internationalt Forbund Til Beskyttelse af Komponistrettigheder I Danmark,
Kronprinsessegade 26,
Kobenhavn, Denmark.

The Performing Right Society Limited,
Copyright House,
33 Margaret Street,
London, W. 1, England.

Saveltajain Tekijanoikeustoimisto Teosto,
P. Rautatienk 9,
Helsinki, Finland.

Société des Auteurs, Compositeurs et Editeurs de Musique,
10 rue Chaptal,
Paris, France.

[fol. 1493] Staatlich genehmigte Gesellschaft zur Verwertung musikalischer Urheberrechte,
Adolf Hitler Platz 7/9/11,
Berlin-Charlottenburg 9,
Germany.

Magyar Szovegirok, Zeneszerzok es Zenemukiadok Szovetkezete,
Gerloczy-Utca 3, 1, 6,
Budapest IV, Hungary.

Societa Italiana Degli Autori ed Editori,
Via Valadier 37,
Rome, Italy.

Udruzenje Jugoslavenskih Muzickih Autora,
Marulicév trg. 17/1,
Zagreb, Jugoslavia.

Norsk Komponistforenings Internasjonale Musikkbyra,
Klingenberggaten 5,
Oslo, VII, Norway.

Sociedade de Escritores E Compositores Teatrais Portugueses,
Rua de S. Pedro de Alcantara 45-1,
Lisbonne, Portugal.

Societatea Compozitorilor Romani,
Strada Lipscani 110,
Bucarest 1, Rumania.

Sociedad General de Autores de Espana,
Plaza de Canovas 4,
Madrid, Spain.

Foreningen Svenska Tonsattares Internationalla Musikbyra,
Tegnerlunden 3,
Stockholm, Sweden.

Association Suisse Pour la Représentation des Droits d'Exécution,
Bahnhofstrasse 92,
Zurich, 1, Switzerland.

[fol. 1494] DEFENDANTS EX. No. 61

G. L. Harman

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION

Equity #562

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al., Complainants,

against

HARRY R. SWANSON, as Secretary of State of Nebraska, et al., Defendants.

Answering the interrogatories propounded by the defendants, Gustave Schirmer, Secretary of G. Schirmer, Inc., a corporation, makes answer to the following interrogatories, numbered 1 to 25 inclusive, as follows:

Answering Interrogatory No. 1, which reads as follows:

Q. "Have any of the copyrighted musical compositions owned or controlled by G. Schirmer, Inc., been licensed by G. Schirmer, Inc., to any motion picture producer for recording upon the sound track of a sound motion picture film between the years 1927 and 1937 inclusive?"

A. Yes.

Answering Interrogatory No. 2, which reads as follows:

Q. "Have any of the copyrighted musical compositions owned or controlled by G. Schirmer, Inc., been licensed by [fol. 1495] any person, firm or corporation or association acting for and in behalf of G. Schirmer, Inc., as agent, trustee or similar capacity to any motion picture producer for recording upon the sound track of a sound motion picture film between the years 1927 and 1937 inclusive?"

A. Yes.

Answering Interrogatory No. 3, which reads as follows:

Q. "State the name and address of each person, firm, corporation or association acting in behalf of G. Schirmer, Inc., as agent, trustee or similar capacity in the licensing of recording rights to motion picture producers at any

time between the years 1927 and 1937 inclusive and state the date the authority of such representative was created and, if it has been been terminated, the date of the termination thereof."

A. E. C. Mills, 30 Rockefeller Plaza, New York City, October 2, 1926 to October 21, 1929;

John G. Paine, 30 Rockefeller Plaza, New York City, October 21, 1929 to May 1, 1937;

Harry Fox, 45 Rockefeller Plaza, New York City, May 1, 1937 to date.

Answering Interrogatory No. 4, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, the contract, power of attorney or other writing pursuant to which each person, firm, corporation or association named in your answer to Interrogatory No. 3 was authorized to execute license agreements as agent, trustee or similar capacity for and in behalf of G. Schirmer, Inc.?"

A. Yes; subject to the Court's ruling upon materiality and relevancy.

[fol. 1496] Answering Interrogatory No. 5, which reads as follows:

Q. "Have licenses to record copyrighted musical compositions upon the sound track of sound motion picture films been entered into by G. Schirmer, Inc., using a form of contract containing any general or standard provisions with respect to the rights acquired by or limitations imposed upon the motion picture producer under the license?"

A. The contracts have varied from time to time with respect to different producers but some may contain clauses substantially similar to those in other contracts. A number of the contracts will be produced on the trial subject to the Court's ruling as to materiality and relevancy.

Answering Interrogatory No. 6, which reads as follows:

Q. "State the exact wording of each of the general or standard provisions which have been included in recording contracts entered into by G. Schirmer, Inc., with motion picture producers."

A. We annex herewith two such contracts as Exhibits 1 and 2.

Answering Interrogatory No. 7, which reads as follows:

Q. "Have licenses to record copyrighted musical compositions upon the sound track of sound motion picture films been entered into by any person, firm, corporation or association acting for and in behalf of G. Schirmer, Inc., as agent, trustee or similar capacity, using a form of contract containing any general or standard provisions with respect to the rights acquired by or limitations imposed upon the motion picture producer under the license?"

A. Yes.

[fol. 1497] Answering Interrogatory No. 8, which reads as follows:

Q. "State the exact wording of each of the general or standard provisions which have been included in recording contracts entered into with motion picture producers for and in behalf of G. Schirmer, Inc., by each of the agents and trustees designated in your answer to Interrogatory No. 3."

A. Annexed hereto as Exhibits 3, 4, 5 and 6 are forms of contracts generally in use by the agent and trustee with motion picture producers with respect to recording of musical compositions in motion pictures.

Answering Interrogatory No. 9, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, (a) a complete contract or license agreement entered into by G. Schirmer, Inc., which is representative of the general or standard form of license contracts between G. Schirmer, Inc., and motion picture producers, and (b) a complete contract or license agreement entered into for and in behalf of G. Schirmer, Inc., by each of the agents and/or trustees named in the answer to Interrogatory No. 3, which is representative of the general or standard form of license contracts between such agent or trustee and motion picture producers?"

A. Yes; in so far as such contracts may be said to be representative and in so far as they are in this defendant's

possession, subject to the ruling of the Court with respect to their relevancy and materiality. With regard to so much of this interrogatory as is designated as (b), we have already annexed in answer to Interrogatory No. 8, forms of contracts.

[fol. 1498] Answering Interrogatory No. 10, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, G. Schirmer, Inc.'s, complete copy of the license contract entered into by E. C. Mills as agent and trustee for music publishers including G. Schirmer, Inc., with Radio Corporation of American Phot-phone Company dated on or about September 5, 1928, together with the exhibits attached thereto and the supplements thereof, all of which were printed and bound in pamphlet form for the parties involved therein."

A. Yes, subject to the ruling of the Court with respect to materiality and relevancy.

Answering Interrogatory No. 11, which reads as follows:

Q. "Have any of the copyrighted musical compositions owned or controlled by G. Schirmer, Inc., been licensed by G. Schirmer, Inc., to any manufacturer for recording upon the sound track of electrical transcriptions between the years 1930 to 1937 inclusive?"

A. Yes, but the term "sound track" ordinarily applies to recording of sound on film, whereas electrical transcriptions are not made on films.

Answering Interrogatory No. 12, which reads as follows:

Q. "Have any of the copyrighted musical compositions owned or controlled by G. Schirmer, Inc., been licensed by any person, firm, corporation or association acting for and in behalf of G. Schirmer, Inc., as agent, trustee or similar capacity, to any manufacturer for recording upon the sound track of electrical transcriptions between the years 1930 to 1937 inclusive?"

A. Yes.

[fol. 1499] Answering Interrogatory No. 13, which reads as follows:

Q. "State the name and address of each person, firm, corporation or association acting for and in behalf of G. Schirmer, Inc., as agent, trustee or similar capacity, in the licensing of recording rights to manufacturers of electrical transcriptions at any time between the years 1930 to 1937 inclusive, and state the date the authority of such representative was created and, if it has been terminated the date of the termination thereof."

A. John G. Paine, 30 Rockefeller Plaza, New York City, October 21, 1929 to May 1, 1937;

Harry Fox, 45 Rockefeller Plaza, New York City, May 1, 1937 to date.

Answering Interrogatory No. 14, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, the contract, power of attorney or other writing pursuant to which each person, firm, corporation or association named in your answer to Interrogatory No. 13 was authorized to execute license agreements as agent, trustee or similar capacity for and in behalf of G. Schirmer, Inc.?"

A. Yes; subject to the Court's ruling with respect to materiality and relevancy.

Answering Interrogatory No. 15, which reads as follows:

Q. "Have licenses to record copyrighted musical compositions upon the sound track of electrical transcriptions been entered into by G. Schirmer, Inc., using a form of contract containing any general or standard provisions with respect to the rights acquired by or limitations imposed upon the manufacturer of such electrical transcriptions?"

[fol. 1500] A. No.

Answering Interrogatory No. 16, which reads as follows:

Q. "State the exact wording of each of the general or standard provisions which have been included in recording contracts entered into by G. Schirmer, Inc., with manufacturers of electrical transcriptions."

A. This has been answered by answer to Interrogatory No. 15.

Answering Interrogatory No. 17, which reads as follows:

Q. "Have licenses to record copyrighted musical compositions upon the sound track of electrical transcriptions been entered into by any person, firm, corporation or association acting for and in behalf of G. Schirmer, Inc., as agent, trustee or similar capacity, using a form of contract containing any general or standard provisions with respect to the rights acquired by or limitations imposed upon the manufacturer of such electrical transcriptions?"

A. Yes.

Answering Interrogatory No. 18, which reads as follows:

Q. "State the exact wording of each of the general or standard provisions which have been included in recording contracts entered into with manufacturers of electrical transcriptions for and in behalf of G. Schirmer, Inc., by each of the agents or trustees designated in your answer to Interrogatory No. 13."

A. Annexed hereto as Exhibits 7, 8, 9 and 10 are forms of printed contracts which contain general or standard provisions.

[fol. 1501] Answering Interrogatory No. 19, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, (a) a complete contract or license agreement entered into by G. Schirmer, Inc., which is representative of the general or standard form of license contracts between G. Schirmer, Inc., and manufacturers of electrical transcriptions, and (b) a complete contract or license agreement entered into for and in behalf of G. Schirmer, Inc., by each of the agents and/or trustees named in the answer to Interrogatory No. 13 which is representative of the general or standard form of license contract between such agent or trustee and manufacturers of electrical transcriptions?"

A. There is no contract or license agreement between G. Schirmer, Inc., and manufacturers of electrical transcriptions. Such contracts are made in the form of license agreements between the agent and the trustee and manufacturers of electrical transcriptions in the form annexed

to Interrogatory No. 18; and with respect to that much of the interrogatory covered by subdivision (b), we will produce such complete contract upon the trial subject to the ruling of the Court with respect to relevancy and materiality.

Answering Interrogatory No. 20, which reads as follows:

Q. "Has G. Schirmer, Inc., entered into any general contract or agreement in writing with any motion picture producers or any manufacturers of electrical transcriptions the terms and provisions of which are made applicable to recording licenses subsequently entered into between the parties with respect to specific copyrighted musical compositions?"

A. No.

[fol. 1502] Answering Interrogatory No. 21, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, all general contracts or agreements entered into by G. Schirmer, Inc., with motion picture producers and manufacturers of electrical transcriptions the terms and provisions of which are made applicable to recording licenses subsequently entered into between the parties with respect to specific copyrighted musical compositions?"

A. This is answered by the answer made to Interrogatory No. 20.

Answering Interrogatory No. 22, which reads as follows:

Q. "Has any person, firm, corporation or association acting for and in behalf of G. Schirmer, Inc., as agent or trustee, or acting as a common agent or trustee for G. Schirmer, Inc., and other owners of copyrighted musical compositions, entered into any general contract or agreement in writing with any motion picture producers or any manufacturers of electrical transcriptions the terms and provisions of which are made applicable to recording licenses subsequently entered into between the parties with respect to specific copyrighted musical compositions?"

A. Yes.

Answering Interrogatory No. 23, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, all general contracts or agreements with motion picture producers and manufacturers of electrical transcriptions entered into by any agent or trustee acting in behalf of G. Schirmer, Inc., individually, or by any common agent or trustee acting in behalf of G. Schirmer, Inc., and other owners of copyrighted musical compositions, the terms and provisions of which general contracts or agreements are made applicable to recording licenses sub- [fol. 1503] sequently entered into between the parties with respect to specific copyrighted musical compositions?"

A. Yes; subject to the ruling of the Court with respect to the relevancy and materiality.

Answering Interrogatory No. 24, which reads as follows:

Q. "State the schedule or rate of license fees for each year from 1930 to 1937 inclusive required by G. Schirmer, Inc., or by any agent or trustee acting for and in behalf of G. Schirmer, Inc., to be paid by manufacturers of electrical transcriptions."

A. There are two types of licenses issued to manufacturers of electrical transcriptions: (a) For the manufacture of individual records of production numbers, fifty cents for each record manufactured, and for popular numbers, twenty-five cents for each record manufactured; (b) In the alternative, a manufacturer of transcriptions may secure a license to make any number of records of a particular composition on the payment of fifteen dollars for each master record manufactured (all other records being pressed from such master record).

Answering Interrogatory No. 25, which reads as follows:

Q. "State the name or title of each copyrighted musical composition and arrangement thereof owned by G. Schirmer, Inc., on the date of answering this interrogatory."

A. We annex hereto as Exhibits 11, 12 and 13 a partial list of names or titles of copyrighted musical compositions [fol. 1504] and arrangements thereof owned by G. Schirmer, Inc., on this date. It is impossible for us to furnish a complete list without the expenditure of very substantial sums

of money, a great amount of research work, engaging lawyers and contacting various parties who may have rights or interests in various compositions.

——.

[fol. 1505] SOUTHERN DISTRICT OF NEW YORK,
State of New York,
City and County of New York, ss:

Gustave Schirmer, being duly sworn, deposes and says that he is the Secretary of G. Schirmer, Inc., one of the complainants herein; that he has read the foregoing answers to the defendants' interrogatories and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by G. Schirmer, Inc., is because the said G. Schirmer, Inc., is a corporation, and deponent an officer thereof, to wit its secretary.

Gustave Schirmer.

Sworn to before me this 1st day of April, 1938. Minerva D. Grey, Notary Public, New York Co. # 216. Com. expires March 30, 1940.

[fol. 1506] EXHIBIT 1

New York City, N. Y.,
March 19, 1936.

Bennie F. Zeidman Productions, Ltd., Talisman Studios, 4516 Sunset Boulevard, Hollywood, California.

GENTLEMEN:

In consideration of the sum of One Dollar ($1.00) and other good and valuable considerations, receipt of which is acknowledged, the undersigned does hereby give to Bennie F. Zeidman Productions, LTD., the non-exclusive, irrevocable right, license, privilege and authority to record, reproduce and perform publicly for profit in any manner, medium or form, in any country covered by this license, the musical composition hereinbelow set out, and to make copies of such recording and to import said copies of recording into

any country covered by this license, all in accordance with the terms, conditions and limitations hereinafter set out.

1. The composition covered by this license is:

"Agitato" By Hugo Riesenfeld.

2. The title of the motion picture with which the said musical composition is to be used is "Angels in White".

3. The type of use to be made of the musical composition is Background Instrumental, and the amount of uses to be made is two (2).

4. The license hereinabove set out is limited to the use of the musical composition in synchronism or timed-relation with the motion picture hereinabove specified.

5. The right to record the musical composition as covered by this agreement is conditioned upon the performance of the musical work in theatres having valid licenses from the American Society of Composers, Authors and Publishers, or any other performing rights society having jurisdiction in the territory in which the said musical composition is performed.

6. The territory covered by this license is the entire world.

7. The undersigned warrants that it is the copyright owner of the musical composition mentioned above and that it further has the right to grant the license contained herein.

8. It is specifically understood that this license is only for the rights mentioned above; all other rights and uses in and to the said musical compositions not herein specifically granted remain the property of the undersigned.

G. Schirmer, Inc., by Gustave Schirmer, Secretary.

[fol. 1507] EXHIBIT 2

March 10th, 1937.

Paramount Pictures, Inc., 5451 Marathon Street, Hollywood, California.

GENTLEMEN:

In consideration of the sum of Five Hundred Dollars ($500.00), receipt whereof is hereby acknowledged, the

undersigned, G. Schirmer, Inc., (hereinafter referred to as the "Publisher"), hereby gives and grants to you, your successors and assigns, the non-exclusive, irrevocable rights, licenses, privileges and authorities to use the title "Trees" and any variation thereof and any similar title, as the title of, and in *and in* connection with, a motion picture to be produced by or for you, and to record and photograph and to have recorded and photographed, mechanically and electrically, in any manner, medium, form or language throughout the world, any and all uses (dramatic and otherwise and unlimited as to kind and number) of the musical composition (including its title, words and music) entitled "Trees" by Oscar Rasbach and Joyce Kilmer, and any and all arrangements, adaptations and versions thereof, in any and all languages, in, for and in connection with said motion picture (whether or not it shall bear said title) and any trailers thereof, and to make copies of such recordings and photographs and to import such recordings, photographs and copies of such recordings and photographs into any part of the world, and to reproduce and perform publicly for profit or otherwise (and to license the reproduction and public performance for profit or otherwise of) said musical composition (including its title, words and music) in any arrangements, recordings and versions thereof, in any and all languages, throughout the world, in synchronism with said motion picture and any trailers thereof.

The right to use said musical composition, as herein granted to you, your successors and assigns, shall be deemed to include, but shall not be limited to, the right to use said musical composition (including its title, music and words) dramatically in and in connection with said motion picture as well as in synchronism or timed relation therewith, and to arrange, adapt and transpose said musical composition, in whole or in part, in such manner as you may deem necessary or desirable for the dramatic rendition thereof, and the right to perform said musical composition with such scenery, costumes, dialogue, spoken words and situations as you may desire for the purpose of dramatically presenting and performing said musical composition, in whole or in part and any number of times.

[fol. 1508] The right to perform said musical composition, as aforesaid, is conditioned upon the performance thereof in theatres having valid licenses from the American Society of Composers, Authors and Publishers or any other similar

performing rights society having jurisdiction in the territory in which said musical composition is performed.

The Publisher warrants only that it is the owner of the recording and dramatic rights herein granted and conveyed and that it has full right and authority to grant the right to use said title of said musical composition in, for and in connection with said motion picture as aforesaid, and this license is given without other warranty or recourse except for the Publisher's agreement to repay the consideration paid for this license if said warranty shall be breached; and the Publisher further reserves to itself all rights and uses in and to said musical composition not herein specifically granted.

This license is limited to one one-reel short subject.

G. Schirmer, Inc., by Gustave Schirmer, Secretary.

W.

[fol. 1509] EXHIBIT 3

In consideration of the sum of — Dollars ($—), receipt of which is hereby acknowledged, —— —— (hereinafter referred to as the Publisher), hereby gives to —— ——,444 West 56th Street, New York City, its successors and assigns, the non-exclusive, irrevocable right and license, privilege and authority to record, in any manner, medium, form or language, in any country within the territory covered by this license, the words and music of the musical composition hereinbelow set out, and to make copies of such recordings and to import said recordings and/or copies of said recordings into any country within the territory covered by this license, and to perform said musical composition everywhere, all in accordance with the terms, conditions and limitations hereinafter set out.

1. The composition covered by this license is ——, by —— ——.

2. The title of the motion picture with which said musical composition is to be used is ——.

3. The type of use to be made of the musical composition is ——, and the amount of uses to be made is ——.

4. The license hereinabove set out is limited to the use of said musical composition in synchronism or timed-rela-

tion with the motion picture hereinabove specified, and trailers thereof.

5. The right to record said musical composition as covered by this agreement is conditioned upon the performance of said musical composition in theatres having valid licenses from the American Society of Composers, Authors and Publishers, or any other performing rights society having jurisdiction in the territory in which said musical composition is performed.

6. The territory covered by this license is the entire world.

7. The undersigned warrants only that it is the owner of the recording rights herein conveyed, and this license is given without other warranty or recourse, except for the Publisher's agreement to repay the consideration paid for this license if said warranty shall be breached; and the Licensor further reserves to itself all rights and uses in and to the said musical composition not herein specifically granted.

——— ———, ——— ———, Agent and Trustee.

[fol. 1510] EXHIBIT 4

In consideration of the sum of — Dollars ($—), receipt whereof is hereby acknowledged, ——— ——— (hereinafter referred to as the Publisher), hereby gives to Paramount Pictures Inc., 1501 Broadway, New York City, its successors and assigns, the non-exclusive, irrevocable right and license, privilege, and authority to record, in any manner, medium, form, or language in any country within the territory covered by this license, the words and music of the musical composition hereinbelow set out, and to make copies of such recordings, and to import said recordings and/or copies of said recordings into any country within the territory covered by this license, and to perform said musical composition everywhere, all in accordance with the terms, conditions and limitations hereinafter set out.

1. The composition covered by this license is ———, by ——— ———.

2. The title of the motion picture with which said musical composition is to be used is ——.

3. The type of use to be made of the musical composition is ——, and the amount of uses to be made is ——.

4. The license herinabove set out is limited to the use of said musical composition in synchronism or timed-relation with the motion picture hereinabove specified, and trailers thereof.

5. The right to perform said musical composition as covered by this agreement is conditioned upon the performance of said musical composition in theatres having valid licenses from the American Society of Composers, Authors and Publishers, or any other performing rights society having jurisdiction in the territory in which said musical composition is performed.

6. The territory covered by this license is the entire world.

7. The undersigned warrants only that it is the owner of the recording rights herein conveyed, and this license is given without other warranty or recourse, except for the publisher's agreement to repay the consideration paid for this license if said warranty shall be breached; and the Licensor further reserves to itself all rights and uses in and to said musical composition not herein specifically granted.

—— ——, —— ——, Agent and Trustee.

[fol. 1511] EXHIBIT 5

In consideration of the sum of — Dollars ($—), the undersigned does hereby give to —— ——, the non-exclusive, irrevocable right, license, privilege and authority to record in any manner, medium or form, in any country covered by this license, the musical compositions hereinbelow set out, and to make copies of such recordings and to import said copies of recordings into any country covered by this license, all in accordance with the terms, conditions and limitations hereinafter set out.

1. The compositions covered by this license are: — — —.

2. The title of the motion picture with which the said musical compositions are to be used is —— ——.

3. The type of use to be made of the musical composition is ——, and the amount of uses to be made is ——.

4. The license hereinabove set out is limited to the use of the musical compositions in synchronism or timed-relation with the motion picture hereinabove specified.

5. The right to record the musical compositions as covered by this agreement is conditioned upon the performance of the musical work in theatres having valid licenses from the American Society of Composers, Authors and Publishers, or any other performing rights society having jurisdiction in the territory in which the said musical compositions are performed.

6. The territory covered by this license is the entire world.

7. Except that the undersigned warrants that the principal for whom he is acting is the owner of the said musical composition, this license is given without warranty or recourse, and the licensor reserves to itself all rights and uses in and to the said musical compositions not herein specifically granted.

—— ——, Agent and Trustee.

[fol. 1512] EXHIBIT 6

In consideration of the sum of — Dollars ($—), receipt whereof is hereby acknowledged, —— —— (hereinafter referred to as the Publisher), hereby gives to Metro Goldwyn Mayer Corporation, 1540 Broadway, New York City, its successors and assigns, the non-exclusive, irrevocable right and license, privilege and authority to record, in any manner, medium, form or language, in any country within the territory covered by this license, the words and music of the musical composition hereinbelow set out, and to make copies of such recordings, and to import said recordings and/or copies of said recordings into any country within the territory covered by this license, and to perform said musical composition everywhere, all in accordance with the terms, conditions and limitations hereinafter set out.

1. The composition covered by this license is ——, by —— ——.

2. The title of the motion picture with which said musical composition is to be used is ——.

3. The type of use to be made of the musical composition is ——, and the amount of uses to be made is ——.

4. The license hereinabove set out is limited to the use of said musical composition in synchronism or timed-relation with the motion picture hereinabove specified, and trailers thereof.

5. The right to perform said musical composition as covered by this agreement is conditioned upon the performance of said musical composition in theatres having valid licenses from the American Society of Composers, Authors and Publishers, or any other performing rights society having jurisdiction in the territory in which said musical composition is performed.

6. The territory covered by this license is the entire world.

7. The undersigned warrants only that it is the owner of the recording rights herein conveyed, and this license is given without other warranty or recourse, except for the Publisher's agreement to repay the consideration paid for this license if said warranty shall be breached; and the Licensor further reserves to itself all rights and uses in and to the said musical composition not herein specifically granted.

—— ——, —— ——, Agent and Trustee.

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EXHIBIT NO. 7

(Sustaining Program License)

1. Pursuant to your license application dated the.....day of..... 193..., I hereby grant you the right, license, privilege and authority:

(a) To record the musical compositions hereinafter set out as part of the electrical transcription you desire to make of the program identified on your application under the title

(b) To make such arrangement, adaptation, and transposition of the said musical compositions as may be expedient or desirable to adapt the musical compositions to the purpose of the said electrical transcription, provided, however, that no arrangement, adaptation, or transposition made by you shall modify the character of any composition or be detrimental to the honor or reputation of the composer or publisher thereof;

(c) To record said musical composition either in whole or in part and either with or without the words thereof and in connection with such other musical compositions as you may desire, or in connection with any words, phrases, dialogue or other literary or dramatic material which you may elect except that no right is hereby granted to change the lyrics of songs or to record lyrics in connection with musical compositions that are not songs;

(d) To make copies of such electrical transcription recordings;

(e) To perform by broadcast and to permit to be broadcasted the said records herein known as electrical transcription recordings, subject, however, to the express understanding and agreement that the said right to broadcast the compositions embodied in said recordings shall extend only to radio broadcast stations, which, at the time of such broadcast, hold *valid* licenses from the American Society of Composers, Authors and Publishers, or the Canadian Performing Rights Society, Ltd., permitting the public performance for profit of the said musical compositions, *and subject to the terms of such licenses* and with respect to any such broadcast performance, to permit the same to be received and reproduced publicly by means of radio receiving apparatus, provided the place where such reception and public reproduction occurs is likewise licensed by the American Society of Composers, Authors and Publishers, or the Canadian Performing Rights Society, Ltd., to give public performances for profit of the said compositions, *and subject to the terms of such licenses.*

2. The license herein granted is intended to apply to the United States and Canada only and in order to make it effective as to this territory, the Licensor grants to you the right, license, privilege, and authority to import electrical transcriptions of the said recordings made in the United States into Canada, and the right, if at any time hereafter there may be such a right conferred by law, to import electrical transcriptions of said recordings made in Canada into the United States. The license hereby granted shall apply solely to the program set out in the application hereinabove referred to and for the radio stations listed in said application or as otherwise particularly noted, unless otherwise particularly provided for hereafter.

3. The license herein granted shall apply only to such electrical transcriptions as are made solely for sustaining program purposes. By sustaining programs is meant any program which is used by any radio station referred to in this agreement to fill in time which has not been *or is not to be paid* for by a sponsor, either local or national. The use of the program covered by this license for anything other than sustaining *program* purposes is a violation of the license.

4. The musical compositions covered by this license are the following:

5. In consideration of the license hereinabove granted, you agree to pay to me as follows: (a) For each master record manufactured by you embodying the above program, you will pay five ($5.00) Dollars for each of the popular musical compositions embodied therein, and ten ($10.00) Dollars for each production or restricted number embodied therein; such production number and restricted number to be especially designated on the license by an asterisk being placed before the name of the composition. The said fee to be paid within ten (10) days after the date of the license.

6. Each pressing from the master record manufactured pursuant hereto shall bear the name and address of the manufacturer and such identifying symbol as may be prescribed by the Agent and Trustee. As part of the license herein contained and as a consideration therefor, the licensee agrees to place the following notice on labels used in connection with all records or other devices manufactured pursuant hereto. "THIS RECORD IS MANUFACTURED UNDER WRITTEN LICENSE FROM JOHN G. PAINE, AGENT AND TRUSTEE, AND ALL RIGHTS OF ANY NATURE WHATSOEVER RELATIVE THERETO EXPIRE THE.....DAY OF .....193....

7. This license expires six (6) months after the day and date first above written, and all rights of manufacture and of use of the master record or any derivatives thereof cease on that date.

8. The license herein is non-assignable and non-transferable, and is immediately voided by non-payment of the consideration, by the appointment of a receiver for the licensee, or by the bankruptcy of the licensee.

9. I further agree to fully indemnify and hold you harmless at all times against any and all demands, actions for infringement of copyright, judgments and/or recoveries by reason of any act done or use made hereunder by you or by any one acting for you under this agreement.

10. The License hereinabove granted is non-exclusive.

11. The application hereinabove referred to is hereby made a part of this license and the license thus becomes an agreement between the parties.

IN WITNESS WHEREOF, I hereby set my hand and seal this.....day of.....

193...

1513

John G. Paine

.....(L.S.)
Agent and Trustee

EXHIBIT NO. 8

1. Pursuant to your license application dated the.....day of..... 193..., I hereby grant you the right, license, privilege and authority:

(a) To record the musical compositions hereinafter set out as part of the electrical transcription you desire to make of the program identified on your application under the title

(b) To make such arrangement, adaptation, and transposition of the said musical compositions as may be expedient or desirable to adapt the musical compositions to the purpose of the said electrical transcription, provided, however, that no arrangement, adaptation, or transposition made by you shall modify the character of any composition or be detrimental to the honor or reputation of the composer or publisher thereof;

(c) To record said musical composition either in whole or in part and either with or without the words thereof and in connection with such other musical compositions as you may desire, or in connection with any words, phrases, dialogue or other literary or dramatic material which you may elect except that no right is hereby granted to change the lyrics of songs or to record lyrics in connection with musical compositions that are not songs;

(d) To make copies of such electrical transcription recordings;

(e) To perform by broadcast and to permit to be broadcasted the said records herein known as electrical transcription recordings, subject, however, to the express understanding and agreement that the said right to broadcast the compositions embodied in said recordings shall extend only to radio broadcast stations, which, at the time of such broadcast, hold *valid* licenses from the American Society of Composers, Authors and Publishers, or the Canadian Performing Rights Society, Ltd., permitting the public performance for profit of the said musical compositions, *and subject to the terms of such licenses* and with respect to any such broadcast performance, to permit the same to be received and reproduced publicly by means of radio receiving apparatus, provided the place where such reception and public reproduction occurs is likewise licensed by the American Society of Composers, Authors and Publishers, or the Canadian Performing Rights Society, Ltd., to give public performances for profit of the said compositions, *and subject to the terms of such licenses.*

2. The license herein granted is intended to apply to the United States and Canada only and in order to make it effective as to this territory, the Licensor grants to you the right, license, privilege, and authority to import electrical transcriptions of the said recordings made in the United States into Canada, and the right, if at any time hereafter there may be such a right conferred by law, to import electrical transcriptions of said recordings made in Canada into the United States. The license hereby granted shall apply solely to the program set out in the application hereinabove referred to and for the radio stations listed in said application unless otherwise particularly provided for hereafter and upon the completion of the program as specified in the said application, or as otherwise particularly noted hereafter, all electrical transcriptions manufactured pursuant to this license shall be destroyed, and whenever requested you agree to furnish adequate proof of such destruction.

3. The musical compositions covered by this license are the following:

4. In consideration of the license hereinabove granted, you agree to pay to me as follows:

(a) For each electrical transcription manufactured embodying any of the aforesaid musical compositions, fifty cents (50c) for each such composition marked with an asterisk, and twenty five cents (25c) for each such composition not so marked; it being understood and agreed that a separate electrical transcription will be manufactured for each production or reproduction of the musical composition made, or failing to manufacture a separate electrical transcription for each such production or reproduction, then each such production or reproduction will, for the purpose of this agreement, be deemed to be a separate manufacture.

It is understood that only such electrical transcriptions which, in addition to being manufactured, shall be used for public performance for profit, shall be subject to the payment of the fee herein provided.

The company may grant sub-licenses hereunder with respect to the whole or any of the rights or licenses herein, provided, always, however, that this shall not relieve the Company from its obligation to make payments as herein provided. In no event, however, shall double payments be required to be made for any use hereunder, and it is understood that the Company shall have no liability hereunder for anything done or performed by the Company for or on behalf of any person, firm or corporation duly licensed by the Licensor for the same musical compositions and the same program.

(b) It is mutually understood and agreed that the payment provided for above shall cover any use of the musical compositions, continuous or non-continuous, so long as the same shall form part of one radio program, and providing that the playing time thereof shall not exceed three and one-half minutes (3½) for the so-called popular music, and three (3) minutes playing time in the case of all other music. In the event of the playing time exceeding the limit set out hereinabove, then each minute and one-half, or fraction thereof in excess of such limit shall be deemed to be one-half use, and such half use or fraction thereof shall be paid for with respect to compositions marked with an asterisk at the rate of twenty five cents (25c) and with respect to all other compositions at the rate of twelve and one-half cents (12½c) for each half use or fraction thereof in excess of the original playing period.

(c) You agree to furnish to me on the 20th day of each month a complete statement of all sums due to me under and by virtue of this license; said statement shall be certified to by the public accountant who regularly audits the books of the Company, or sworn to by a responsible officer of the Company, and shall be accompanied by check in payment of the amount shown to be due. You agree to make no outright sale of any of the electrical transcriptions manufactured pursuant to this license or under the license, nor make any other outright transfer of the said electrical transcription.

5. Each electrical transcription manufactured pursuant hereto shall bear the name and address of the manufacturer, and such identifying symbol as may be prescribed by the Agent and Trustee. As part of the license herein contained, and as a consideration therefor, the licensee agrees to place the following notice on label used in connection with all records or other devices manufactured pursuant hereto. "This record is manufactured under written license from John G. Paine, Agent and Trustee, and the record must be destroyed after program (s) thereon have been performed. Any further use of this record is a violation of the manufacturing license".

6. I further agree to fully indemnify and hold you harmless at all times against any and all demands, actions for infringement of copyright, judgments and/or recoveries by reason of any act done or use made hereunder by you or by any one acting for you under this agreement.

7. The license hereinabove granted is non-exclusive.

8. The application hereinabove referred to is hereby made a part of this license and the license thus becomes an agreement between the parties.

IN WITNESS WHEREOF, I hereby set my hand and seal this.....day of .....193....

1514

.....(L.S.)

986

EXHIBIT NO. 9

1. Pursuant to your license application dated the.....day of..... 193...., I hereby grant you the right, license, privilege and authority:

(a) To record the musical compositions hereinafter set out as part of the electrical transcription you desire to make of the program identified on your application under the title

(b) To make such arrangement, adaptation, and transposition of the said musical compositions as may be expedient or desirable to adapt the musical compositions to the purpose of the said electrical transcription, provided, however, that no arrangement, adaptation, or transposition made by you shall modify the character of any composition or be detrimental to the honor or reputation of the composer or publisher thereof;

(c) To record said musical composition either in whole or in part and either with or without the words thereof and in connection with such other musical compositions as you may desire, or in connection with any words, phrases, dialogue or other literary or dramatic material which you may elect except that no right is hereby granted to change the lyrics of songs or to record lyrics in connection with musical compositions that are not songs;

(d) To make copies of such electrical transcription recordings;

(e) To perform by broadcast and to permit to be rebroadcasted the said records herein known as electrical transcription recordings, subject, however, to the express understanding and agreement that the said right to broadcast or rebroadcast the compositions embodied in said recordings shall extend only to radio broadcast stations, or other place of public entertainment, which, at the time of such broadcast, hold performance licenses from the copyright proprietor of the musical compositions embodied in the said electrical transcription or from the person, firm, association or corporation duly authorized to grant such licenses.

2. The license herein granted is intended to apply to the United States and Canada only and in order to make it effective as to this territory, the Licensor grants to you the right, license, privilege, and authority to import electrical transcriptions of the said recordings made in the United States into Canada, and the right, if at any time hereafter there may be such a right conferred by law, to import electrical transcriptions of said recordings made in Canada into the United States. The license hereby granted shall apply solely to the program set out in the application hereinabove referred to and for the radio stations listed in said application unless otherwise particularly provided for hereafter and upon the completion of the program as specified in the said application, or as otherwise particularly noted hereafter, all electrical transcriptions manufactured pursuant to this license shall be destroyed, and whenever requested you agree to furnish adequate proof of such destruction.

3. The musical compositions covered by this license are the following:

4. In consideration of the license hereinabove granted, you agree to pay to me as follows:

(a) For each electrical transcription manufactured embodying any of the aforesaid musical compositions, fifty cents (50c) for each such composition marked with an asterisk, and twenty five cents (25c) for each such composition not so marked; it being understood and agreed that a separate electrical transcription will be manufactured for each production or reproduction of the musical composition made, or failing to manufacture a separate electrical transcription for each such production or reproduction, then each such production or reproduction will, for the purpose of this agreement, be deemed to be a separate manufacture.

It is understood that only such electrical transcriptions which, in addition to being manufactured, shall be used for public performance for profit, shall be subject to the payment of the fee herein provided.

The company may grant sub-licenses hereunder with respect to the whole or any of the rights or licenses herein, provided, always, however, that this shall not relieve the Company from its obligation to make payments as herein provided. In no event, however, shall double payments be required to be made for any use hereunder, and it is understood that the Company shall have no liability hereunder for anything done or performed by the Company for or on behalf of any person, firm or corporation duly licensed by the Licensor for the same musical compositions and the same program.

(b) It is mutually understood and agreed that the payment provided for above shall cover any use of the musical compositions, continuous or non-continuous, so long as the same shall form part of one radio program, and providing that the playing time thereof shall not exceed three and one-half minutes (3½) for the so-called popular music, and three (3) minutes playing time in the case of all other music. In the event of the playing time exceeding the limit set out hereinabove, then each minute and one-half, or fraction thereof in excess of such limit shall be deemed to be one-half use, and such half use or fraction thereof shall be paid for with respect to compositions marked with an asterisk at the rate of twenty five cents (25c) and with respect to all other compositions at the rate of twelve and one-half cents (12½c) for each half use or fraction thereof in excess of the original playing period.

(c) You agree to furnish to me on the 20th day of each month a complete statement of all sums due to me under and by virtue of this license; said statement shall be certified to by the public accountant who regularly audits the books of the Company, or sworn to by a responsible officer of the Company, and shall be accompanied by check in payment of the amount shown to be due. You agree to make no outright sale of any of the electrical transcriptions manufactured pursuant to this license or under the license, nor make any other outright transfer of the said electrical transcription.

5. Each electrical transcription manufactured pursuant hereto shall bear the name and address of the manufacturer, and such identifying symbol as may be prescribed by the Agent and Trustee. As part of the license herein contained, and as a consideration therefor, the licensee agrees to place the following notice on label used in connection with all records or other devices manufactured pursuant hereto. "This record is manufactured under written license from Harry Fox, Agent and Trustee, and the record must be destroyed after program (s) thereon have been performed. Any further use of this record is a violation of the manufacturing license".

6. I further agree to fully indemnify and hold you harmless at all times against any and all demands, actions for infringement of copyright, judgments and/or recoveries by reason of any act done or use made hereunder by you or by any one acting for you under this agreement,

7. The license hereinabove granted is non-exclusive.

8. The application hereinabove referred to is hereby made a part of this license and the license thus becomes an agreement between the parties.

IN WITNESS WHEREOF, I hereby set my hand and seal this.....day of .....193....

1515

Harry Fox (L.S.)

Agent and Trustee

286

EXHIBIT NO. 10

1. Pursuant to your license application the date of which appears in Schedule A, on the reverse side hereof, which Schedule B incorporated herein and made part hereof, I, on behalf of the Publisher or Publishers named in said Schedule A hereby grant you the right, license, privilege and authority:

(a) To record the musical composition or compositions hereinafter set out in the aforementioned Schedule A as part of the electrical transcription you desire to make of the program identified on your application and specified in the aforementioned Schedule A;

(b) To make such arrangement, adaptation and transposition of the said musical composition or compositions as may be expedient or desirable to adapt the same to the purpose of the said electrical transcription, provided, however, that no arrangement, adaptation or transposition made by you shall modify the character of any composition or be detrimental to the honor or reputation of the composer or publisher thereof, and provided further that any and all property rights in or to or arising out of any such arrangement, adaptation, interpretation or transposition and all variations contained therein shall belong to the publisher;

(c) To record said musical composition or compositions either in whole or in part and either with or without the words thereof and in connection with such other musical compositions as you may desire, or in connection with any words, phrases, dialogue or other literary or dramatic material which you may elect except that no right is hereby granted to change the lyrics of songs or to record lyrics in connection with musical compositions that are not songs;

(d) To make copies of such electrical transcription recordings; and for all purposes hereunder the original and each copy thereof made by you shall be considered a separate electrical transcription and shall be referred to herein as an "electrical transcription";

(e) To perform by broadcast and to permit to be rebroadcast the said records herein known as electrical transcriptions, subject, however, to the express understanding and agreement that the said right to broadcast or rebroadcast the compositions embodied in said electrical transcriptions shall extend only to radio broadcast stations, or other places of public entertainment, which, at the time of such broadcast, hold performance licenses from the copyright proprietor of the musical compositions embodied in the said electrical transcription or from the person, firm, association or corporation duly authorized to grant such licenses.

2. The license herein granted is intended to apply to the United States and Canada only and in order to make it effective as to this territory, you are hereby given the right, license, privilege, and authority to import electrical transcriptions made in the United States into Canada, and the right, if at any time hereafter there may be such a right conferred by law, to import electrical transcriptions made in Canada into the United States. The license hereby granted shall apply solely to the particular program or programs set out in the application hereinabove referred to and for the radio station or stations listed in said application unless otherwise particularly provided for hereafter in writing and upon the completion of the program or programs as specified in the said application, or as otherwise particularly noted hereafter, all electrical transcriptions manufactured pursuant to this license shall be destroyed, and whenever requested you agree to furnish adequate proof of such destruction.

3. The musical compositions covered by this license are enumerated in the aforementioned Schedule A.

4. In consideration of the license hereinabove granted, you agree to pay to me as Agent and Trustee, as follows:

(a) For each electrical transcription manufactured embodying any of the musical compositions enumerated in the aforementioned Schedule A fifty cents (50c) for each such composition marked with an asterisk, and twenty five cents (25c) for each such composition not so marked; it being understood and agreed that a separate electrical transcription will be manufactured for each production or reproduction of the musical composition made, or failing to manufacture a separate electrical transcription for each such production or reproduction, then each such production or reproduction will, for the purpose of this agreement be deemed to be a separate manufacture.

It is understood that only such electrical transcriptions which, in addition to being manufactured, shall be used for public performance for profit, shall be subject to the payment of the fee herein provided.

You may grant sublicenses hereunder with respect to the whole or any of the rights or licenses herein, provided always however, that they shall not relieve you from your obligation to make payments as herein provided. In no event, however, shall double payments be required to be made for or used hereunder, and it is understood that you shall not be liable hereunder for anything done or performed by you for or on behalf of any person, firm or corporation duly licensed by the publisher or publishers for the same musical compositions upon the same program.

(b) It is mutually understood and agreed that the payment provided for above shall cover any use of the musical compositions, continuous or non-continuous, so long as the same shall form part of one radio program, and providing that the playing time thereof shall not exceed three and one-half minutes (3½) for the so-called popular music, and three (3) minutes playing time in the case of all other music. In the event of the playing time exceeding the limit set out hereinabove, then each minute and one-half, or fraction thereof in excess of such limit shall be deemed to be one-half use, and such half use or fraction thereof shall be paid for with respect to compositions marked with an asterisk at the rate of twenty five cents (25c) and with respect to all other compositions at the rate of twelve and one-half cents (12½c) for each half use or fraction thereof in excess of the original playing period.

(c) You agree to furnish to me on the 20th day of each month a complete statement of all sums due to me under and by virtue of this license; said statement shall be certified to by the public accountant who regularly audits your books or sworn to by one of your responsible officers and shall be accompanied by a check in payment of the amount shown to be due. You agree to make no outright sale of any of the electrical transcriptions manufactured pursuant to this license or under this license nor to make any other outright transfer of the said electrical transcriptions.

5. Each electrical transcription record manufactured pursuant hereto shall bear the name and address of the manufacturer, and such identifying symbol as may be prescribed by me as Agent and Trustee. As a condition to the license herein contained and as a consideration therefore you agree to place the following notice on the label used in connection with all records or other devices manufactured pursuant hereto: "This record is manufactured under written license from Harry Fox, Agent and Trustee, and the record must be destroyed after the program or programs thereon have been performed. Any other further or different use of this record from that expressly authorized hereby is a violation of the manufacturing license."

6. I further agree on behalf of my principal or principals to hold you harmless at all times against any and all judgements or recoveries in actions for infringements of copyrights by reason of any act done or use made hereunder by you or anyone acting for you under this license.

7. This license is given without warranty other than that the publisher or publishers have the right to grant the same. You agree to check this license, including the aforementioned Schedule A, with your records and application to be certain that every musical composition recorded is properly licensed hereby, as any error herein will not be rectified unless written notice thereof is received by me within thirty days from the date hereof as appears in the aforementioned Schedule A. If there be an error or mistake in the within license, including the aforementioned Schedule A, and said error shall be the result in whole or in part of the insufficiency or inadequacy of the information given in your application, or if such mistake is not called to my attention within thirty days as aforesaid, there shall be no liability whatsoever to you. However, in no event whatsoever shall the publisher or publishers be liable to you for any reason except to the extent of the return of the fee or a proportionate part thereof paid by you for this license.

8. This license is non-exclusive.

9. Dramatic and so-called "grand rights" of the musical compositions hereby licensed are expressly excluded from the operation of this license.

10. This license is granted to you subject to the condition, which, you, by the acceptance hereof, expressly recognize and confirm, that the recording by you for the purpose of electrical transcription as hereinbefore set forth, does not come within the purview of Section 1 (e) of the Copyright Law of the United States (being the Act of March 4, 1909, as amended) insofar as that section relates to parts of instruments serving to reproduce musical works mechanically.

11. Your application herein referred to is hereby made a part of this license and such application together with this license, including Schedule A, shall constitute the entire agreement between us.

IN WITNESS WHEREOF I hereby set my hand and seal on the date appearing in the aforementioned Schedule A.

Harry Fox

Agent and Trustee

Note There is a proof of the new form effective after 1/1/38.

1516

988

SCHEDULE A

(1) In accordance with your application dated the.....day of.....,
193....., the annexed license covers the following musical compositions:

TITLE	COMPOSER	AUTHOR	PUBLISHER

(2) The program which has been identified by you in your application and for which this license applies is:

In all respects, this schedule is incorporated in and is subject to every term and conditions contained on the reverse side hereof.

Dated:

Henry Doyle

1517

Agent and Trustee

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PAGE

[fol. 1518] DEFENDANT'S EXHIBIT No. 58

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION

Equity #562

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, et al., Complainants,

AGAINST

HARRY R. SWANSON, as Secretary of State of Nebraska, et al., Defendants.

Answering the interrogatories propounded by the defendants, Walter S. Fischer, President of Carl Fischer, Inc., a corporation, makes answer to the following interrogatories, numbered 1 to 25, inclusive, as follows:

Answering Interrogatory No. 1, which reads as follows:

Q. "Have any of the copyrighted musical compositions owned or controlled by Carl Fischer, Inc., been licensed by Carl Fischer, Inc., to any motion picture producer for recording upon the sound track of a sound motion picture film between the years 1927 and 1937 inclusive?"

A. Yes.

Answering Interrogatory No. 2, which reads as follows:

Q. "Have any of the copyrighted musical compositions owned or controlled by Carl Fischer, Inc., been li-
[fol. 1519] censed by any person, firm or corporation or association acting for and in behalf of Carl Fischer, Inc., as agent, trustee or similar capacity, to any motion picture producer for recording upon the sound track of a sound motion picture film between the years 1927 and 1937 inclusive?"

A. Yes.

Answering Interrogatory No. 3, which reads as follows:

Q. "State the name and address of each person, firm, corporation or association acting in behalf of Carl Fischer, Inc., as agent, trustee or similar capacity in the licensing

of recording rights to motion picture producers at any time between the years 1927 and 1937 inclusive and state the date the authority of such representative was created and, if it has been terminated, the date of the termination thereof."

A. E. C. Mills, 30 Rockefeller Plaza, New York City, October 2, 1926 to October 21, 1929;
John G. Paine, 30 Rockefeller Plaza, New York City, October 21, 1929 to May 1, 1937;
Harry Fox, 45 Rockefeller Plaza, New York City, May 1, 1937 to date.

Answering Interrogatory No. 4, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, the contract, power of attorney or other writing pursuant to which each person, firm, corporation or association named in your answer to Interrogatory No. 3 was authorized to execute license agreements as agent, trustee or similar capacity for and in behalf of Carl Fischer, Inc.?"

A. Yes; subject to the Court's ruling upon materiality and relevancy.

[fol. 1520] Answering Interrogatory No. 5, which reads as follows:

Q. "Have licenses to record copyrighted musical compositions upon the sound track of sound motion picture films been entered into by Carl Fischer, Inc., using a form of contract containing any general or standard provisions with respect to the rights acquired by or limitations imposed upon the motion picture producer under the license?"

A. The contracts have varied from time to time with respect to different producers but some may contain clauses substantially similar to those in other contracts. A number of the contracts will be produced on the trial subject to the Court's ruling as to materiality and relevancy.

Answering Interrogatory No. 6, which reads as follows:

Q. "State the exact wording of each of the general or standard provisions which have been included in recording contracts entered into by Carl Fischer, Inc., with motion picture producers."

A. We annex herewith two such contracts as Exhibits 1 and 2.

Answering Interrogatory No. 7, which reads as follows:

Q. "Have licenses to record copyrighted musical compositions upon the sound track of sound motion picture films been entered into by any person, firm, corporation or association acting for and in behalf of Carl Fischer, Inc., as agent, trustee or similar capacity, using a form of contract containing any general or standard provisions with respect to the rights acquired by or limitations imposed upon the motion picture producer under the license?"

A. Yes.

[fol. 1521] Answering Interrogatory No. 8, which reads as follows:

Q. "State the exact wording of each of the general or standard provisions which have been included in recording contracts entered into with motion picture producers for and in behalf of Carl Fischer, Inc., by each of the agents and trustees designated in your answer to Interrogatory No. 3."

A. Annexed hereto as Exhibits 3, 4, 5 and 6 are forms of contracts generally in use by the agent and trustee with motion picture producers with respect to recording of musical compositions in motion pictures.

Answering Interrogatory No. 9, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, (a) a complete contract or license agreement entered into by Carl Fischer, Inc., which is representative of the general or standard form of license contracts between Carl Fischer, Inc., and motion picture producers, and (b) a complete contract or license agreement entered into for and in behalf of Carl Fischer, Inc., by each of the agents and/or trustees named in the answer to Interrogatory No. 3, which is representative of the general or standard form of license contracts between such agent or trustee and motion picture producers?"

A. Yes; in so far as such contracts may be said to be representative and in so far as they are in this defendant's

possession, subject to the ruling of the Court with respect to their relevancy and materiality. With regard to so much of this interrogatory as is designated as (b), we have already annexed in answer to Interrogatory No. 8, forms of contracts.

[fol. 1522] Answering Interrogatory No. 10, which read as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, Carl Fischer, Inc.,'s complete copy of the license contract entered into by E. C. Mills as agent and trustee for music publishers including Carl Fischer, Inc., with Radio Corporation of American Phot-phone Company dated on or about September 5, 1928, together with the exhibits attached thereto and the supplements thereof, all of which were printed and bound in pamphlet form for the parties involved therein."

A. Yes, subject to the ruling of the Court with respect to materiality and relevancy.

Answering Interrogatory No. 11, which reads as follows:

Q. "Have any of the copyrighted musical compositions owned or controlled by Carl Fischer, Inc., been licensed by Carl Fischer, Inc., to any manufacturer for recording upon the sound track of electrical transcriptions between the years 1930 to 1937 inclusive?"

A. Yes, but the term "sound track" ordinarily applies to recording of sound on film, whereas electrical transcriptions are not made on films.

Answering Interrogatory No. 12, which reads as follows:

Q. "Have any of the copyrighted musical compositions owned or controlled by Carl Fischer, Inc., been licensed by any person, firm, corporation or association acting for and in behalf of Carl Fischer, Inc., as agent, trustee or similar capacity, to any manufacturer for recording upon the sound track of electrical transcriptions between the years 1930 to 1937 inclusive?"

A. Yes.

[fol. 1523] Answering Interrogatory No. 13, which reads as follows:

Q. "State the name and address of each person, firm, corporation or association acting for and in behalf of Carl Fischer, Inc., as agent, trustee or similar capacity, in the licensing of recording rights to manufacturers of electrical transcriptions at any time between the years 1930 to 1937 inclusive, and state the date the authority of such representative was created and, if it has been terminated, the date of the termination thereof."

A. John G. Paine, 30 Rockefeller Plaza, New York City, October 21, 1929 to May 1, 1937;

Harry Fox, 45 Rockefeller Plaza, New York City, May 1, 1937 to date.

Answering Interrogatory No. 14, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, the contract, power of attorney or other writing pursuant to which each person, firm, corporation or association named in your answer to Interrogatory No. 13 was authorized to execute license agreements as agent, trustee or similar capacity for and in behalf of Carl Fischer, Inc.?"

A. Yes; subject to the Court's ruling with respect to materiality and relevancy.

Answering Interrogatory No. 15, which reads as follows:

Q. "Have licenses to record copyrighted musical compositions upon the sound track of electrical transcriptions been entered into by Carl Fischer, Inc., using a form of contract containing any general or standard provisions with respect to the rights acquired by or limitations imposed upon the manufacturer of such electrical transcriptions?"
[fol. 1524] A. No.

Answering Interrogatory No. 16, which reads as follows:

Q. "State the exact wording of each of the general or standard provisions which have been included in recording contracts entered into by Carl Fischer, Inc., with manufacturers of electrical transcriptions."

A. This has been answered by answer to Interrogatory No. 15.

Answering Interrogatory No. 17, which reads as follows:

Q. "Have licenses to record copyrighted musical compositions upon the sound track of electrical transcriptions been entered into by any person, firm, corporation or association acting for and in behalf of Carl Fischer, Inc., as agent, trustee or similar capacity, using a form of contract containing any general or standard provisions with respect to the rights acquired by or limitations imposed upon the manufacturer of such electrical transcriptions?"

A. Yes.

Answering Interrogatory No. 18, which reads as follows:

Q. "State the exact wording of each of the general or standard provisions which have been included in recording contracts entered into with manufacturers of electrical transcriptions for and in behalf of Carl Fischer, Inc., by each of the agents or trustees designated in your answer to Interrogatory No. 13."

A. Annexed hereto as Exhibits 7, 8, 9 and 10 are forms of printed contracts which contain general or standard provisions.

[fol. 1525] Answering Interrogatory No. 19, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, (a) a complete contract or license agreement entered into by Carl Fischer, Inc., which is representative of the general or standard form of license contracts between Carl Fischer, Inc., and manufacturers of electrical transcriptions, and (b) a complete contract or license agreement entered into for and in behalf of Carl Fischer, Inc., by each of the agents and/or trustees named in the answer to Interrogatory No. 13 which is representative of the general or standard form of license contract between such agent or trustee and manufacturers of electrical transcriptions?"

A. There is no contract or license agreement between Carl Fischer, Inc., and manufacturers of electrical transcriptions. Such contracts are made in the form of license agreements between the agent and trustee and manufacturers of electrical transcriptions in the form annexed to Interrogatory No. 18; and with respect to that much of the

Interrogatory covered by subdivision (b), we will produce such complete contract upon the trial subject to the ruling of the Court with respect to relevancy and materiality.

Answering Interrogatory No. 20, which reads as follows:

Q. "Has Carl Fischer, Inc., entered into any general contract or agreement in writing with any motion picture producers or any manufacturers of electrical transcriptions the terms and provisions of which are made applicable to recording licenses subsequently entered into between the parties with respect to specific copyrighted musical compositions?"

A. No.

[fol. 1526] Answering Interrogatory No. 21, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, all general contracts or agreements entered into by Carl Fischer, Inc., with motion picture producers and manufacturers of electrical transcriptions the terms and provisions of which are made applicable to recording licenses subsequently entered into between the parties with respect to specific copyrighted musical compositions?"

A. This is answered by the answer made to Interrogatory No. 20.

Answering Interrogatory No. 22, which reads as follows:

Q. "Has any person, firm, corporation or association acting for and in behalf of Carl Fischer, Inc., as agent or trustee, or acting as a common agent or trustee for Carl Fischer, Inc., and other owners of copyrighted musical compositions, entered into any general contract or agreement in writing with any motion picture producers or any manufacturers of electrical transcriptions the terms and provisions of which are made applicable to recording licenses subsequently entered into between the parties with respect to specific copyrighted musical compositions?"

A. Yes.

Answering Interrogatory No. 23, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, all general contracts or agreements with motion picture producers and manufacturers of electrical transcriptions entered into by any agent or trustee acting in behalf of Carl Fischer, Inc., individually, or by any common agent or trustee acting in behalf of Carl Fischer, Inc., and other owners of copyrighted musical compositions, the terms and provisions of which general contracts or agreements are made applicable to recording licenses subse-
[fol. 1527] quently entered into between the parties with respect to specific copyrighted musical compositions?"

A. Yes; subject to the ruling of the Court with respect to the relevancy and materiality.

Answering Interrogatory No. 24, which reads as follows:

Q. "State the schedule or rate of license fees for each year from 1930 to 1937 inclusive required by Carl Fischer, Inc., or by any agent or trustee acting for and in behalf of Carl Fischer, Inc., to be paid by manufacturers of electrical transcriptions."

A. There are two types of licenses issued to manufacturers of electrical transcriptions: (a) For the manufacture of individual records of production numbers, fifty cents for each record manufactured, and for popular numbers, twenty-five cents for each record manufactured; (b) In the alternative, a manufacturer of transcriptions may secure a license to make any number of records of a particular composition on the payment of fifteen dollars for each master record manufactured (all other records being pressed from such master record).

Answering Interrogatory No. 25, which reads as follows:

Q. "State the name or title of each copyrighted musical composition and arrangement thereof owned by Carl Fischer, Inc., on the date of answering this interrogatory."

A. We annex hereto as Exhibit 11 a partial list of names or titles of copyrighted musical compositions and arrange-
[fol. 1528] ments thereof owned by Carl Fischer, Inc., on this date. It is impossible for us to furnish a complete list

without the expenditure of very substantial sums of money, a great amount of research work, engaging lawyers and contacting various parties who may have rights or interest in various compositions.

[fol. 1529] SOUTHERN DISTRICT OF NEW YORK,

State of New York,
City and County of New York, ss:

Walter S. Fischer, being duly sworn, deposes and says that he is the president of Carl Fischer, Inc., one of the complainants herein; that he has read the foregoing answers to the defendants' interrogatories and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by Carl Fischer, Inc., is because said Carl Fischer, Inc., is a corporation, and deponent an officer thereof to wit its president.

Walter S. Fischer.

Sworn to before me this 1st day of April, 1938. Godfrey Cohn, Notary Public, New York Co. #115. Term expires March 30, 1939.

[fol. 1530] EXHIBIT 1

Copy

FWT.

January 30th, 1932.

Paramount Publix Corporation, 1501 Broadway, New York City.

DEAR SIRS:

The undersigned, Carl Fischer, Inc. in consideration of the sum of Fifty ($50.00) Dollars, receipt of which is hereby acknowledged, hereby grants to you the non-exclusive, irrevocable right and license to record mechanically and/or

electrically the words and/or music of one chorus of the composition entitled University of Maine Stein Song, (various arrangements of which have been published by the undersigned) an arrangement of which said composition by Rudy Vallee was registered for copyright in the Copyright Office of the United States in the name of the undersigned on February 25th, 1930, No. E:13,772, together with the right to make duplicate copies of such records and to reproduce and perform publicly for profit any arrangement, recording or version of said chorus of said composition in synchronism with a screen song cartoon entitled Rudy Vallee Melodies, and in connection with the exhibition and exploitation thereof throughout the world.

The right to use above said musical composition in the United States of America is subject to the payment by you of any license fees payable to the American Society of Composers, Authors and Publishers.

The undersigned hereby warrants that it has full right and authority to grant the rights hereby granted.

All rights not herein granted are reserved to the undersigned.

Carl Fischer, Inc., by —— ——.

[fol. 1531] EXHIBIT 2

Copy

May 8, 1930.

Paramount Publix Corporation, 1501 Broadway, New York, N. Y.

GENTLEMEN:

The undersigned, Carl Fischer, Inc., in consideration of the sum of Three Hundred Fifty ($350) Dollars, receipt of which is hereby acknowledged, without warranty and without recourse does hereby grant to you the non-exclusive, irrevocable license to produce, distribute and exhibit a motion picture cartoon of the Rudy Vallee arrangement of the musical composition entitled "Stein Song" under the title of said musical composition, and in connection therewith to photograph and record and reproduce by electrical or mechanical means the title, words and music of said composi-

tion, in whole or in part, and to use same in synchronism with said song cartoon and to exhibit same and reproduce the records thereof throughout the world.

All rights not herein granted are reserved unto the undersigned.

Very truly yours, Carl Fischer, Inc., by —— ——.

Consented to and approved: Paramount Publix Corporation, by —— ——.

[fol. 1532] EXHIBIT 1

Copy

FWT.

January 30th, 1932.

Paramount Publix Corporation, 1501 Broadway, New York City.

DEAR SIRS:

The undersigned, Carl Fischer, Inc. in consideration of the sum of Fifty ($50.00) Dollars, receipt of which is hereby acknowledged, hereby grants to you the non-exclusive, irrevocable right and license to record mechanically and/or electrically the words and/or music of one chorus of the composition entitled University of Maine Stein Song, (various arrangements of which have been published by the undersigned) an arrangement of which said composition by Rudy Vallee was registered for copyright in the Copyright Office of the United States in the name of the undersigned on February 25th, 1930, No. E:13,772, together with the right to make duplicate copies of such records and to reproduce and perform publicly for profit any arrangement, recording or version of said chorus of said composition in synchronism with a screen song cartoon entitled Rudy Vallee Melodies, and in connection with the exhibition and exploitation thereof throughout the world.

The right to use above said musical composition in the United States of America is subject to the payment by you of any license fees payable to the American Society of Composers, Authors and Publishers.

The undersigned hereby warrants that it has full right and authority to grant the rights hereby granted.

All rights not herein granted are reserved to the undersigned.

Carl Fischer, Inc., by —— ——.

[fol. 1533] EXHIBIT 2

Copy

May 8, 1930.

Paramount Publix Corporation, 1501 Broadway, New York, N. Y.

GENTLEMEN:

The undersigned, Carl Fischer, Inc., in consideration of the sum of Three Hundred Fifty ($350) Dollars, receipt of which is hereby acknowledged, without warranty and without recourse does hereby grant to you the non-exclusive, irrevocable license to produce, distribute and exhibit a motion picture cartoon of the Rudy Vallee arrangement of the musical composition entitled "Stein Song" under the title of said musical composition, and in connection therewith to photograph and record and reproduce by electrical or mechanical means the title, words and music of said composition, in whole or in part, and to use same in synchronism with said song cartoon and to exhibit same and reproduce the records thereof throughout the world.

All rights not herein granted are reserved unto the undersigned.

Very truly yours, Carl Fischer, Inc., by —— ——.

Consented to and approved. Paramount Publix Corporation, by —— ——.

[fol. 1534] EXHIBITS 3-6, Inclusive

Exhibits 3, 4, 5 and 6 answering Interrogatory No. 8, are identical with Exhibits 3, 4, 5 and 6 annexed to the answers of Gustave Schirmer, Secretary of G. Schirmer, Inc.

[fol. 1535] EXHIBITS 7–10, Inclusive

Exhibits 7, 8, 9 and 10 answering Interrogatory No. 18, are identical with Exhibits 7, 8, 9 and 10 annexed to the answers of Gustave Schirmer, Secretary of G. Schirmer, Inc.

[fol. 1536] DEFENDANTS' EXHIBIT No. 59

G. L. Harman

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION

Equity. #562

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al., Complainants,

against

HARRY R. SWANSON, as Secretary of State of Nebraska, et al., Defendants

Answering the interrogatories propounded by the defendants, Saul H. Bornstein, Treasurer of Irving Berlin, Inc., a corporation, makes answer to the following interrogatories, numbered 1 to 25, inclusive, as follows:

Answering Interrogatory No. 1, which reads as follows:

Q. "Have any of the copyrighted musical compositions owned or controlled by Irving Berlin, Inc., been licensed by Irving Berlin, Inc., to any motion picture producer for recording upon the sound track of a sound motion picture film between the years 1927 and 1937 inclusive?"

A. Yes.

Answering Interrogatory No. 2, which reads as follows:

[fol. 1537] Q. "Have any of the copyrighted musical compositions owned or controlled by Irving Berlin, Inc., been licensed by any person, firm or corporation or association acting for and in behalf of Irving Berlin, Inc., as agent, trustee or similar capacity, to any motion picture producer for recording upon the sound track of a sound motion picture film between the years 1927 and 1937 inclusive?"

A. Yes.

Answering Interrogatory No. 3, which reads as follows:

Q. "State the name and address of each person, firm, corporation or association acting in behalf of Irving Ber-

lin, Inc., as agent, trustee or similar capacity in the licensing of recording rights to motion picture producers at any time between the years 1927 and 1937 inclusive and state the date the authority of such representative was created and, if it has been terminated, the date of the termination thereof."

A. E. C. Mills, 30 Rockefeller Plaza, New York City, October 2, 1926 to October 21, 1929;
John G. Paine, 30 Rockefeller Plaza, New York City, October 21, 1929 to May 1, 1937;
Harry Fox, 45 Rockefeller Plaza, New York City, May 1, 1937 to date.

Answering Interrogatory No. 4, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, the contract, power of attorney or other writing pursuant to which each person, firm, corporation or association named in your answer to Interrogatory No. 3 was authorized to execute license agreements as agent, trustee or similar capacity for and in behalf of Irving Berlin, Inc.

A. Yes; subject to the Court's ruling upon materiality [fol. 1538] and relevancy.

Answering Interrogatory No. 5, which reads as follows:

Q. "Have licenses to record copyrighted musical compositions upon the sound track of sound motion picture films been entered into by Irving Berlin, Inc., using a form of contract containing any general or standard provisions with respect to the rights acquired by or limitations imposed upon the motion picture producer under the license?"

A. The contracts have varied from time to time with respect to different producers but some may contain clauses substantially similar to those in other contracts. A number of the contracts will be produced on the trial subject to the Court's ruling as to materiality and relevancy.

Answering Interrogatory No. 6, which reads as follows:

Q. "State the exact wording of each of the general or standard provisions which have been included in recording

contracts entered into by Irving Berlin, Inc., with motion picture producers."

A. We annex herewith two such contracts as Exhibits 1 and 2.

Answering Interrogatory No. 7, which reads as follows:

Q. "Have licenses to record copyrighted musical compositions upon the sound track of sound motion picture films been entered into by any person, firm, corporation or association acting for and in behalf of Irving Berlin, Inc., as agent, trustee or similar capacity, using a form of contract containing any general or standard provisions with respect to the rights acquired by or limitations imposed [fol. 1539] upon the motion picture producer under the license?"

A. Yes.

Answering Interrogatory No. 8, which reads as follows:

Q. "State the exact wording of each of the general or standard provisions which have been included in recording contracts entered into with motion picture producers for and in behalf of Irving Berlin, Inc., by each of the agents and trustees designated in your answer to Interrogatory No. 3."

A. Annexed hereto as Exhibits 3, 4, 5 and 6 are forms of contracts generally in use by the agent and trustee with motion picture producers with respect to recording of musical compositions in motion pictures.

Answering Interrogatory No. 9, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, (a) a complete contract or license agreement entered into by Irving Berlin, Inc., which is representative of the general or standard form of license contracts between Irving Berlin, Inc., and motion picture producers, and (b) a complete contract or license agreement entered into for and in behalf of Irving Berlin, Inc., by each of the agents and/or trustees named in the answer to Interrogatory No. 3, which is representative of the general or standard form of license contracts between such agent or trustee and motion picture producers?

A. Yes; in so far as such contracts may be said to be representative and in so far as they are in this defendant's possession, subject to the ruling of the Court with respect to their relevancy and materiality. With regard to so much of this interrogatory as is designated as (b), we have already annexed in answer to Interrogatory No. 8, forms of [fol. 1540] contracts.

Answering Interrogatory No. 10, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, Irving Berlin, Inc.'s, complete copy of the license contract entered into by E. C. Mills as agent and trustee for music publishers including Irving Berlin, Inc., with Radio Corporation of American Phot-phone Company dated on or about September 5, 1928, together with the exhibits attached thereto and the supplements thereof, all of which were printed and bound in pamphlet form for the parties involved therein."

A. Yes, subject to the ruling of the Court with respect to materiality and relevancy.

Answering Interrogatory No. 11, which reads as follows:

Q. "Have any of the copyrighted musical compositions owned or controlled by Irving Berlin, Inc., been licensed by Irving Berlin, Inc., to any manufacturer for recording upon the sound track of electrical transcriptions between the years 1930 to 1937 inclusive?"

A. Yes, but the term "sound track" ordinarily applies to recording of sound on film, whereas electrical transcriptions are not made on films.

Answering Interrogatory No. 12, which reads as follows:

Q. "Have any of the copyrighted musical compositions owned or controlled by Irving Berlin, Inc., been licensed by any person, firm, corporation or association acting for and in behalf of Irving Berlin, Inc., as agent, trustee or similar capacity, to any manufacturer for recording from the sound track of electrical transcriptions between the years 1930 to 1937 inclusive?"

[fol. 1541] A. Yes.

Answering Interrogatory No. 13, which reads as follows:

Q. "State the name and address of each person, firm, corporation or association acting for and in behalf of Irving Berlin, Inc., as agent, trustee or similar capacity, in the licensing of recording rights to manufacturers of electrical transcriptions at any time between the years 1930 to 1937 inclusive, and state the date the authority of such representative was created and, if it has been terminated, the date of the termination thereof."

A. John G. Paine, 30 Rockefeller Plaza, New York City, October 21, 1929 to May 1, 1937;
Harry Fox, 45 Rockefeller Plaza, New York City, May 1, 1937 to date.

Answering Interrogatory No. 14, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, the contract, power of attorney or other writing pursuant to which each person, firm, corporation or association named in your answer to Interrogatory No. 13 was authorized to execute license agreements as agent, trustee or similar capacity for and in behalf of Irving Berlin, Inc.?"

A. Yes; subject to the Court's ruling with respect to materiality and relevancy.

Answering Interrogatory No. 15, which reads as follows:

Q. "Have licenses to record copyrighted musical compositions upon the sound track of electrical transcriptions been entered into by Irving Berlin, Inc., using a form of [fol. 1542] contract containing any general or standard provisions with respect to the rights acquired by or limitations imposed upon the manufacturer of such electrical transcriptions?"

A. No.

Answering Interrogatory No. 16, which reads as follows:

Q. "State the exact wording of each of the general or standard provisions which have been included in recording contracts entered into by Irving Berlin, Inc., with manufacturers of electrical transcriptions."

A. This has been answered by answer to Interrogatory No. 15.

Answering Interrogatory No. 17, which reads as follows:

Q. "Have licenses to record copyrighted musical compositions upon the sound track of electrical transcriptions been entered into by any person, firm, corporation or association acting for and in behalf of . ving Berlin, Inc., as agent, trustee or similar capacity, using a form of contract containing any general or standard provisions with respect to the rights acquired by or limitations imposed upon the manufacturer of such electrical transcriptions?"

A. Yes.

Answering Interrogatory No. 18, which reads as follows:

Q. "State the exact wording of each of the general or standard provisions which have been included in recording contracts entered into with manufacturers of electrical transcriptions for and in behalf of Irving Berlin, Inc., by each of the agents or trustees designated in your answer to Interrogatory No. 13."

A. Annexed hereto as Exhibits 7, 8, 9 and 10 are forms [fol. 1543] of printed contracts which contain general or standard provisions.

Answering Interrogatory No. 19, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, (a) a complete contract or license agreement entered into by Irving Berlin, Inc., which is representative of the general or standard form of license contracts between Irving Berlin, Inc., and manufacturers of electrical transcriptions, and (b) a complete contract or license agreement entered into for and in behalf of Irving Berlin, Inc., by each of the agents and/or trustees named in the answer to Interrogatory No. 13 which is representative of the general or standard form of license contract between such agent or trustee and manufacturers of electrical transcriptions?"

A. There is no contract or license agreement between Irving Berlin, Inc., and manufacturers of electrical transcriptions. Such contracts are made in the form of license

agreements between the agent and trustee and manufacturers of electrical transcriptions in the form annexed to Interrogatory No. 18; and with respect to that much of the Interrogatory covered by subdivision (b), we will produce such complete contract upon the trial subject to the ruling of the Court with respect to relevancy and materiality.

Answering Interrogatory No. 20, which reads as follows:

Q. "Has Irving Berlin, Inc., entered into any general contract or agreement in writing with any motion picture producers or any manufacturers of electrical transcriptions the terms and provisions of which are made applicable to recording licenses subsequently entered into between the [fol. 1544] parties with respect to specific copyrighted musical compositions?"

A. No.

Answering Interrogatory No. 21, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, all general contracts or agreements entered into by Irving Berlin, Inc., with motion picture producers and manufacturers of electrical transcriptions the terms and provisions of which are made applicable to recording licenses subsequently entered into between the parties with respect to specific copyrighted musical compositions?"

A. This is answered by the answer made to Interrogatory No. 20.

Answering Interrogatory No. 22, which reads as follows:

Q. "Has any person, firm, corporation or association acting for and in behalf of Irving Berlin, Inc., as agent or trustee, or acting as a common agent or trustee for Irving Berlin, Inc., and other owners of copyrighted musical compositions, entered into any general contract or agreement in writing with any motion picture producers or any manufacturers of electrical transcriptions the terms and provisions of which are made applicable to recording licenses subsequently entered into between the parties with respect to specific copyrighted musical compositions?"

A. Yes.

Answering Interrogatory No. 23, which reads as follows:

Q. "Will you voluntarily produce upon the trial of this cause, without being required to do so by subpoena or other judicial process, all general contracts or agreements with motion picture producers and manufacturers of electrical [fol. 1545] transcriptions entered into by any agent or trustee acting in behalf of Irving Berlin, Inc., individually, or by any common agent or trustee acting in behalf of Irving Berlin, Inc., and other owners of copyrighted musical compositions, the terms and provisions of which general contracts or agreements are made applicable to recording licenses subsequently entered into between the parties with respect to specific copyrighted musical compositions?"

A. Yes; subject to the ruling of the Court with respect to the relevancy and materiality.

Answering Interrogatory No. 24, which reads as follows:

Q. "State the schedule or rate of license fees for each year from 1930 to 1937 inclusive required by Irving Berlin, Inc., or by any agent or trustee acting for and in behalf of Irving Berlin, Inc., to be paid by manufacturers of electrical transcriptions."

A. There are two types of licenses issued to manufacturers of electrical transcriptions: (a) For the manufacture of individual records or production numbers, fifty cents for each record manufactured, and for popular numbers, twenty-five cents for each record manufactured; (b) In the alternative, a manufacturer of transcriptions may secure a license to make any number of records of a particular composition on the payment of fifteen dollars for each master record manufactured (all other records being pressed from such master record).

Answering Interrogatory No. 25, which reads as follows:

Q. "State the name or title of each copyrighted musical composition and arrangement thereof owned by Irving Berlin, Inc., on the date of answering this interrogatory."

[fol. 1546] A. We annex hereto a partial list of names or titles of copyrighted musical compositions and arrangements thereof owned by Irving Berlin, Inc., on this date. It is impossible for us to furnish a complete list without the expenditure of very substantial sums of money, a great

amount of research work, engaging lawyers and contacting various parties who may have rights or interests in various compositions.

(S.) Saul H. Bornstein.

[fol. 1547] SOUTHERN DISTRICT OF NEW YORK,
State of New York,
City and County of New York, ss:

Saul H. Bornstein, being duly sworn, deposes and says that he is the treasurer of Irving Berlin, Inc., one of the complainants herein; that he has read the foregoing answers to the defendants' interrogatories and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by Irving Berlin, Inc., is because the said Irving Berlin, Inc., is a corporation, and deponent an officer thereof, to wit its treasurer.

Saul H. Bornstein.

Sworn to before me this 11th day of April, 1938.
Marion L. Ellsin, Notary Public, N. Y. Co.

Copy

[fol. 1548] EXHIBIT No. 1

December 23, 1931.

Paramount Publix Corporation,
1501 Broadway,
New York, N. Y.

DEAR SIRS:

The undersigned, Irving Berlin, Inc. in consideration of the sum of Three Hundred Fifty ($350.00) Dollars, receipt of which is hereby acknowledged, without warranty and without recourse, does hereby grant to you the non-exclusive, irrevocable license to produce, distribute and exhibit (and to license the exhibition and performance of) a motion picture cartoon of the musical composition entitled "There's Danger In Your Eyes Cherie";

words by Jack Meskill, music by Pete Wendling, which said musical composition was registered for copyright in the Copyright Office of the United States as a published work by Irving Berlin, Inc., on December 5, 1929, No. E:11,347; and a version of which said composition by Harry Richman, was thereafter registered for copyright in the Copyright Office of the United States by Irving Berlin, Inc., on December 5, 1929, No. E:11,742;

under the title of said musical composition; and in connection therewith to photograph and record and reproduce, by electrical or mechanical means, the title, words and music of said composition, in whole or in part, and to use same in synchronism with said song cartoon and to exhibit same and reproduce the records thereof throughout the world.

The foregoing license is intended as a license with respect to the major right of making a production of the said song, solely in the form and manner hereinbefore described; and it is expressly understood that the said license, insofar as it refers to the right of performance of the motion picture production and the synchronized records thereof, is subject to any grant heretofore made by the undersigned to the American Society of Composers, Authors and Publishers, or any Performing Rights Society affiliated therewith if such grant should be held in any country to include the right of performance contemplated hereby.

All rights not herein granted are reserved unto the undersigned.

Very truly yours, Irving Berlin, Inc. (Signed) By: S. H. Bornstein.

Copy

[fol. 1549] EXHIBIT No. 2

May 18, 1933.

Paramount Productions, Inc.,
15 Exchange Place,
Jersey City, N. J.

DEAR SIRS:

The undersigned, Irving Berlin, Inc. in consideration of the sum of Two Hundred Fifty ($250.) Dollars, receipt of which is hereby acknowledged, without warranty and without recourse, does hereby grant to you the non-exclusive,

irrevocable license to produce, distribute and exhibit (and to license the exhibition and performance of) a motion picture cartoon of the musical composition entitled "I'm Playing With Fire":

Words and Music by Irving Berlin, registered for copyright as an unpublished musical composition by Irving Berlin, Inc. on November 18, 1932, No. E: 64198, and thereafter registered for copyright in the name of Irving Berlin, Inc. on December 23, 1932, N. 33870.

Under the title of said musical composition, and in connection therewith to photograph and record and reproduce by electrical or mechanical means the title, words and music of said composition, in whole or in part, and to use same in synchronism with said song cartoon and to exhibit same and reproduce the records thereof throughout the world.

The foregoing license is intended as a license with respect to the major right of making a production of the said song, solely in the form and manner hereinbefore described; and it is expressly understood that the said license insofar as it refers to the right of performance of the motion picture production and the synchronized records thereof, is subject to any grant heretofore made by the undersigned to the American Society of Composers, Authors and Publishers, or any Performing Rights Society affiliated therewith if such grant should be held in any country to include the right of performance contemplated hereby.

All rights not herein granted are reserved unto the undersigned.

Very truly yours, Irving Berlin, Inc. (Signed) By: S. H. Bornstein.

[fol. 1550] EXHIBITS 3-6, Inclusive

Exhibits 3, 4, 5 and 6 answering Interrogatory No. 8, are identical with Exhibits 3, 4, 5 and 6 annexed to the answers of Gustave Schirmer, Secretary of G. Schirmer, Inc.

[fols. 1551-1552] EXHIBITS 7-10, Inclusive

Exhibits 7, 8, 9, and 10 answering Interrogatory No. 18, are identical with Exhibits 7, 8, 9, and 10 annexed to the answers of Gustave Schirmer, Secretary of G. Schrimer, Inc.

[fol. 1553] STATEMENT RE COMPLAINANTS' EXHIBIT 1 ANNEXED TO DEPOSITION OF JEROME KERN, TAKEN IN CALIFORNIA ON JUNE 15, 1937

This exhibit contains a list of more than 500 copyrighted compositions, of which the music was written by Jerome Kern. Such compositions were copyrighted at various dates between 1905 and 1939. Specimen compositions giving the collaborator, the publisher, the date of copyright and the show, if any, in which they appeared, are the following:

Composition	Collaborator/s	Publisher	Copyright Date	Show
Can't Help Lovin' Dat Man	Oscar Hammerstein 2d	T. B. Harms Co.	12/ 2/28	Show Boat
Cat And The Fiddle	Otto Harbach	T. B. Harms Co.	2/ 2/32	
Don't Turn My Picture To The Wall	Robert B. Smith	Harms, Inc.	4/ 9/12	The Girl From Montmartre
Good Morning, Dearie	Anne Caldwell	T. B. Harms Co.	11/14/21	Good Morning, Dearie
Gypsy Caravan	H. Dietz	T. B. Harms Co.	9/23/24	Dear Sir
Here Am I	Oscar Hammerstein 2d	T. B. Harms Co.	9/ 7/29	Sweet Adeline
High, Wide and Handsome	Oscar Hammerstein 2d	Chappell & Co.	6/ 9/37	High, Wide and Handsome
Hitchy-Koo 1920	H. Anderson/Arr.	T. B. Harms Co.	1/21/21	Hitchy-Koo 1920
Home Sweet Home	Anne Caldwell	T. B. Harms Co.	4/21/19	A New Girl
Honeymoon Lane	M. E. Rourke	Harms, Inc.	4/ 4/13	
In Arcady	H. Reynolds	Harms, Inc.	4/19/15	Nobody Home
It's Not In The Cards	D. Fields	J. Kern	3/17/36	
I've Told Ev'ry Little Star	O. Hammerstein 2d	T. B. Harms Co.	10/28/32	Music In The Air
Journey's End	P. G. Wodehouse	T. B. Harms Co.	9/21–10/21/22	The Cabaret Girl
Just Because You're You	Gene Buck	T. B. Harms Co.	6/26/17	Ziegfeld Follies 1917
Ka-Lu-A	A. Caldwell	T. B. Harms Co.	10/24/21	Good Morning, Dearie
Keep Smiling	O. Hammerstein	J. Kern	4/16/34	Three Sisters
Look For The Silver Lining	Bud DeSylva	T. B. Harms Co.	1/27/20	
The Night Was Made For Love	Otto Harbach	T. B. Harms Co.	10/ 5/31	The Cat And The Fiddle
No One Else But You	Graham John	T. B. Harms Co.	5/15/28	Blue Eyes
Ol' Man River	Oscar Hammerstein 2d	T. B. Harms Co.	12/ 2/27	Show Boat
Our Song	Dorothy Fields	Chappell & Co.	1/21/37	When You're In Love
Pale Venetian Moon	Anne Caldwell	T. B. Harms Co.	11/22/22	The Bunch and Judy
Raggedy Ann	Anne Caldwell	T. B. Harms Co.	10/31/23	Stepping Stones
Rose Marie	Anne Caldwell	T. B. Harms Co.	10/24/21	Good Morning, Dearie
Sally	Clifford Grey	T. B. Harms Co.	1/17/21	Sally
She Didn't Say Yes	O. Harbach	T. B. Harms Co.	10/29/31	Cat And The Fiddle

[fol. 1554]

Show Boat	Oscar Hammerstein 2d	T. B. Harms Co.	4/ 5/28	
Susie	Anne Caldwell	T. B. Harms Co.	11/13/26	Criss-Cross
Till The Clouds Roll By	P. G. Wodehouse	Harms, Inc.	2/16/17	Oh Boy
Turkey Trot	David Stamper	Norworth Pub. Co.	7/17/11*	Little Miss Fix It
When Your Heart's On Fire Smoke Gets In Your Eyes	O. Harbach	T. B. Harms Co.	11/ 3/33	Gowns by Roberta
Whistling Boy	Dorothy Fields	Chappell & Co. Inc.	1/14/37	When You're In Love
Who	O. Harbach & O. Hammerstein 2d	T. B. Harms Co.	9/19/25	Sunny
In Love With Love	Anne Caldwell	T. B. Harms Co.	11/ 2/23	Stepping Stones

* Renewed 7/26/38 by Dave Stamper
10/27/38 by J. D. Kern

[fol. 1555] STATEMENT RE COMPLAINANTS' EXHIBIT 4 ANNEXED TO DEPOSITION OF SIGMUND ROMBERG, TAKEN IN CALIFORNIA ON JUNE 15, 1937.

This exhibit contains a list of more than 450 copyrighted compositions, of which the music was written by Sigmund Romberg. Such compositions were copyrighted at various dates between 1910 and 1938. Specimen compositions giving the collaborator, the publisher, the date of copyright and the show, if any, in which they appeared, are the following:

Composition	Collaborator/s	Publisher	Copyright Date	Show
Blame It All on The Night	Otto Harbach	Robbins Music Corp.	11/13/36	Forbidden Melody
Blossom Time	Franz Schubert & Heinrich Berte	Karczag Pub. Co.	12/ 1/21	Blossom Time
Childhood Days	Matthew Woodward	G. Schirmer	5/22/16	A Brazilian Honeymoon
Drinking Song	Dorothy Donnelly	Harms Inc.	1/10,25	Student Prince in Heidelberg
Goodbye My Love Goodbye	Oscar Hammerstein 2nd	Harms Inc.	1/30,31	Children of Dreams
Gypsy Song	Rida Johnson Young	G. Schirmer	8/18/17	Maytime
How Could A Fellow Want More	Otto Harbach	Robbins Music Corp.	10/22/36	Forbidden Melody
If I Had A Girl Like You	Oscar Hammerstein 2nd	Harms Inc.	1/30/31	Children of Dreams
I'm Just A Sentimental Fool	Oscar Hammerstein 2nd	Harms Inc.	9/14/28	New Moon
Lover Come Back To Me	Oscar Hammerstein 2nd	Harms Inc.	9/14/28	New Moon
Mariachie	Gus Kahn	Leo Feist Inc.	2/23/38	Girl of the Golden West
Marianne	Oscar Hammerstein 2nd	Harms Inc.	1/23/28	New Moon
Maytime	Rida Johnson Young	G. Schirmer	9/29/17	

[fol. 1555] STATEMENT RE COMPLAINANTS' EXHIBIT 4 ANNEXED TO DEPOSITION OF SIGMUND ROMBERG, TAKEN IN CALIFORNIA ON JUNE 15, 1937.

This exhibit contains a list of more than 450 copyrighted compositions, of which the music was written by Sigmund Romberg. Such compositions were copyrighted at various dates between 1910 and 1938. Specimen compositions giving the collaborator, the publisher, the date of copyright and the show, if any, in which they appeared, are the following:

Composition	Collaborator/s	Publisher	Copyright Date	Show
Memories	Louis Weslyn	M. Witmark & Sons	4/23/10*	
New Moon	Oscar Hammerstein 2nd & Frank Mandel & Laurence Schwab	Harms Inc.	12/29/28	
Night Is Young	Oscar Hammerstein 2nd	Robbins Music Corp.	1/10/35	The Night Is Young
Nina Rosa	Otto Harbach & Irving Caesar	Harms Inc.	5/ 8/34	Nina Rosa
Riff Song	Otto Harbach & Oscar Hammerstein 2nd	Harms Inc.	11/ 8/26	The Desert Song
Road To Paradise	Rida Johnson Young	G. Schirmer	8/18/17	Maytime
[fol. 1556]				
Romance	Otto Harbach & Oscar Hammerstein 2nd	Harms Inc.	11/ 8/26	The Desert Song
Rosalie Selection	George Gershwin	New World Music Corp.	3/ 6/28	Rosalie
Sally Down Our Alley	Harold Atteridge & Herman Timberg	G. Schirmer	11/10/17	Doing Our Bit
Some Day	Harry B. Smith	Harms Inc.	3/22/27	Cherry Blossoms
Song Of Love	Franz Schubert & Heinrich Berte	Harczag Pub. Co.	2/10/22	Blossom Time
Student Prince	Dorothy Donnelly	Harms Inc.	6/24/32	
Students March Song	Dorothy Donnelly	Harms Inc.	1/27/25	Student Prince In Heidelberg
Sweetheart	Rida Johnson Young	G. Schirmer	8/18/17	Maytime
Venetia	Harold Atteridge	Winter Garden Co.	10/14/14	Dancing Around
Wanting You	Oscar Hammerstein 2nd	Harms Inc.	9/14/28	New Moon
When Hearts Are Young	Cyrus Wood & Alfred Goodman	Harms Inc.	10/28/22	The Lady in Ermine
When I Close My Eyes	Oscar Hammerstein 2nd	Harms Inc.	1/ 4/28	New Moon
When I Grow Too Old To Dream	Oscar Hammerstein 2nd	Robbins Music Corp.	1/10/35	The Night Is Young
When Knighthood Was in Flower	Harold Atteridge & Jean Schwartz	Harms Inc.	10/28/24	The Passing Show of 1924
Will You Remember	Rida Johnson Young	G. Schirmer	8/17/17	Maytime
Your Land And My Land	Dorothy Donnelly	Harms Inc.	2/ 1/27	My Maryland

* Renewed May 4, 1937 by M. Witmark & Sons

[fol. 1557] CONDENSATION OF PLAINTIFFS' DEPOSITION EXHIBIT 13

This exhibit contains a list of approximately 400 copyrighted compositions, of which the words or music were written by Irving Caesar. Such compositions were copyrighted at various dates between 1919 and 1939. Specimen compositions giving the collaborator' the publisher the date of copyright, and the show, if any, are the following:

Adored One	Sigmund Romberg	Harms Inc.	9/21/31	Nina Rosa
Crazy Rhythm	Joseph Meyer Roger Wolfe Cahn	Harms Inc.	4/14/28	Here's Howe
I Want to be Happy	Vincent Youmans	Harms Inc.	6/19/24	No, No, Nanette
Is It True What They Say about Dixie	Gerald Marks, Sammy Lerner	Irving Caesar Inc.	1/22/36	
Just A Gigolo	L. Casucci	DeSylva, Brown & Henderson	12/26/30	
Longing (Triste Ricordo)	Adolfo Geniso Ernesto DeCurtis	Harms Inc.	6/13/21	
No, No, Nanette	Otto Harbach, Vincent Youmans, Frank Mandel	Harms Inc.	6/ 3/25	No, No, Nanette
Sing A Song of Safety	Gerald Marks	Irving Caesar Inc.	5/ 7/37	
Sometime I'm Happy	Vincent Youmans	Harms Inc.	4/21/27	Hit the Deck
Swanee	Geo. Gershwin	Harms Inc.	11/ 1/19	
Tea for Two	Vincent Youmans	Harms Inc.	6/19/24	No, No, Nanette
There's Something Spanish in Your Eyes	Cliff Friend	Remick & Co.	12/ 9/27	
What a Perfect Combination	Bert Kalmer, Harry Ruby, Harry Akst	Harms Inc.	10/28/32	

[fols. 1558-1568] CONDENSATION OF PLAINTIFFS' DEPOSITION EXHIBIT 18

This exhibit contains a list of more than 400 copyrighted compositions, of which the words or music were written by George W. Meyer. Such compositions were copyrighted at various dates between 1907 and 1938. Specimen compositions giving the collaborator, the publisher, the date of copyright, and the show, if any, are the following:

Anything Is Nice If It Comes from Dixieland	Grant Clarke & Milton Ager	Leo Feist Inc.	2/ 8/19	
Black-Birds		Ascherberg, Hopwood & Crew	10/20/26	Black-Birds
Bring Back My Daddy to Me	William Tracey & Howard Johnson	Leo Feist Inc.	11/26/17	
Brown Eyes Why Are You Blue	Al Bryan	Henry Waterson Inc.	9/ 9/25	
Come On and Baby Me	Sam M. Lewis/Joe Young	Waterson, Berlin & Snyder Co.	9/ 6/16	
Down Among the Sleepy Hills of Tennessee	Sam M. Lewis/Joe Young	Irving Berlin Inc.	2/28/23	

[fol. 1558–1568] CONDENSATION OF PLAINTIFFS' DEPOSITION EXHIBIT 18—*Continued*

This exhibit contains a list of more than 400 copyrighted compositions, of which the words or music were written by George W. Meyer. Such compositions were copyrighted at various dates between 1907 and 1938. Specimen compositions giving the collaborator, the publisher, the date of copyright, and the show, if any, are the following:

Composition	Collaborator/s	Publisher	Copyright Date	Renewed	Show
Everything Is Peaches Down in Georgia	Grant Clarke & Milton Ager	Leo Feist Inc.	7/19/18		
For Baby and Me		B. Feldman & Co.	11/22/26		
For Me and My Gal	Edgar Leslie & E. Ray Goetz	Waterson, Berlin & Snyder Co.	1/24/17		
Girl I Left Behind Me	Edgar Leslie/Billy Rose	Famous Music Corp.	7/29/35		
Here Comes the Bride	E. Ray Goetz	Leo Feist Inc.	6/21/19		
I Believe in Miracles	Sam M. Lewis & Pete Wendling	Leo Feist Inc.	12/27/34		
If He Can Fight Like He Can Love Good-Night Germany	Grant Clark & Howard E. Rogers	Leo Feist Inc.	4/30/18		
Just A Girl of Yesterday		Maurice Richmond Mus. Co.	4/ 1/16		
Just Like Washington Crossed the Delaware	Howard Johnson	Leo Feist Inc.	3/29/18		
Let's All Be American Now	Irving Berlin & Edgar Leslie	ABC Standard Music	2/17/17		
Lonesome		F. A. Mills	1/2/09	Famous Music–1/4/36	
My Tucky Home	Sam M. Lewis/Joe Young	Irving Berlin Inc.	11/14/23		
Sittin' in a Corner	Gus Kahn	Irving Berlin Inc.	8/16/23		
Tuck Me to Sleep in My Old Kentucky Home	Sam M. Lewis/Joe Young	Irving Berlin Inc.	8/ 6/21		
When You're a Long Long Way From Home	Sam M. Lewis	Broadway Music Corp.	7/17/14		

[fol. 1569] PLAINTIFFS' DEPOSITION EXHIBIT No. 19

Schedule VI

Agreement, made and entered into this 8th day of June, 1910, by and between Victor Herbert, of the City of New York, party of the first part, and M. Witmark & Sons, a corporation organized under the laws of the State of New York, party of the second part,

Whereas, the party of the first part has undertaken to write the musical score of a musical play entitled

"Trentini"

(title subject to change)

the book and lyrics of which are by Rida Johnson Young, to be produced under the management of — and

Whereas, the party of the second part is desirous of acquiring the exclusive license to print, publish and sell said musical score and any part or parts thereof, and the libretto and lyrics thereof, and any arrangement or selection of the whole or any part thereof.

Now, Therefore, This Agreement Witnesseth:

I. This agreement is made in consideration of the sum of One Dollar by each of the parties to the other in hand paid, the receipt whereof is hereby acknowledged and in consideration of the faithful performance by the party of the second part of the terms, covenants and conditions hereinafter contained; and this agreement is limited exclusively to matters in connection with the printing, publishing and selling copies of said score, libretto and lyrics and parts thereof.

II. The party of the first part hereby grants to the party of the second part the sole and exclusive license and privilege to print, publish and sell in all countries copies of the libretto and lyrics and piano and vocal score of said musical play, or any part or portion of the said libretto, lyrics and [fol. 1570] score and copies of any arrangement or selection of the whole or any part of said libretto, lyrics and score during the term of the copyrights thereof and renewals of such copyrights.

III. The party of the second part in consideration of said license, agrees at its own cost and expense, to do all

acts and take all proceedings necessary or convenient to the procurement of copyright or copyrights with renewals of the same in said libretto, lyrics and score and each and every part thereof and in all selections and arrangements thereof, as well as to give copyright performances in England and wherever necessary to protect the performing rights therein, in all countries in which it is possible to secure copyright and said copyrights so secured shall remain and be for all time the sole and absolute property of the party of the first part and to be held by the party of the second part in trust for the party of the first part; and the party of the second part further agrees at its cost and expense, to take all necessary and proper steps for the purpose of protecting the said copyrights from infringement and otherwise. All copyright performances given as aforesaid shall be at the cost and expense of the party of the first part.

IV. That all arrangements and selections of said score and any part thereof shall be made under the supervision and direction of the party of the first part, at the cost and expense of the party of the second part and the party of the second part shall employ only such musician or musicians for this purpose as may be named by the party of the first part and that neither the said score nor any part thereof, nor any arrangement or selection of the whole or any part of said score shall be published by the party of the second part unless under the supervision of the party of the first part. The party of the second part further [fol. 1571] agrees to print and publish in first class style, the said libretto, lyrics and piano and vocal score and separately such numbers, songs and pieces thereof and such arrangements and selections thereof as may be directed by the party of the first part. The party of the second part agrees to insert upon each copy published the copyright notice or notices required by law, including the notice "that all performing rights are reserved." The party of the second part further agrees that no advertising matter of any kind shall appear on or in connection with the said publication, except such as relates to the said libretto, lyrics or score or the parts thereof, or other compositions composed by the party of the first part.

V. The party of the second part hereby agrees to pay to the party of the first part the following royalties: Twelve

(12¢) cents for and upon each and every copy of the piano and vocal score of said musical and dramatic composition sold by the party of the second part; an amount equal to ten (10%) per cent of the retail marked price thereof for and upon each and every copy of any separate number or songs or any combination of two or more numbers or songs of said musical play when printed together with the words thereof; an amount equal to fifteen (15%) per cent of the retail marked price thereof upon each and every copy of any arrangement or selection of the whole or any part of the music of said musical play for piano or any solo instrument, and an amount equal to ten (10%) per cent of the retail marked price upon each and every copy sold of arrangements for band and orchestra. The party of the second part agrees that the retail marked price of the various publications hereinbefore set forth shall be those customary and prevalent among first class music houses.
[fol. 1572] It is understood that no royalties are to be paid for single numbers designated as "new issues" but the total number of such "new issues" are not to exceed one thousand.

VI. That party of the second part agrees not to distribute, sell, offer or expose for sale any copy of the said libretto and lyrics, piano and vocal scores, or any part or portion of the said libretto, lyrics and scores or any arrangement or selection of the whole or any part thereof, without the signature of the party of the first part conspicuously stamped or impressed upon the title page thereof, either by the party of the first part personally or by his duly authorized agent, and the party of the second part agrees immediately after printing any such copy to submit the same to the party of the first part or his duly authorized agent for signature. The party of the first part agrees at all reasonable times, personally or through his duly authorized agent, to impress or stamp his signature on any such copy as frequently as the party of the second part may reasonably require.

VII. The party of the second part further agrees that it will make regular settlements under this contract promptly on or about the fifteenth day of June and December in each year during the existence of said copyrights and that at the time of such settlement and payment, it will deliver to the party of the first part a full, true and

itemized statement showing in detail all sales made by the party of the second part of any publication hereinbefore set forth and the royalties due said party of the first part at the time of such settlement.

VIII. The said party of the second part agrees that it will keep or cause to be kept, books of account in which [fol. 1573] full and complete entry shall be made of all said publications printed and sold by the party of the second part and its agents and the said books shall at all reasonable times be open to the inspection of the party of the first part or his agent duly appointed in writing; and the said party of the first part or his attorney, shall have the right to examine any and all books of account of the said party of the second part containing any items, memoranda or information relating to the printing and sale of said publications, and to inspect and count the number of copies on hand.

IX. This contract shall not under any circumstances be considered as licensing the party of the second part to present or perform the said libretto, lyrics and musical score or any part thereof or granting any rights therein, except the publication rights. It is understood that this license is personal to the party of the second part and is not assignable by it without the consent in writing of the party of the first part.

X. The term "score" as used herein shall include any additional musical numbers that may be written for said play at any time.

XI. It is expressly understood that no numbers written by any person other than the party of the first part shall be published as part of the said libretto, lyrics and musical score nor shall any such number be published with a title page like or similar to that of the musical score.

XII. It is mutually agreed that the rights hereby granted to the party of the second part by the party of the first part are dependent upon the faithful performances by it of all the covenants and conditions herein contained and the failure of the party of the second part to carry out or perform [fol. 1574] any of the covenants and conditions contained in this contract shall render its rights hereunder voidable at the option of the party of the first part and upon the

party of the first part giving notice to the party of the second part terminating this agreement, then all rights which the party of the second part may obtain by virtue of this contract shall cease and terminate and shall at once revert to the party of the first part and shall belong to him as if this contract had never been made, without prejudice to any rights that the party of the first part may have by reason of any breaches of this contract; and in such event, or in the event of the bankruptcy or insolvency of the party of the second part or its abandonment of the music publishing business, the party of the second part agrees to immediately assign to the party of the first part in proper form, any and all copyrights which the party of the second part may have secured by virtue of this contract and at the same time to return all manuscripts belonging to the said party of the first part.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

In presence of:

Victor Herbert, L.S.

[Seal.]

M. Witmark & Sons, By Isidore W. Witmark, President, L. S.

[fol. 1575] PLAINTIFFS' DEP. EX. 20

Schedule VII

Agreement, made and entered into this 2nd day of April, 1914, by and between Victor Herbert, of the City of New York, party of the first part, and M. Witmark & Sons, a corporation organized under the laws of the State of New York, party of the second part,

Whereas, the party of the first part has undertaken to write the musical score of a musical play entitled *"The Only Girl"* (Title subject to change)—the musical version of "Our Wives") —, and

Whereas, the party of the second part is desirous of acquiring the exclusive license to print, publish and sell said musical score and any part or parts thereof, and the

libretto and lyrics thereof, and any arrangement or selection of the whole or any part thereof,

Now, Therefore, This Agreement Witnesseth:

First. This agreement is made in consideration of the sum of One Dollar by each of the parties to the other in hand paid, the receipt whereof is hereby acknowledged and in consideration of the faithful performance by the party of the second part of the terms, covenants and conditions hereinafter contained; and this agreement is limited exclusively to matters in connection with the printing, publishing and selling copies of said score, libretto and lyrics and parts thereof.

Second. The party of the first part hereby grants to the party of the second part the sole and exclusive license and privilege to print, publish and sell in all countries copies of the libretto and lyrics and piano and vocal score of said musical play, or any part or portion of the said libretto, lyrics and score and copies of any arrangement or selection of the whole or any part of said libretto, lyrics and score during the term of the copyrights thereof and renewals of such copyrights.

[fol. 1576] Third. The party of the second part in consideration of said license, agrees at its own cost and expense, to do all acts and take all proceedings necessary or convenient to the procurement of copyright or copyrights with renewals of the same in said libretto, lyrics, and score and each and every part thereof and in all selections and arrangements thereof.

Fourth. That all arrangements and selections of said score and any part thereof shall be made under the supervision and direction of the party of the first part, at the cost and expense of the party of the second part and the party of the second part shall employ only such musician or musicians for this purpose as may be named by the party of the first part and that neither the said score nor any part thereof, nor any arrangement or selection of the whole or any part of said score shall be published by the party of the second part unless under the supervision of the party of the first part. The party of the second part further agrees to print and publish in first class style, the libretto, lyrics and piano and vocal score and separately such numbers, songs and pieces thereof and such arrange-

ments and selections thereof as may be directed by the party of the first part. The party of the second part agrees to insert upon each copy published the copyright notice or notices required by law, including the notice "that all performing rights are reserved". The party of the second part further agrees that no advertising matter of any kind shall appear on or in connection with the said publication, except such as relates to the said libretto, lyrics or score or the parts thereof, or other compositions composed by the party of the first part.

Fifth. The party of the second part hereby agrees to pay to the party of the first part the following royalties: Twelve and one-half (12½¢) cents for and upon each and every copy of the piano and vocal score of said musical [fol. 1577] and dramatic composition sold by the party of the second part; an amount equal to seven and one-half (7½%) per cent of the retail market price thereof for and upon each and every copy of any separate number or song or any combination of two or more numbers or songs of said musical play when printed together with the words thereof; an amount equal to seven and one-half (7½%) per cent of the retail marked price thereof upon each and every copy of any arrangement or selection of the whole or any part of the music of said musical play for piano or any solo instrument. The party of the second part agrees that the retail marked price of the various publications hereinbefore set forth shall be those customary and prevalent among first class music houses.

It is understood that no royalties are to be paid for single numbers designated as "new issues" but the total number of such "new issues" are not to exceed one thousand.

The party of the first part hereby assigns, transfers, sets over and conveys to the party of the second part all mechanical rights in the lyrics written and composed by him for the musical play above mentioned, and the said party of the second part hereby agrees to collect such royalties as may accrue to the party of the first part and will pay to the party of the first part one-half of his share of all moneys received by the said party of the second part.

Sixth. The party of the second part agrees not to distribute, sell, offer or expose for sale any copy of the said libretto and lyrics, piano and vocal score, or any part or portion of the said libretto, lyrics and scores or any ar-

rangement or selection of the whole or any part thereof, without the signature of the party of the first part conspicuously stamped or impressed upon the title page thereof, either by the party of the first part personally or by his duly authorized agent, and the party of the second part [fol. 1578] agrees immediately after printing any such copy to submit the same to the party of the first part or his duly authorized agent for signature. The party of the first part agrees at all reasonable times, personally or through his duly authorized agent, to impress or stamp his signature on any such copy as frequently as the party of the second part may reasonably require.

Seventh. The party of the second part further agrees that it will make regular settlements under this contract promptly on or about the fifteenth day of June and December in each year during the existence of said copyrights and that at the time of such settlement and payment, it will deliver to the party of the first part a full, true and itemized statement showing in detail all sales made by the party of the second part of any publication hereinbefore set forth and the royalties due said party of the first part at the time of such settlement.

Eighth. The said party of the second part agrees that it will keep or cause to be kept, books of account in which full and complete entry shall be made of all said publications printed and sold by the party of the second part and its agents and the said books shall at all reasonable times be open to the inspection of the party of the first part or his agent duly appointed in writing; and the said party of the first part or his attorney, shall have the right to examine any and all books of account of the said party of the second part containing any items, memoranda or information relating to the printing and sale of said publications, and to inspect and count the number of copies on hand.

Ninth. This contract shall not under any circumstances be considered as licensing the party of the second part to present or perform the said libretto, lyrics and musical score or any part thereof or granting any rights therein, [fol. 1579] except the publication rights.

Tenth. The term "score" as used herein shall include any additional musical numbers that may be written for said play at any time.

Eleventh. It is expressly understood that no numbers written by any person other than the party of the first part shall be published as part of the said libretto, lyrics and musical score nor shall any such number be published with a title page like or similar to that of the musical score.

Twelfth. It is mutually agreed that the rights hereby granted to the party of the second part by the party of the first part are dependent upon the faithful performance by it of all the covenants and conditions herein contained and the failure of the party of the second part or carry out or perform any of the covenants and conditions contained in this contract shall render its rights hereunder voidable at the option of the party of the first part and upon the party of the first part giving notice to the party of the second part terminating this agreement, then all rights which the party of the second part may obtain by virtue of this contract shall cease and terminate and shall at once revert to the party of the first part and shall belong to him as if this contract has never been made, without prejudice to any rights that the party of the first part may have by reason of any breaches of this contract; and in such event, or in the event of the bankruptcy or insolvency of the party of the second part or its abandonment of the music publishing business, the party of the second part agrees to immediately assign to the party of the first part in proper form, any and all copyrights which the party of the second part may have secured by virtue of this contract and at the same time to return all manuscripts belonging to the said party of the first part.

[fol. 1580] In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

In presence of:

Victor Herbert, L.S.

[Seal.]

M. Witmark & Sons, by Jay Witmark, Treas.

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PLAINTIFF'S DEPOSITION EXHIBIT NO. 21-E

Plaintiff's Exhibit No. 21-E
MAY 25 1938
REPORTER

AGREEMENT made this 16th day of 1919, between VICTOR HERBERT of the Borough of Manhattan, City of New York, hereinafter designated as the COMPOSER, and T.B.HARMS & FRANCIS, DAY & HUNTER, a New York corporation, hereinafter designated as the PUBLISHER.

WHEREAS, the Composer has undertaken to compose all the music for the musical production at present entitled name "Orpheus Wise" (to be changed) which is to be produced during the season

WHEREAS, the Publisher desires to acquire the exclusive license to print, publish and sell such music, or any part or parts thereof, or any arrangement or selection of or from the whole or any part thereof in the United States of America, and Canada,

NOW THEREFORE, in consideration of the mutual covenants in this agreement contained, it is agreed as follows:

I. The Composer grants to the Publisher the sole and exclusive license to print, reprint, publish and vend in the United States of America, and Canada, all the music that he shall compose for and that shall be introduced in the performance of and any arrangement of or selection from the whole or any part thereof made under his supervision, during the terms of the copyrights thereof and of the renewals of such copyrights.

II. The Composer grants to the Publisher, subject to the terms hereof, the right to secure copyrights in such countries and renewals of copyrights in the said scores and in each and every part thereof, and in all arrangements or selections of the whole or any part thereof. The Publisher agrees, at its own cost and expense, to do all acts and take all proceedings necessary or expedient to the securing of such copyrights and renewals of the same, and all such copyrights so secured shall be held by the Publisher in trust for the Composer. The Publisher agrees at its own cost

and expense, to do all acts and take all proceedings necessary or expedient to the securing of such copyrights and renewals of the same, and all such copyrights so secured shall be held by the Publisher in trust for the Composer. The Publisher agrees at its own cost and expense to take all necessary and proper steps for the purpose of protecting the said copyrights from infringements or otherwise. That all arrangements and selections of such scores and any part thereof shall be made under the supervision of the Composer, but at the cost and expense of the Publisher.

III. (a) The Publisher agrees to insert upon the title page of each copy published all the copyright notices required by the law of each country, and to insert on each such copy the name of Victor Herbert as sole composer of the music so published.

(b) The Publisher agrees that all publications containing any of the music of the Composer shall be devoted exclusively to the compositions of the Composer and shall contain neither the whole nor any part of the work of any other composer, nor shall any of the music of the Composer be joined with the music of any other Composer in any collective or composite work. And the Publisher further agrees that the title page of any publication containing the music of the Composer shall contain the name of no other Composer save and except that of Victor Herbert.

IV. The Publisher agrees to pay to the Composer upon each and every copy sold the following royalties:

(a) Eight cents per copy for each pianoforte copy of each separate number.

(b) Twelve and one-half cents for and upon each and every copy of the piano score.

(c) Fifteen cents per copy for each vocal score.

(d) Fifteen cents upon each and every copy of

any selection for any instrument.

(e) An amount equal to fifteen percent of the retail marked price thereof upon each band or orchestra arrangement and of any miscellaneous numbers or arrangements not otherwise herein provided for.

V. The Publisher further agrees:

(a) To pay regularly on or before the second Tuesdays of January and July in each year during the terms of the copyrights and of the renewals of copyrights in said scores, arrangements and selections, and so long thereafter as it shall continue to publish and sell said scores, or any part thereof, or any arrangement or selection thereof, the royalties earned from, because or on account of the publication and sale of said scores, arrangements and selections, or any part thereof, such payment to be made to the Composer at his residence, No.321 West 108th Street, Borough of Manhattan, New York City.

(b) At the same time to account for all the copies of the whole or any part of said scores, selections and arrangements printed and sold by it, and to deliver to the Composer, or the duly authorized representative of the Composer, at No.321 West 106th Street, Borough of Manhattan, New York City, a full, true and itemized statement showing in detail the number of copies of the whole or any part of said scores selections and arrangements printed and sold by it during the preceding six months, the number of such copies stamped with the autograph signature of the Composer as hereinafter provided, the number of stamped and unstamped publications on hand, and the royalties due to the said Composer.

(c) The Publisher agrees not to distribute, sell offer or expose for sale any copy of the said scores, or of

any part thereof, or of any arrangement or selection of the whole or any part thereof, without the signature of the said Composer conspicuously stamped or impressed upon the title page thereof, either by the Composer or by such other person as may be thereunto duly authorized by the Composer, and the Publisher agrees immediately after printing any copy of any such scores or of any parts, selections or arrangements thereof, to submit the same to the Composer for signature. The Composer agrees that at all reasonable times his representative will impress or stamp said signature on any such copy as frequently as the Publisher may reasonably require.

(d) The Publisher agrees that it will keep or shall cause to be kept true books of account in which full and complete entries shall be made of the number of copies of the scores and parts thereof, and of the selections and arrangements and parts thereof, printed and sold by the Publisher and its agents, and the said books shall at all reasonable times be open to the inspection of the Composer, or his agents or representatives with the privilege to make copies of the same; and the said Publisher agrees to keep all original orders for the printing of said scores, parts, selections and arrangements, and all original orders for shipments of said publications, and that said Composer and his representatives shall have the right to examine any and all books of account of said Publisher containing any item, memoranda or information relating to the said printing, shipment and sales of said publications, as well as the stock of said publications on hand, and all orders for the printing and shipment of said publications.

(e) The Publisherm agrees that all orders for the printing of said publications shall be first submitted to the Composer, or some other person thereunto duly

appointed by the Composer, who shall countersign the same, and no order for the printing of said publications shall be given unless the same is countersigned.

(f) The Publisher agrees that all the printing of said publications shall be done at and by one and the same printing house, located in New York City.

(g) The Publisher also agrees to secure from the printer and to deliver to the Composer every three months, in the first weeks of December, March, June and September in each year, a full true and itemized statement signed by the printer in his own hand, showing the number of copies of each of the publications above mentioned printed and delivered by him during the preceding three months.

(h) It is expressly agreed that the Composer shall be entitled to the payment of the said royalties in full, free from any charge or deduction whatsoever; the Publisher hereby agrees to arrange with the Author of the lyrics of said production for his compensation, and the Publisher hereby assumes the payment of all compensation and royalties that the author of the lyrics may be entitled to from or because of the publication and sale of the said music and lyrics.

VI. The Publisher agrees immediately after the publication of the score of said production and parts thereof, to deliver to the Composer free of cost two complete copies thereof.

VII. Nothing herein contained shall be construed as granting to the Publisher the right to represent or perform the music, musical numbers, settings and orchestrations, or any part thereof, or any selection or arrangement thereof or as granting to it the right to make parts of instruments serving to reproduce mechanically such music, musical numbers, settings and orchestrations, or any part, arrangement or selection thereof, nor as granting to it

any rights in such music, except the right to copyright and renew copyrights in the same in trust for the Composer, and to print, reprint, publish and vend the same in sheet music form only in accordance with the terms of this agreement.

The Composer agrees to pay to the Publisher as agent for name of lyric writer fifty percent of all moneys which he shall actually collect on account of the reproduction on phonograph records of any number containing any lyrics written by

VIII. The Publisher agrees not to assign or make any other disposition of this contract, or any right, title or interest therein, nor to grant any right, title or interest therein or in said scores or any part thereof, or in any selection or arrangement thereof, to any person, firm or corporation without the written consent of the said Composer first had and obtained.

The grant of said rights being personal to the Publisher, the said rights shall not be transferrable by operation of law or legal proceedings.

IX. The rights of the Publisher under this agreement are dependent upon the due performance by it of each of the terms and covenants herein contained, all of which are hereby agreed upon as being of the essence of this contract, and in case of the Publisher's default in the due performance of any of the terms and covenants on its part to be performed, the Composer may at his election mail a notice addressed to the Publisher, whose office for the purpose of this agreement is fixed at 62-64 West 45th Street, New York City, specifying the nature of the default complained of, and in case said default shall not be rectified in five days, this agreement shall forthwith terminate and all rights hereby granted to the Publisher shall thereupon cease and come to an end, but without prejudice to any right or rights to compensation or damages or to any cause of action which the

Composer may or might have in respect to any breach of this agreement.

It is agreed that if the Publisher shall be adjudicated a bankrupt in proceedings instituted by or against it, or take advantage of the insolvency laws of any State, Territory or Country, or should its property be advertised for sale in pursuance of any judicial, statutory or summary proceedings, or a Receiver of its property be appointed, or in the event of the voluntary or involuntary dissolution of the Publisher, then and in any of such events this contract shall end and all rights granted thereunder to the Publisher shall revert to the said Composer, and he shall be at liberty to make such disposition of the publishing rights of such music, musical settings, numbers, orchestrations, etc., as he may desire, and any and all payments theretofore made to him shall be retained by and belong to him absolutely, and in any such case or in the case of the termination of this agreement because of the Publisher's breach of any covenant, the said Publisher agrees that it and its legal representatives will immediately assign to said Composer in due form any and all copyrights and renewals thereof which said Publisher may have secured in pursuance of this contract, and to return and deliver to the Composer all manuscripts belonging to the said Composer, and all copies of all scores of said production and all parts thereof and of all arrangements and selections and parts thereof in its possession or under its control.

IN WITNESS WHEREOF, the Composer has hereunto set his hand and seal and the Publisher has caused this agreement to be subscribed and itscorporate seal to be affixed hereto the day and year first above written.

In the presence of: T.B.HARMS & FRANCIS,DAY & HUNTER

By Louis Dreyfus, President

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[fol. 1588] PLAINTIFFS' DEPOSITION EXHIBIT 22

Schedule I

Acknowledgements from the Copyright Office of the Receipt of Two Copies of the Following Compositions from "The Red Mill"

1		Dramatic Composition
7	(6)	Because You're You " " " Arr. for Trombone Solo " " " " " Cornet Solo " " " " " Mandolin Orch. " " " " " Guitar Solo " " " " " Hotel Orch.
8		Entrance (Governor and Chorus)
9		Every Day Is Ladies Day With Me
10		Good-A-Bye John
11		Go While the Goin' Is Good
12		The Red Mill Fantasia
13		Finale 11
15	(2)	If You Love But Me " " " " " Arr. for Orchestra
16		I'll Ring the Bell
17		I'm Always Doing Something I Don't Want to Do
21	(4)	In the Isle of Our Dreams " " " " " " Arr. for Hotel Orch. " " " " " " " " Cornet Solo " " " " " " " " Trombone Solo
23		The Legend of the Mill " " " " " Arr. for Hotel Orch.
25	(2)	Mignonette " Arr. for Hotel Orch.
26		Moonbeams
27		Opening Chorus Act 1
29	(2)	The Streets of New York " " " " " Arr. for Hotel Orch.
30		When You're Pretty the World Is Fair
32	(2)	Whistle It " " Arr. for Hotel Orch.
33		A Widow Has Ways
34		You Never Can Tell About a Woman
35		The Red Mill Vocal Score
37	(2)	Lancers "
39	(2)	March and Two Step Arr. for Band " " " " " " Orchestra
40		Schottische Arr. for Orchestra
43	(3)	Selection " Arr. for Orchestra " " " Band
46	(3)	Waltzes " Arr. for Mandolin Orch. " " " Orchestra
46		Copyrights

[fol. 1589] Certificates of Publication Covering the Following Arrangements of "Moonbeams" from "The Red Mill"

11	Arrangements

Mixed Voices
Vocal Orchestra
Male Voices
Duet in D
Female Voices
Two Part Song
Three Part Song
S. A. B.
Cello and Piano
Violin- Cello and Piano
Violin and Piano

Renewal Certificates Covering the Following Compositions from "The Red Mill"

1		Dramatic Composition
2		Because You're You
3		Act 1 Opening Chorus
4		" 2 " "
5		Ensemble
6		Entrance Song and Chorus
7		Everyday Is Ladies Day with Me
8		Good-A-Bye John
9		Go While the Going Is Good
10		Finale 1
11		" 2
12		If You Love but Me
13		I'll Ring the Bell
14	Renewals	In the Isle of Our Dreams
15		I'm Always Doing Something I Don't Want to Do
16		Lancers
17		The Legend of the Mill
18		Mignonette
19		Moonbeams
20		Overture
21		Selection
22		The Streets of New York
23		Teach Them What to Say
24		Whistle It
25		Vocal Score
26		When You're Pretty and the World Is Fair
27		A Widow Has Ways
28		You Never Can Tell About a Woman
11		Arrangements on Moonbeams
28		Renewals
46		Copyrights (originals)
85		Separate copyrights and renewals

[fol. 1590] PLAINTIFFS' DEPOSITION EXHIBIT 23

Schedule II

Certificates of Publication Covering the Following Numbers from "Naughty Marietta"

1		Dramatic Composition
		(Ah Sweet Mystery of Life
		" " " " " Arr. for Violin, Cello & Piano
		" " " " " " " Dance Orch.
		" " " " " " " Piano
		" " " " " " " Violin & Piano
		" " " " " " " Duet In D
		" " " " " " " " " B Flat
17	(16)	" " " " " " " Three Part Song
		" " " " " " " Mixed Voices
		" " " " " " " Male Voices
		" " " " " " " Two Part Song
		" " " " " " " Male Voices
		" " " " " " " Vocal Orch.
		" " " " " " " Female Voices
		" " " " " " " S. A. B.
		" " " " " " " Cello & Piano
18		All I Crave Is More of Life
19		Barn Dance Schottische
20		Dance of the Marionettes
		(The Dream Melody
23	(3)	(The Dream Melody Arr. for Orchestra
		(The Dream Melody " " Band

24		If I Were Anybody Else but Me
		(I'm Falling in Love With Someone
28		" " " " " " Arr. for Mixed Voices
		" " " " " " " " Hotel Orch.
		" " " " " " " " Mandolin Orch.
		(Italian Street Song
		" " " Arr. for Hotel Orch.
		" " " " " Duet in F
		" " " " " Soprano Solo
37	(9)	" " " " " Mixed Chorus
		" " " " " Three Pt. Song
		" " " " " S. A. B.
		" " " " " Two Pt. Song
		" " " " " Voc. Orch.
38		It Never Never Can Be Love
40	(2)	(It's Pretty Soft for Simon
		" " " " " " " Hotel Orch.
41		Lancers
42		Live for Today
43		Mister Voodoo
45	(2)	(Naughty Marietta
		" " " " Hotel Orch.
46		Neath the Southern Moon
47		New Orleans Jeunesse
		(Selection
51	(4)	" " " Mandolin Orch.
		" " " Band
		" " " Orchestra
52		The Sweet By and By
54	(2)	(Tramp Tramp Tramp
		" " " " " T.T.B.B.

[fol. 1591] Certificates of Publication Covering the Following Numbers from "Naughty Marietta"

56	(2)	(Waltzes
		" Arr. for Orchestra
57		We've Hunted the Wolf in the Forest
58		You Marry a Marionette

58 Copyrights

[fol. 1592] PLAINTIFFS' DEPOSITION EXHIBIT 24

Schedule III

M'lle. Modiste

Music—Victor Herbert
Book—Henry Blossom, Jr.

Partial List of Original Copyrights—in name of:
(M. Witmark & Sons, New York, as trustees for Victor Herbert
and
(Henry Blossom, Jr.

1 Book—Copyrighted October 6, 1905—Entry D 7367
2 Vocal Score—Copyrighted October 30, 1905—Entry C 105903

Individual Numbers

"If I Were on the Stage" (Note: original title of "Kiss Me Again")

3 Song:—Copyrighted October 13, 1905—Entry C 104750
4 Arrangement for Hotel Orchestra—Copyrighted November 3, 1905 Entry C 106471
5 Arrangement for Mandolin Orchestra by T. P. & Geo. J. Trinkaus Copyrighted December 21, 1906—Entry C 137558

"In Dreams So Fair"
Song:—Copyrighted January 25, 1906—Entry C 112826

"Kiss Me Again" (part of "If I were on the Stage")
Copyrighted: April 16, 1915 —Entry E 358936—song
June 7, 1915 —Entry E 364261—Vocal Orch. Arrg.
April 20, 1916 —Entry E 388379
Oct. 18, 1916 —Entry E 398837
April 12, 1918 —Entry E 424236—Band Arrangement
May 10, 1918 —Entry E 427376—Arrg. by Otto Langey
August 20, 1921—Entry E 533584
August 11, 1928—Entry E 699618—
Dec. 7, 1931 —Entry E 523779)Arrg. for violin
E 523781)—and piano

"I Want What I Want When I Want It"
Copyrighted: October 4, 1905 —Entry C 104028
January 20, 1906—Entry C 112488
May 5, 1906 —Entry C 120630

"Chorus of Footmen"
Song Copyrighted October 13, 1905—Entry C 104751
Piano Arrangement Copyrighted October 13, 1905—Entry C 104752

"Dear Little Girl Who Is Good"
Copyrighted September 29, 1905—Entry C 103563

[fol. 1593]

"Hats Make the Woman"
Copyright September 29, 1905—Entry C 103564

"I'm Always Misunderstood"
Copyright October 7, 1905—Entry C 104282

"I Should Think You Could Guess"
Copyright October 7, 1905—Entry C 104283

"Mascot of the Troop"
Song—Copyright October 7, 1905—Entry C 104281
March—Copyright July 2, 1906—Entry C 134697
Two Step for Piano—Arrg. by Karl L. Hoschner
Copyright January 20, 1906—Entry C 112489
Arrg. for Hotel Orchestra
Copyright October 27, 1905—Entry C 105784
March & Two Step Arrg. for Orchestra
Copyright February 21, 1906—Entry C 114739

"Keokuk Culture Club"
Song—Copyright October 16, 1905—Entry C 105025

"The Time, The Place, and The Girl"
Song—Copyright October 12, 1905—Entry C 104690
Arrg. for Hotel Orch.
Copyright November 3, 1905—Entry C 106470
Arrg. by Trinkaus for Mandolin Orch.
Copyright February 9, 1906—Entry C 113860

"The Nightingale and The Star"
Copyright October 14, 1905—Entry C 104803

"When The Cat's Away the Mice Will Play"
Song—Copyright October 16, 1905—Entry C 105026
Arrg. by George Trinkaus for Mandolin Orch.
Copyright December 20, 1924—Entry C 606021

"Ze English Language"
Song—Copyright October 12, 1905—Entry C 104691

"Love Me, Love My Dog"

39 Song—Copyright September 25, 1905—Entry C 103305

Opening Chorus—Act I

40 Copyright October 23, 1905—Entry C 105504

[fol. 1594]

Finale Act I

41 Copyright November 3, 1905—Entry C 106468

Opening Chorus—Act II

42 Copyright October 20, 1905—Entry C 105311

Entr Acte

43 Piano—Copyright December 29, 1905—Entry C 105023

44 Arrg. for Orch. by H. L. Rogers—Copyright January 29, 1906 Entry C 113103

Ballet

45 Piano—Copyright October 16, 1905—Entry C 105023

Selections

46 Piano Arrg. Copyright October 30, 1905—Entry C 105902

47 Orch. arrg. by Otto Langey Copyright January 15, 1906 Entry C 112206

Miscellaneous

48 Fantasia Arrangement by Tom Clark for piano and trombone Copyright August 24, 1907—Entry C 160407

49 ditto for piano and cornet Copyright August 24, 1907—Entry C 160408

50 Waltz Arrangement for Orchestra by Otto Langey Copyright March 3, 1906—Entry C 115495

51 ditto for piano by Karl J. Hoschner Copyright February 21, 1906, Entry C 114732

52 March and Two Step Arrangement for Orchestra by Otto Langey Copyright February 21, 1906—Entry C 114738

53 Lancers Arrangement for Orchestra by Otto Langey Copyright January 29, 1906—Entry C 113104

[fol. 1595] PLAINTIFFS' DEPOSITION EXHIBIT 25

Renewals of Copyrights

M'lle. Modiste

1 Book—Renewed in name of Marjorie Wilson, widow of author; November 5, 1932—Entry R 22194 (7367)

Following Renewed in name of Ella Herbert Bartlett, Clifford Herbert, and Marjorie Wilson:

Vocal Score

2 December 2, 1932—Entry R 22367 (105903)

"If I Were on The Stage" ("Kiss Me Again")

3 Song December 2, 1932—Entry R 22366 (104750)

4 Hotel Orch. Arrg. December 10, 1932—Entry R 22495 (106471)

"I Want What I Want When I Want It"

5 November 5, 1932—Entry R 22026 (104028)

"Chorus of Footmen"

6 Song December 2, 1932—Entry R 22368 (104751)

7 Piano Arrg. December 2, 1932—Entry R 22369 (104752)

"Dear Little Girl Who Is Good"

8 November 5, 1932—Entry 22034 (103563)

"Hats Make the Woman"
9 November 5, 1932—Entry R 22025 (103564)
"I'm Always Misunderstood"
10 November 5, 1932—Entry R 22022 (104282)
"I Should Think that You Could Guess"
11 November 5, 1932—Entry R 22023 (104283)
"Mascot of the Troop"
12 Song—November 5, 1932—Entry R 22021 (104281)
"Keokuk Culture Club"
13 Song—December 2, 1932—Entry R 22387 (105025)
"The Time, The Place and The Girl"
14 Song—December 2, 1932—Entry R—22363 (104690)
15 Hotel Orch. Arr. December 10, 1932—Entry R 22494 (106470)
[fol. 1596]
"The Nightingale and The Star"
16 December 2, 1932—Entry R 22375 (104803)
"When The Cat's Away"
17 December 2, 1932—Entry R 22388 (105026)
"Ze English Language"
18 December 2, 1932—Entry R 22364 (104691)
"Love Me, Love My Dog"
19 October 5, 1932—Entry R 21656 (103305)
Opening Chorus—Act I
20 December 2, 1932—Entry R 22402 (105504)
Finale—Act I
21 December 9, 1932—Entry R 22493 (106468)
Opening Chorus—Act II
22 December 2, 1932—Entry R 22395 (105311)
Entr Act
23 Piano—January 3, 1933—Entry R 33851 (111033)
Ballet
24 Piano—December 2, 1932—Entry R 22386 (105023)
Selections
25 Piano—December 2, 1932—Entry R 22413 (105902)

PLAINTIFFS' DEPOSITION EXHIBIT 26

Schedule IV

Red Mill

Original Copyrights issued to M. Witmark & Sons—as trustees for Victor Herbert & Henry Blossom, Jr. Renewals issued to Ella H. Bartlett, Clifford Herbert and Marjorie Wilson.

		Original		Renewals		
		Date	Entry No.	Date	Entry No.	
1	Book	Aug. 27, 1906	D-8998	Jan. 29, 1934	R-29233	1
2	Vocal Score	Sept. 27, 1906	C-130652	Jan. 6, 1934	R-28441	2
	Individual Numbers					
3	Overture—Piano Score	Sept. 24, 1906	C-130367	Jan. 6, 1934	R-28420	3
4	Opening Chorus—Act I	July 25, 1906	C-126164	Aug. 25, 1933	R-26740	4
5	Entrance Song and Chorus	Aug. 22, 1906	C-127973	Aug. 25, 1933	R-26766	5
6	Finale I	Aug. 6, 1906	C-126953	Aug. 25, 1933	R-26749	6
7	Opening Chorus—Act II	Aug. 6, 1906	C-126954	Aug. 25, 1933	R-26750	7
8	Ensemble	Aug. 10, 1906	C-127259	Aug. 25, 1933	R-26756	8
9	Finale II	Sept. 24, 1906	C-130368	Jan. 6, 1934	R-28425	9
10	Because You're You	Sept. 7, 1906	C-129045	Sept. 21, 1933	R-27086	10
11	Every Day Is Ladies Day	Sept. 7, 1906	C-129046	Sept. 21, 1933	R-27087	11
12	Good-a-bye, John	Sept. 24, 1906	C-130414	Jan. 6, 1934	R-28433	12
13	Go While the Going is Good	Aug. 22, 1906	C-127974	Aug. 25, 1933	R-26767	13
14	If You Love But Me	Mar. 30, 1907	C-147028	Apr. 3, 1934	R-30899	14
15	I'll Ring the Bell	Sept. 24, 1906	C-130415	Jan. 6, 1934	R-28434	15
16	I'm Always Doing Something	Aug. 22, 1906	C-127975	Aug. 25, 1933	R-26768	16
17	In the Isle of Our Dreams	Aug. 22, 1906	C-127977	Aug. 25, 1933	R-26770	17
18	Legend of the Mill	Aug. 6, 1906	C-126956	Aug. 25, 1933	R-26752	18
19	Mignonette	July 19, 1906	C-125813	Aug. 25, 1933	R-26734	19
20	Moonbeams	Oct. 6, 1906	C-131451	Jan. 6, 1934	R-28455	20
21	Streets of New York	Aug. 22, 1906	C-127976	Aug. 25, 1933	R-26769	21
22	Teach Them What To Say	Aug. 10, 1906	C-127258	Aug. 25, 1933	R-26755	22
23	When You're Pretty and the World is Fair	Jan. 24, 1907	C-140923	Jan. 29, 1934	R-29202	23
24	Whistle It	Aug. 6, 1906	C-126955	Aug. 25, 1933	R-26751	24
25	A Widow Has Ways	July 19, 1906	C-125812	Aug. 25, 1933	R-26733	25
26	You Never Can Tell About A Woman	July 19, 1906	C-125811	Aug. 25, 1933	R-26732	26

PLAINTIFFS' DEPOSITION EXHIBIT 26—Continued

Schedule IV

Red Mill

Original Copyrights issued to M. Witmark & Sons—as trustees for Victor Herbert & Henry Blossom, Jr. Renewals issued to Ella H. Bartlett, Clifford Herbert and Marjorie Wilson.

		Original		Renewals		
		Date	Entry No.	Date	Entry No.	
27	Because You're You—Arrg't for Guitar by T. P. & Geo. J. Trinkaus	Mar. 5, 1907	C-144656			
28	In The Isle of Our Dreams—Arrg't for Mandolin Orch. by Trinkaus	Feb. 2, 1907	C-142116			
29	Selections—Arrg'd for Military Band by Herbert L. Clarke	Mar. 4, 1907	C-144584			
30	March and Two Step—Arrg'd for Band by Herbert L. Clarke	Mar. 4, 1907	C-144585			
31	March and Two Step—Arranged for Orchestra by Otto Langey	Dec. 31, 1906	C-139003			
32	Waltzes—Arrg'd for Mandolin Orch. by Trinkaus	May 1, 1907	C-150181			
33	Schottische—Arrg'd for Orchestra by Otto Langey	Dec. 31, 1906	C-139002			
[fol. 1598]						
34	Lancers—Arrg'd by Otto Langey Orchestra Parts only	Oct. 29, 1906	C-133348			
35	Because You're You—Arrg'd for Mandolin Orch. by Trinkaus	Dec. 13, 1906	C-136836			
36	Selections—Arrg'd for Orchestra by Otto Langey	Nov. 17, 1906	C-134786			
37	Waltzes—Arrg'd for Orchestra by Otto Langey	Dec. 7, 1906	C-136302			
38	If You Love But Me—Arrg'd for Orchestra by W. C. O'Hare	June 4, 1907	C-153642			
39	Fantasia—Arrg. for Piano and Trombone by Tom Clark	Aug. 24, 1907	C-16404			
40	Fantasia—Arrg. for Piano and Cornet by Tom Clark	Aug. 24, 1907	C-16405			
41	In the Isle of Our Dreams—Song with Guitar Accom. arr. by Trinkaus	Mar. 8, 1907	C-146181			
42	Selections—Arrg. for Mandolin Orch. by Trinkaus		C-146606			
43	Waltzes—Arrg. for Military Band by Herbert L. Clarke	Apr. 3, 1907	C-147325			
44	Lancers—Arrg. for Piano by Karl L. Hoschna	Jan. 23, 1908	C-172634	Apr. 11, 1935	R-37148	27
	Selections—Arrg. by Karl L. Hoschna			1934	R-28472	28

44 Original Copyrights
28 Renewals
72 Copyrights Total

PLAINTIFFS' DEPOSITION EXHIBIT 27

Schedule V

Babes in Toyland

Original Copyrights issued to M. Witmark & Sons—as trustees for Victor Herbert & Glen MacDonough. Renewals issued to Ella H. Bartlett, Clifford Herbert and Alan MacDonough.

		Original		Renewals		
		Date	Entry No.	Date	Entry No.	
1	Book	June 15, 1903	D-3587	June 26, 1930	9435	1
2	Vocal Score	Aug. 22, 1903	C-53514	Aug. 22, 1903	R-9900	2
	Individual Numbers					
3	March of the Toys—Piano Score	June 25, 1903	C-50193	July 25, 1930	R-9794	3
4	Babes in Toyland Waltzes—Arrg't for Piano by Karl Hoschna	Aug. 11, 1903	C-52908	Sept. 3, 1930	R-9990	4
5	Selections—Piano Arrg't by K. Hoschna	Aug. 13, 1903	C-53048	Sept. 3, 1930	R-9991	5
6	March and Two Step—Arr. for Piano by Hilding Anderson	Aug. 27, 1903	C-53819	Sept. 3, 1930	R-10028	6
7	Toyland	May 14, 1903	C-47877	July 25, 1930	R-9793	7
8	Opening Act 3—Chorus	Sept. 23, 1903	C-55185	Sept. 24, 1930	R-10300	8
9	Opening Act 2— "	Aug. 13, 1903	C-53068	Sept. 3, 1930	R-9992	9
10	Barney O'Flynn	July 1, 1903	C-50620	July 25, 1930	R-9790	10
11	Beatrice Barefacts	May 28, 1904	C-71675	June 3, 1931	R-14757	11
12	Before and After	May 11, 1903	C-47607	July 25, 1930	R-9792	12
13	Birth of the Butterfly—Finale Act I	Aug. 19, 1903	C-53345	Sept. 3, 1930	R-10023	13
14	Country Dance	Aug. 13, 1903	C-53067	Sept. 3, 1930	R-10021	14
15	Contrary Mary	May 11, 1903	C-47608	Sept. 3, 1930	R-9989	15
16	Floretta	June 5, 1903	C-49100	July 25, 1930	R-9796	16
17	Go to Sleep, Slumber Deep	July 22, 1903	C-51815	July 22, 1930	R-9798	17
18	Gavotte (Eccentric Dance) Piano	Aug. 19, 1903	C-53344	Sept. 3, 1930	R-10024	18
19	He Won't Be Happy Till He Gets It (Words by Chas. N. Douglas)	Jan. 11, 1904	C-62674	Jan. 14, 1931	R-12327	19
20	I Can't Do That Sum	Oct. 31, 1903	C-57876	Nov. 1, 1930	R-11039	20
21	In the Toymakers Workshop	Oct. 7, 1903	C-56203	Nov. 19, 1930	R-11431	21
22	Jane	June 17, 1903	C-49789	July 25, 1930	R-9795	22
23	John Johnson	May 14, 1903	C-47876	Sept. 3, 1930	R-9988	23
24	Legend	Aug. 22, 1903	C-53511	Sept. 3, 1930	R-10027	24
25	Mignonette	Aug. 19, 1903	C-53342	Sept. 3, 1930	R-10022	25
26	Military Ball	July 1, 1903	C-50619	July 25, 1930	R-9791	26
27	The Moon Will Help You Out	July 8, 1903	C-51047	July 25, 1930	R-9799	27
28	Never Mind Bo Peep	Aug. 19, 1903	C-53343	Sept. 3, 1930	R-10025	28
29	Our Castle in Spain	Dec. 7, 1903	C-60317	Dec. 10, 1930	R-11786	29
30	Song of the Poet	Aug. 22, 1903	C-53509	Sept. 3, 1930	R-10026	30
31	With Downcast Eye—Renewals	May 28, 1903	C-48664	July 25, 1930	R-9797	31
32	I Can't Do That Sum—Polka Two Step Arr. by Karl Hoschna	June 11, 1904	C-72377			

32 Original Copyrights
31 Renewals
63 Copyrights Total

[fol. 1600] CONDENSATION OF PLAINTIFFS' DEPOSITION EXHIBIT 29

This exhibit contains a list of approximately 125 copyrighted compositions, of which the words or music were written by Edgar Leslie. Specimen compositions giving the collaborator, the publisher, the date of copyright, and the show, if any, are the following:

Composition	Collaborator/s	Publisher	Copyright Date	Renewed	Show
A Little Bit Independent But Easy on the Eyes	Joe Burke	Bregman Vocco & Conn	10/22/35		
America I Love You	Archie Gottler	Kalmar Puck & Abrahams Consolidated	9/ 3/15		
Among My Souvenirs	Horatio Nicholls	DeSylva Brown & Henderson	10/ 5/27		
At A Perfume Counter	Joe Burke	Bregman, Vocco & Conn	1/27/38		Casa Manana
California and You	Harry Puck	Kalmar Puck & Abrahams Consolidated	4/18/14		
For Me and My Gal	E. Ray Goetz–George W. Meyer	Waterson Berlin & Snyder	1/24/17		
Good Luck Mary	A. Bryan–A. Piantadosi	Dora Cooper	12/16/09	1/ 26/37—Edgar Leslie 12/13/37—Al. Piantadosi 12/14/37—Edgar Leslie	
In A Little Gypsy Tea Room	Joe Burke	Joe Morris Music Co.	5/ 8/35		
It Looks Like Rain in Cherry Blossom Lane	Joe Burke	Joe Morris Music Co.	5/10/37		
Me and the Man in the Moon	Jimmie Monaco	Bregman Vicco & Conn	11/ 5/28		
Moon over Miami	Joe Burke	Irving Berlin Inc.	12/17/35		
Oh What A Pal was Mary	Bert Kalmar Pete Wendling	Waterson Berlin & Snyder	7/ 8/19		
On Treasure Island	Joe Burke	Joe Morris Music Co.	10/ 4/35		
Robins and Roses	Joe Burke	Irving Berlin, Inc.	4/ 3/36		
Romance	Walter Donaldson	Bregman, Vocco & Conn	12/31/29		Cameo Kirby
When the Grown Up Ladies Act Like *Babies*	Joe Young Maurice Abrahams	Maurice Abrahams Music Co.	10/17/14		
I'm A Yiddish Cowboy	Al Piantadosi Halsey K. Mohr	Shapiro Bernstein & Co.	4/ 8/08	1 /31/36—Al Piantadosi 2/ 6/36—Edgar Leslie	
He'd Have to Get Out and Get Under His Automobile	Grant Clarke M. Abrahams	Maurice Abrahams Music Co.	11/1/13		

[fol. 1601] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ANNE PAUL NEVIN

UNITED STATES OF AMERICA,
State of Maine,
County of Hancock, ss:

Anne Paul Nevin, being duly sworn, deposes and says:

I am one of the complainants herein, and the widow of Ethelbert Nevin, who departed this life in 1901. He was a pianist and composer, and his memory is one of the bright spots in American music. He was born in 1862 in Edgeworth, Pa., and in his comparatively short life he composed some of the most famous songs in this nation. To have done nothing else than to have composed "The Rosary" and "Mighty Lak a Rose" would have been sufficient to have established his reputation.

In his lifetime, my husband never received any money whatever from the public performance for profit of his copyrighted musical compositions. It was not until I joined the American Society, long after his death, that I began to benefit from the royalties from the licensing for public performance for profit on his compositions.

With respect to many of the copyrights, the original term has expired and I have renewed the term of the copyrights in my name, as his widow, pursuant to the provisions of the Copyright Act.

I have been receiving substantial royalties from the Society, and since 1928 I have received in excess of $4,000 each year from the Society as my participation in the licensing for public performance for profit of my husband's songs. This is a very substantial sum of money to me, and were it not for the Society I would not be in receipt of anything for these public performing rights. I depend for my livelihood chiefly upon this income from the Society.

Herewith is a list of the various works that my husband wrote from 1874 down to the time of his death, as well as the posthumous works published after his death, with the years in which they were published:

[fol. 1603]

1874

Lilian Polka ..... Piano

1880

Apple Blossoms ..... Song and Dance

1881

The Lovers (In the garden were leisurely walking) ..... Song
The Milk Maid (Shame upon you, Robin) ..... Song

1886

I once had a sweet little doll, dears ..... Song
Stars of the summer night ..... Song
Summer Longings (Ah! My heart is weary waiting) ..... Song
When all the world is young, lad ..... Song

1887

Bed-time Song (Sway to and fro in the twilight gray) ..... Song
Cradle Song (Sleep, baby, sleep) ..... Song

1888

Op. 2, Sketch Book
1. Gavotte ..... Piano
2. Im wunderschonen Monat Mai ('Twas in the lovely month of May) ..... Song
3. Love Song ..... Piano
4. Du bist wie eine Blume (Oh! fair, and sweet and holy) ..... Song
5. Berceuse ..... Piano
6. Lehn' deine Wang (Oh! let thy tears fall fast with mine) ..... Song
7. Serenata ..... Piano
8. Oh! that we two were maying ..... Song
9. Valse Rhapsodie ..... Piano
10. In winter I get up at night ..... Song
11. Of speckled eggs the birdie sings ..... Song
12. Dark brown is the river ..... Song
13. The night has a thousand eyes ..... Mixed chorus and violin obbligato

Op. 3, Three Songs
1. Deep in a rose's glowing heart ..... Song with violin and 'cello obbligati
2. One spring morning ..... Song with violin and 'cello obbligati
3. Doris ..... Song with violin and 'cello obbligati

Serenade (Good-night, good-night, beloved) ..... Song
May Day Dance ..... Unison chorus, with piano 4-hand acc.

[fol. 1604]

1889

Op. 4, Five Songs
1. Herbstgefuhl (Autumn sadness) ..... Song
2. Chanson des Lavandieres (What care I, unwilling) ..... Song
3. 'Twas April ..... Song
4. Raft Song (From upwards my raft drifts down) ..... Song
5. Before the daybreak ..... Christmas Carol

The Earth has Grown Old ..... Christmas Carol
Everywhere, Everywhere, Christmas Tonight ..... Christmas Carol
Wynken, Blynken and Nod ..... Solo and chorus of mixed voices with piano 4-hand acc.

1890

Op. 6, Three Duets for the Piano
1. Valse Caprice ..... Piano, four hands
2. Country Dance ..... " " "
3. Mazurka ..... " " "

Op. 7, Four Pieces
1. Valser Gentile ..... Piano
2. Slumber Song ..... Piano
3. Intermezzo ..... Piano
4. Song of the Brook ..... Piano

Jesu, Jesu, Miserere	Sacred Song
The Silent Skies are Full of Speech	Christmas Carol
Nunc Dimittis	Mixed Voices
Benedictus	Mixed Voices
Jubilate	Mixed Voices
1891	
Op. 8, 1. Melody	Violin and Piano
2. Habanera	Violin and Piano
Une Vieille Chanson (If a lovely lawn there be)	Song
Barcarolle (The crimson glow of sunset fades)	Men's Voices
Op. 12, Five Songs	
1. A Summer Day	Song
2. Beat upon mine little heart	Song
3. In a Bower	Song
4. Little Boy Blue	Song
5. At Twilight	Song
Op. 13, Water Scenes	
1. Dragon Fly	Piano
2. Ophelia	Piano
3. Water Nymph	Piano
4. Narcissus	Piano
5. Barcarolle	Piano
[fol. 1605] **1892**	
The Rhine and the Moselle	Chorus of Men's Voices
Op. 16, In Arcady	
1. A Shepherd's Tale	Piano
2. Shepherds All and Maidens Fair	Piano
3. Lullaby	Piano
4. Tournament	Piano
Op. 17, Three Songs	
1. Hab' ein Roslein (The Rosebud)	Song
2. Le Vase Brise (The Vase)	Song
3. Rappelle-toi (Remember well)	Song
Op. 18, Two Etudes	
1. In the form of a Romance	Piano
2. In the form of a Scherzo	Piano
1893	
Barcarolle	Violin and Piano
Evening Song	Chorus of Mixed Voices
My Love	Chorus of Mixed Voices
Op. 20, A Book of Songs	
1. A Fair, Good Morn	Song
2. Sleep, little Tulip	Song
3. Ev'ry Night	Song
4. Airly Beacon	Song
5. When the Land Was White with Moonlight	Song
6. A Song of Love	Song
7. Nocturne (Up to her chamber window)	Song
8. Dites-moi (Tell me)	Song
9. Orsola's Song	Song
10. In the Night	Song
When Christmas Comes	Christmas Carol
1894	
The Merry, Merry Lark	Song
La Vie (Life)	Song
Ti Saluto (Thine my greeting)	Song
1896	
Op. 21, May in Tuscany	
1. Arlecchino	Piano
2. Notturno (In Boccaccio's Villa)	Piano
3. Barchetta	Piano
4. Misericordia	Piano
5. Il Rusignuolo (In my neighbor's garden)	Piano
6. La Pastorella (Montepiano)	Piano

Op. 22, Two Songs	
1. Rechte Zeit (Time enough!)	Song
2. Madel, wie bluht's (Maiden, how sweet)	Song
[fol. 1606] 1898	
The Rosary	Song
Life Lesson (There, little girl, don't cry)	Song
My Love's Waitin'	Song
Op. 25, A Day in Venice	
1. Alba (Dawn)	Piano
2. Gondolieri (Goldoliers)	Piano
3. Canzone Amorsa (Love Song)	Piano
4. Buona Notte (Good Night)	Piano
March of the Pilgrims, for the Knight Templars	Piano
1899	
Op. 28, Songs from Vineacre	
1. A Necklace of Love	Song
2. Sleeping and Dreaming	Song
3. The Dream-maker Man	Song
4. Ein Liedchen	Song
5. My Desire	Song
6. The Nightingale's Song	Song
7. La Lune Blanche	Song
8. Ein Heldenlied	Song
Op. 29, Captive Memories	Bar. Solo, Solo Quartet and Reader; Song Cycle
Op. 30, En Passant	
1. A Fontainebleau	Piano
2. In Dreamland	Piano
3. Napoli	Piano
4. At Home (A June Night in Washington)	Piano
1900	
Memorial Day	Mixed Voices
Posthumous Works	
1901	
An African Love Song	Song
Mighty lak' a rose	Song
To Anne	Song
At Rest	Song
The Woodpecker	Song
The Four Seasons	Mixed Voices
1902	
O'er Hill and Dale	
'Twas a lover and his lass	Piano
The Thrush	Piano
Love is a-straying, ever since maying	Piano
The Lark is on the wing	Piano
The Quest	Cantata
1907	
Sweetest Eyes were ever seen	Song
[fol. 1607] 1909	
Wedding Morn	Song
1913	
Marguerites	Song
Rain Song	Song
I Fear Thy Kisses, Gentle Maiden	Song

A very complete account of my husband's life and works is to be found in the book entitled "The Life of Ethelbert Nevin" by Vance Thompson, published and copyrighted by the Boston Music Company in 1913. If the State Statute is enforced against me, I will lose the moneys that I receive from the Society, and will be without means of livelihood.

I am 70 years of age, and I ask the protection of this Court of Equity to preserve me in my declining years against want and poverty, in memory of a man who has enriched this nation with his genius.

As evidence of the perennial appeal of my husband's works, "Mighty Lak' a Rose" was reported performed over the radio in 1935 over 6,000 times and "The Rosary" was reported performed over the radio that year over 3,000 times, including performances in the State of Nebraska. I have obtained these figures from the record furnished to me by the Society, which in turn is furnished to it by the two principal radio networks. It does not purport to represent all of the actual performances given by radio broadcasters throughout the country. I have frequently heard many other songs of my husband's performed over the radio, but have found no report made of them by the broadcasters. These songs have all been and are now being performed within the State of Nebraska.

Nevertheless, from these meagre reports it is apparent that the radio broadcasters are making a very substan-
[fol. 1608] tial use of my husband's songs. Hotels, motion picture theatres, cabarets and dance halls make no record, so far as I know, of public performances of musical compositions, including my husband's, so that it is impossible to estimate the extent of such use. Alone and unaided, it would be impossible for me to license the public performance for profit of my husband's compositions. I have no financial resources for that purpose; I could not engage lawyers or investigators throughout the country, and I would be utterly helpless.

It is for that reason that I joined the Society, knowing that in the combined strength of those similarly situated, we could protect the public performance for profit of our works against piracy and infringement.

If the State Statute should be enforced, it would make it impossible for the Society to operate in that State, and I, and others similarly situated, would be in the same position that my husband was in at the time of his death.

The practical effect of the State Statute is to give to selfish and powerful groups the right to exploit, without compensation, my husband's works and the works of other authors and composers.

The Copyright Statute carefully provided that the widow of an author was to have the first right to renew the original

term of copyright. It was the public policy of the Government of the United States, realizing that authors pay much more attention to the creation of their works than to the business of obtaining money therefrom, to protect the widows and families of authors by that provision of the Copyright Act. That beneficent provision and public policy of the Government would be utterly destroyed by the State Statute.

[fol. 1609] As the initial terms of the respective copyrights in the works of my late husband expire, the renewal rights vest in me, and I have exercised such rights with respect to certain compositions and am continuing and will continue to exercise such rights with respect to other compositions, from time to time, as such rights accrue to me.

Under the Copyright Law, I have the right, when each renewal term vests in me, to transfer to a publisher only the publishing rights and to reserve to myself, or to the Society, or to others, the public performing rights or any other rights in such works for limited periods or for the balance of the term of copyright.

Under the State Statute, this right is denied to me. I must grant to my publisher, not only the right of publication, but all other rights under the copyright, since he is given the sole power to fix the value and price of public performances for profit and other uses of my copyrighted works in the State of Nebraska.

This is an arbitrary and unjustifiable interference with my right to make contracts and with the rights granted to me under the Copyright Law of the United States, and will seriously impair the value of my existing rights in copyrights, as well as my right to renew copyrights with respect to which the original term has not yet expired.

Anne Paul Nevin.

Sworn to before me this 10th day of June, 1937. Forrest B. Snow, Notary Public. My commission expires May 9, 1942. (Seal.)

STATE OF MAINE,
County of Hancock, ss:

[fol. 1610] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEBRASKA, LINCOLN DIVISION

CLERK'S CERTIFICATE

I, Mary A. Mullen, Clerk of the District Court of the United States for the District of Nebraska, in compliance with Designation or Praecipe filed by Counsel for Appellees, on the 16th day of December, 1940, hereby certify that Items 1 to 12, inclusive, of the Praecipe, are true and correct copies of the originals now on file in this office; that Plaintiffs' Exhibit No. 13 is a true and correct copy of the original list of Irving Caesar's Compositions annexed to the deposition of Irving Caesar; that Plaintiffs' Exhibit 18 is a true and correct copy of the original list of George W. Meyers' Compositions annexed to the deposition of George W. Meyer; that Items No. 15, 16, 17, 18, 19, 20, 21, 22 and 23 of the Praecipe are true copies of Exhibits 19, 20, 21E, 22, 23, 24, 25, 26 and 27 annexed to the depositions of Ella Herbert Bartlett; and that said Exhibits 19 and 20 are identical with Schedules VI and VII annexed to the affidavit of Ella Herbert Bartlett submitted in support of the plaintiffs' motion for temporary injunction, and that Exhibits 22 to 27 inclusive are identical with Schedules I to V inclusive annexed to the Affidavit of Ella Herbert Bartlett. And I further certify that said affidavit, including the said exhibits herein referred to, was adopted and incorporated in the answer of Gene Buck to Interrogatory No. 17 submitted by the defendants to him. I further certify that in answer to Interrogatory No. 17 submitted to Gene Buck by the defendants he incorporated and made a part of his answer the affidavit of Anne Paul Nevin verified on June 8, 1937, submitted in support of the plaintiffs' motion for temporary injunction, a true copy of which is included herein.

I further certify that Plaintiffs' Exhibit No. 29 is a photostatic copy of the original list of compositions by Edgar Leslie; that Exhibit No. 1 (described in Item 25 of this Praecipe), is a photostatic copy of the original list of compositions by Jerome Kern introduced in his deposition; that Exhibit No. 4 is a photostatic copy of Exhibit No. 4 (original) introduced in the deposition of Sigmund Rom-
[fol. 1611] berg; that Plaintiffs' Trial Exhibit No. 1 (described in Item 27 of this Praecipe) is a true and correct copy of Plaintiffs' Trial Exhibit No. 1, on file in this Court.

I further certify that all the exhibits mentioned in Items 28, 29 and 34 of this Praecipe, are true and correct copies of all the exhibits attached to Appellees' Counter-Designation (requested in Item 61), filed on September 21, 1940.

I further certify that Item 30 is a true and correct copy of the original Plaintiffs' Trial Exhibit No. 17; that Item 31, is a true and correct copy of the original Plaintiffs' Trial Exhibit No. 18; that Item 32 is a true and correct copy of the original Plaintiffs' Trial Exhibit No. 20; that Item 33 is a true and correct copy of the original Exhibit No. 21; that Item 35 is a true and correct copy of the original Plaintiffs' Exhibit No. 29; that Item 36 is a true and correct copy of the original of Plaintiffs' Exhibit No. 32, with the exception of "Let's Go Country" which is not shown in the original exhibit.

I further certify that Items 37 to 53, inclusive, are true and correct copies of plaintiffs' original exhibits numbered 33, 35, 36, 38, 39, 40, 41, 42, 43, 44, 49, 53, 62 and 64, and of defendants' exhibits numbered 45, 52 and 54.

I further certify that the exhibits requested and enumerated in Items 54 to 57, inclusive, are true and correct copies of the original exhibits numbered 58, 59, 60 and 61, attached to the Interrogatories of Walter S. Fischer, Saul Bornstein, Gene Buck and Gustav Schirmer.

I further certify that Item 58 is a true and correct copy of all docket entries on the Appearance Docket, to and including September 17, 1940, in this case; that Item 59 is a true and correct copy of the original Designation, with proof of service, filed in this Court on the 26th day of July, 1940; that Item 60 is a true and correct copy of the original Counter-Designation, with proof of service, filed in this Court on the 31st day of July, 1940; that Item 61, is a true and correct copy of the original Counter-Designation, together with exhibits annexed, filed herein on the 21st day of September, 1940, in compliance with Order of August 20, 1940, together with proof of service, filed herein on December 16, 1940.

[fol. 1612] I further certify that Item 62 is a true and correct copy of the Praecipe, or Designation for record, filed herein on December 16, 1940, together with proof of service thereof filed herein on December 21, 1940, in compliance with which we have compiled and assembled this record, in the matter of Gene Buck, etc., et al., versus Harry R. Swanson, etc., et al., No. 562 Equity, all of which original files and records are now in my custody as Clerk of this Court.

Witness my hand as Clerk, and the Seal of said Court, at Lincoln, Nebraska, this 23d day of December, 1940.

Mary A. Mullen, Clerk, by J. B. Nickerson, Deputy.

[fol. 1613] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON—Filed December 24, 1940

Point No. I

While copyrighted vocal and instrumental musical compositions may grant individual monopolies, they cannot be unitedly exercised to restrain competition and to fix prices; and a suit to enjoin such combination to restrain commerce and trade in copyrighted musical compositions is not one arising under the Copyright laws of the United States.

Point No. II

There is nothing in the Constitution of the United States which precludes a state from adopting and enforcing statutes which secure competition and preclude combinations which tend to defeat it; and the state is the sole judge, within reasonable limitations, of what laws shall be enacted for the protection and welfare of its people and as to when and how the police power of the state shall be exercised.

Point No. III

The state may pass such reasonable regulations in reference to the sale and use of copyrighted material by the individual owner and his publisher within the State of Nebraska as its legislature may deem proper, when the enactment is not prohibited by the Copyright Act nor in derogation of it.

Point No. IV

A state statute prohibiting monopolies in copyrighted vocal and instrumental musical compositions does not mili- [fol. 1614] tate against the commerce clause of the Federal Constitution when the acts of the unlawfully combining conspirators are so carried on as to be intra-state transactions.

[fol. 1614] Point No. V

The penalties of an anti-monopoly statute may not be considered so drastic as to be non-enforceable and to deprive those affected by it of the due process and equal protection clauses of the State and Federal Constitutions, when the act itself gives full and complete protection in the courts, and when the penalties for violation are from $1.00 to $5,000, and when the criminal provisions provided are misdemeanors with penalties not to exceed one year in prison, and when such fine or imprisonment may be imposed only after a full and complete hearing on the merits in the courts of the state, and when jury trial is guaranteed by the act and the Constitution of the state. The Court may consider similar penalties in other anti-monopoly statutes in Nebraska and in the nation as an aid in sustaining the act.

Point No. VI

Where there is a conflict in the considered opinion of the Court and the findings of fact, conclusions of law, and decree subsequently entered, the opinion will be considered supererogatory; and the findings of fact, conclusions of law, and decree only will be considered on appeal.

Point No. VII

If a three-judge federal court, sitting by virtue of provisions of Section 266 of the Judicial Code, in its findings of fact, conclusions of law, and decree makes no finding, conclusion, or decree that a state statute permanently enjoined is violative of a Federal statute or the Federal or State Constitution, the Supreme Court of the United States in reviewing the case is justified in reversing the cause, dissolving the permanent injunction, and ordering the case dismissed because the basis for the three-judge federal court's jurisdiction is the repugnancy of the act in question to a Federal statute or some provision of the Federal Constitution.

[fol. 1615] Point No. VIII

If on appeal to the United States Supreme Court, in an action brought under Section 266 of the Judicial Code, wherein the lower court granted a permanent injunction, the appellate court should consider an opinion rendered by the

lower court previous to the findings of fact, conclusions of law, and decree, holding that one subsection of the Act in question was inseparable from the balance of the Act, and was the inducing cause for its passage, and for that reason declared the entire Act non-enforceable, then the appellate court should re-examine such question and sustain the enforceability of all the balance of the Act; when it is clear that after striking out the unconstitutional part of the statute, the residue is intelligible, complete, and capable of execution. Especially is this true when the state court has never passed upon the question.

Point No. IX

The issue of whether or not a particular subsection of an act was the inducing cause for its passage is a matter of legislative intent which must be pleaded in order to raise the issue; and if not so raised, the trial court errs in any findings or ruling on the subject. It is proper for the parties adversely affected by such erroneous ruling to call the trial court's attention thereto in a motion for rehearing and a showing by affidavits of a majority of all the legislators who voted for the act that said subsection was not the inducing cause for its passage nor for their affirmative votes.

William J. Hotz, Attorney for Appellants; Special Assistant to the Attorney General of Nebraska. 1530-5 City National Bank Building, Omaha, Nebraska.

[fol. 1616] IN SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1940.

No. 312.

PRAECIPE TO THE CLERK OF THE SUPREME COURT OF THE UNITED STATES.—Filed December 24, 1940.

To the Honorable Clerk of the Supreme Court of the United States:

1. The appellants have heretofore filed in the United States District Court, District of Nebraska, Lincoln Division, their designation of the record on appeal with praecipe therefor, and served the same upon the appellees, and made due return thereof on the 27th day of July, 1940.

2. That in addition to said designation of record and praecipe therefor, being a condensed and abbreviated transcript of the original record of the trial of said cause, there was filed and served on the appellees, and as a part thereof, a concise statement of the points to be relied upon for reversal upon appeal together with authorities in support in accordance with Rule 75 of the Code of Civil Procedure, and which rule is referred to and made a part of Rule 10 (2) of the Supreme Court of the United States; that all the appeal papers required by the rules of the Supreme Court of the United States and the applicable rules of Civil Procedure were compiled in three (3) volumes and indexed and certified by the United States District Court and forwarded to the Clerk of the Supreme Court of the United States and duly docketed on August 6, 1940.

3. Appellants respectfully refer to the said transcript of record on appeal and the index thereof in reference to the foregoing matters.

[fol. 1617] 4. For a proper consideration of the case on appeal, the appellants desire that said condensed and abbreviated record, consisting of said three volumes, shall constitute the record on appeal; but there may be eliminated therefrom the following items:

(a) Jurisdictional statement with all the exhibits attached, which has heretofore been printed, served, and ruled upon, the Court noting probable jurisdiction on December 9, 1940.

(b) Appellees' statement opposing jurisdiction and motion to dismiss or affirm with brief in support, filed July 3, 1940, and the appellants' brief in opposition to the motion to dismiss or affirm filed July 16, 1940, which have been printed and served.

(c) Appellants' designation of law points to be relied upon for reversal with list of cases in support of each point; and in lieu thereof, the enclosed law points relied upon for reversal, which are the same law points relied upon for reversal filed in the Supreme Court of the United States when the cause was docketed on August 6, 1940, without the inclusion of the citations in support of each law point. The law points relied upon for reversal submitted herewith, together with the assignment of errors

contained in Volume I, pages 77-84, shall be printed and shall constitute the law points and matters to be relied upon by the appellants for the reversal upon appeal.

5. In the event the rules of the Supreme Court of the United States require the reprinting of any part or all the matters set forth in Subsections (a), (b), and (c) above, we hereby request the Clerk to include them in the printed transcript of the record on appeal even though elsewhere printed.

6. Since the compilation and service of the said record on appeal, there has been proceedings in the lower court in reference to the settlement of the record, consisting of three volumes, as filed with the Clerk of the Supreme Court of the United States on August 6, 1940, and these settlement proceedings had before the three-judge federal court which tried the cause in the lower court consisted of three (3) counter-designations of record served and filed by the appellees on July 26, 1940, on July 31, 1940, and on September 21, 1940, with resistances and objections thereto filed by the appellants on July 31, 1940 and on October 8, 1940. These matters in reference to the settlement of the record were finally determined by the said court on October 12, 1940, and order in reference thereto filed with the Clerk of [fol. 1618] the United States District Court on October 15, 1940, and a certified copy thereof filed with the Clerk of the Supreme Court of the United States in this cause.

(a) The said above described order, settling the three volume record as condensed and abbreviated and filed with the Clerk of the Supreme Court of the United States on August 6, 1940, should be included in the record on appeal as a part of Volume I thereof together with a copy of this praecipe.

William J. Hotz, Attorney for Appellants; Special Assistant to the Attorney General of Nebraska. 1530-5 City National Bank Building, Omaha, Nebraska.

[fol. 1619] [File endorsement omitted.]

[fol. 1620] IN SUPREME COURT OF THE UNITED STATES

APPELLEES' DESIGNATION OF ADDITIONAL PARTS OF THE RECORD—Filed January 22, 1941

Appellees, pursuant to Rule 13, Paragraph 9 of the Rules of the United States Supreme Court, designate the following parts of the record as submitted by appellants, to be printed in addition to those designated by appellants:

1. Exhibits "A", "B", "C", "D", "E", "F", "G" and "H" annexed to the bill of complaint.

Appellants' proposed record separates these exhibits from the bill of complaint itself and places them in other parts of the record. These exhibits should all be printed following page 49 to Volume I of Appellants' Record. These exhibits now appear in the following parts of the record as submitted by appellants:

Exhibits "A" to "D" of the complaint, inclusive, appear in Volume III, pp. 2-21 of Appellants' Record;

Exhibit "E" of the complaint appears in Volume I, pp. 144-158 of Appellants' Record;

Exhibits "F" to "H" of the complaint, inclusive, appear in Volume III, pp. 23-28 of Appellants' Record.

It is not necessary, of course, to duplicate the printing of these exhibits in other parts of the record.

[fol. 1621] 2. The opinions, orders, findings and decree in Volume I, pp. 98-118, inclusive, of Appellants' Record.

3. Defendants' motion for a new trial, and order denying same, in Volume I, pp. 119-43, inclusive, of Appellants' Record.

4. Appellants' "Statement In Lieu Of The Designation Required By Supreme Court Rule 13 In Reference To Designation of Law Points," in Volume I, pp. 85-91, inclusive, of Appellants' Record.

5. In the event that this Honorable Court should issue its writ of certiorari directed to the United States District Court for the District of Nebraska, Lincoln Division, commanding that court to certify and send to this Court the papers described in appellees' suggestion of diminution of the record heretofore filed herein on January 11, 1941, appellees will designate such further parts of the record

for printing as are contained in the annexed proposed designation of additional parts of the record.

Dated, January 20, 1941.

Thomas G. Haight, Louis D. Frohlich, Herman Finkelstein, Counsel for Appellees.

[fol. 1622] IN SUPREME COURT OF THE UNITED STATES

APPELLEES' DESIGNATION OF ADDITIONAL PARTS OF THE RECORD—Filed January 22, 1941

Appellees, pursuant to Rule 13, Paragraph 9 of the Rules of the United States Supreme Court, designate the following parts of the record to be printed in addition to those designated by appellants:

1. Transcript of evidence upon the trial, held September 18, 19, 20 and 21, 1939, pages 1-503, inclusive, in question and answer form (Add. Tr. 1-503).*

2. Depositions of Sigmund Spaeth, Abraham Schwartz, Walter S. Fischer, Irving Caesar, Edwin H. Morris, George W. Meyer, Ella Herbert Bartlett, Will Von Tilzer, Edgar Leslie, Jerome Kern and Sigmund Romberg, all in question and answer form (Add. Tr. 504-1083).

3. The excerpts from Plaintiffs' Exhibit 13 annexed to the deposition of Irving Caesar (list of Irving Caesar's compositions) contained in the condensation of such exhibit annexed hereto and marked "Condensation of Plaintiffs' Deposition Exhibit 13." If such condensation is unsatisfactory to appellants, appellees designate, in the alternative, the entire exhibit (Add. Tr. 1310-1319).

4. The excerpts from Plaintiffs' Ex. 18 annexed to the deposition of George W. Meyer (list of George W. Meyer's compositions) contained in the condensation of such exhibit annexed hereto and marked "Condensation of Plaintiffs' Deposition Exhibit 18." If such condensation is unsatisfactory to appellants' appellees designate, in the alternative, the entire exhibit (Add. Tr. 1320-1331).

5. Plaintiffs' Ex. 19 annexed to the deposition of Ella Herbert Bartlett (contract between Victor Herbert and M. Witmark & Sons 6/8/10) (Add. Tr. 1361-66).

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*Note: References to "Add. Tr. —" refer to pages of Additional Transcript filed in this Court by Appellees.

[fol. 1623] 6. Plaintiffs' Ex. 20 annexed to the deposition of E. H. Bartlett (Victor Herbert contract 4/2/14) (Add. Tr. 1367-72).

7. Plaintiffs' Ex. 21-E annexed to the deposition of E. H. Bartlett (contract between Victor Herbert and T. B. Harms) (Add Tr. 1332-38).

8. Plaintiffs' Ex. 22 annexed to the deposition of E. H. Bartlett (copyrights on "Red Mill") (Add. Tr. 1349-50).

9. Plaintiffs' Ex. 23 annexed to the deposition of E. H. Bartlett (copyrights on "Naughty Marietta") (Add. Tr. 1351-2).

10. Plaintiffs' Ex. 24 annexed to the deposition of E. H. Bartlett (copyrights on "Mademoiselle Modiste") (Add. Tr. 1353-5).

11. Plaintiffs' Ex. 25 annexed to the deposition of E. H. Bartlett (renewals of copyrights on "Mademoiselle Modiste") (Add. Tr. 1356-7).

12. Plaintiffs' Ex. 26 annexed to the deposition of E. H. Bartlett (renewals of copyrights on "Red Mill") (Add. Tr. 1358-9).

13. Plaintiffs' Ex. 27 annexed to the deposition of E. H. Bartlett (renewals of copyrights on "Babes in Toyland") (Add. Tr. 1360).

14. The excerpts from Plaintiffs' Ex. 29 annexed to the deposition of Edgar Leslie (list of Edgar Leslie's compositions) contained in the condensation of such exhibit annexed hereto and marked "Condensation of Plaintiffs' Deposition Exhibit 29." If such condensation is unsatisfactory to appellants, appellees designate, in the alternative, the entire exhibit (Add. Tr. 1382-3).

15. The excerpts from Plaintiffs' Ex. 1 annexed to the deposition of Jerome Kern (list of Jerome Kern's compositions) (Add. Tr. 1430-1). If such condensation is unsatisfactory to appellants, appellees designate in the alternative, the entire exhibit (Add. Tr. 1384-1400).

16. The excerpts from Plaintiffs' Ex. 4 annexed to the deposition of Sigmund Romberg (list of Sigmund Romberg's compositions) (Add. Tr. 1432-3). If such condensation is unsatisfactory to appellants, appellees designate, in the alternative, the entire exhibit (Add. Tr. 1401-10).

17. The excerpts from Plaintiffs' Trial Exhibit 1 (list of Gene Buck's compositions) (Add. Tr. 1434-5). If such condensation is unsatisfactory to appellants, appellees desig-

nate, in the alternative, the entire exhibit (Add. Tr. 1084-9).

18. Plaintiffs' Tr. Ex. 15 (in part). (Add. Tr. 1436-50).

19. Plaintiffs' Tr. Ex. 16 (in part). (Add. Tr. 1452-3).

[fol. 1624] 20. Plaintiffs' Tr. Ex. 17 (tabulation of receipts from Nebraska—January 1, 1928 to June 30, 1939). (Add. Tr. 1090).

21. Plaintiffs' Tr. Ex. 18 (schedule of cost of operating and commissions paid in Nebraska—1932-37). (Add. Tr. 1091).

22. Plaintiffs' Tr. Ex. 20 (schedule of sheet music sales which grossed over a million copies). (Add. Tr. 1092-4).

23. Plaintiffs' Tr. Ex. 21 (schedule of licenses in effect 1922-39). (Add. Tr. 1095).

24. Plaintiffs' Tr. Ex. 22 (Page 1122 and first twenty lines of Page 1123 of Copyright Hearings, 1936). (Add. Tr. 1455-6).

25. Plaintiffs' Tr. Ex. 29 (Table 19 of Federal Communications Commission Bulletin). (Add. Tr. 1096).

26. Plaintiffs' Tr. Ex. 32 (sample sheet from ASCAP Index). (Add. Tr. 1097).

27. Plaintiffs' Tr. Ex. 33 (circular explaining ASCAP Index). (Add. Tr. 1098-1105).

28. Plaintiffs' Tr. Ex. 35 (advertisement of Lang-Worth Feature Programs, Inc.) (Add. Tr. 1106).

29. Plaintiffs' Tr. Ex. 36 (chart showing Society's accounts with foreign societies). (Add. Tr. 1107).

30. Plaintiffs' Tr. Ex. 38 (list of William J. Hill's compositions). (Add. Tr. 1108-11).

31. Plaintiffs' Tr. Ex. 39 (list of John Philip Sousa's compositions). (Add. Tr. 1112-23).

32. The excerpts from Plaintiffs' Tr. Ex. 40 (list of Oley Speaks' compositions) (Add. Tr. 1425, l. 13-41). If such condensation is unsatisfactory to appellants, appellees designate, in the alternative, the entire exhibit (Add. Tr. 1124-7).

33. The excerpts from Plaintiffs' Tr. Ex. 41 (list of Deems Taylors' compositions) (Add. Tr. 1425, l. 42-51). If such condensation is unsatisfactory to appellants, appellees designate, in the alternative, the entire exhibit (Add. Tr. 1128-31).

34. Plaintiffs' Tr. Ex. 42 (1921 contract between Society and Malec Bros.). (Add. Tr. 1132).

[fol. 1625] 35. Plaintiffs' Tr. Ex. 43 (1922 contract between Society and Malec Bros.). (Add. Tr. 1133).

36. Plaintiffs' Tr. Ex. 44 (letter from Amusement Owners Protective Association of Nebraska). (Add. Tr. 1134).

37. Plaintiffs' Tr. Ex. 49 (pages 140-143 of "Radio Advertising" for September, 1939). (Add. Tr. 1135-38).

38. Plaintiffs' Tr. Ex. 53 (letter of May 12, 1939 from E. N. Blazer to Eppley Hotels Co.). (Add. Tr. 1139-40).

39. Plaintiffs' Tr. Ex. 62 (list of suits filed by the Society in Nebraska). (Add. Tr. 1141-52).

40. Plaintiffs' Tr. Ex. 64 (contract between SESAC and Station WOW). (Add. Tr. 1153-5).

41. Defendants' Exhibit 45 (agreement between National Broadcasting Company and Station WOW). (Add. Tr. 1156-9).

42. Defendants' Ex. 52 (form of first notice sent by Society to infringers). (Add. Tr. 1160-63).

43. Defendants' Ex. 54 (agreement between Columbia Broadcasting System and Station KOIL dated April 25, 1938). (Add. Tr. 1164-69).

44. Defendants' Ex. 58 (answers to interrogatories propounded to Walter Fischer and exhibits 1-10, inclusive, thereto annexed). (Add. Tr. 1275-92).

45. Defendants' Ex. 59 (answers to interrogatories propounded to Saul Bornstein and exhibits 1-10, inclusive, thereto annexed). (Add. Tr. 1293-1308).

46. Defendants' Ex. 60 (answers to interrogatories propounded to Gene Buck and exhibits 1, 2 and 3 thereto annexed). (Add. Tr. 1171-1250; 1373-81).

47. Defendants' Ex. 61 (answers to interrogatories propounded to Gustave Schirmer and exhibits 1-10, inclusive, thereto annexed). (Add. Tr. 1251-74).

48. Docket Entries (Add. Tr. 1464-70).

49. Counter-Designation filed pursuant to order of August 20, 1940, omitting duplication of all items hereinabove otherwise designated for printing (Add. Tr. 1421-57).

50. Certificate of the Clerk of the District Court, dated December 23, 1940, transmitting additional parts of the record to this Court (Add. Tr. 1472-4).

58. Out, order of Feb. 3.

61. Pages 1421-1429 not to be printed by order of Feb. 3.

Dated, January 20, 1941.

[fol. 1626] Thomas G. Haight, Louis D. Frohlich, Herman Finkelstein, Counsel for Appellees.

[fols. 1627-1628] UNITED STATES OF AMERICA

State of New York,
County of New York, ss:

Herman Finkelstein, being duly sworn, deposes and says: That he is counsel for the Appellees in the above entitled case and that he served the Appellees' "Designation of Additional Parts of the Record" on Walter R. Johnson, Esquire, Attorney General, William J. Hotz, Esquire, Special Assistant to the Attorney General and Andrew Bennett, Esquire, Attorneys for Appellants, by depositing in the mail of the United States, in a Post Office Box regularly maintained by the Government of the United States at No. 1450 Broadway, Borough of Manhattan, City of New York, and under the care of the General Post Office in the Borough of Manhattan, City of New York, a true copy of the same on this 20th day of January, 1941, addressed to said Messrs. Johnson & Hotz at 1530 City National Bank Building, Omaha, Nebraska, and to said Mr. Bennett at 917-15th Street, NW, Washington, D. C. with the required postage affixed thereto.

Subscribed and sworn to before me this 21st day of January, 1941. Herman Finkelstein. Rose E. Cohen, Notary Public, Queens County. Queens Co. Clk. No. 3699, Reg. No. 4127. N. Y. Co. Clk. No. 1064, Reg. No. 2 C 618. Kings Co. Clk. No. 220, Reg. No. 2384. Commission expires March 30, 1942.

[Seal.]

[fol. 1629] [File endorsement omitted.]

Endorsed on cover: Enter William J. Hotz, File No. 44,661, Nebraska, D. C. U. S., Term No. 312. Harry R. Swanson, as Secretary of State of Nebraska, et al., Appellants, vs. Gene Buck, Individually and as President of the American Society of Composers, Authors and Publishers, et al. Filed August 6, 1940. Term No. 312 O. T. 1940.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF STATE OF NEBRASKA, ET AL.,

Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

STATEMENT AS TO JURISDICTION.

WALTER R. JOHNSON,
Attorney General of Nebraska,
JOHN RUSSELL,
Assistant to the Attorney General,
WILLIAM J. HOTZ,
Special Assistant to the Attorney General,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF STATE OF NEBRASKA, ET AL., *Appellants,*

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL., *Appellees.*

ATTACHED HERETO AND MADE A PART HEREOF, IN ACCORDANCE WITH RULE No. 12 OF THE SUPREME COURT OF THE UNITED STATES ARE THE FOLLOWING APPEAL PAPERS:

(a) Memorandum Opinion overruling motion to dismiss and granting temporary injunction, dated November 13, 1937, and injunctional order of November 13, 1937.

(b) Opinion on merits and permanent injunction, dated December 28, 1939.

(c) Findings of fact, conclusions of law, and decree dated January 25, 1940.

(d) Motion for new trial or to correct decree, dated February 5, 1940.

(e) Order overruling motion for new trial or to correct decree, dated March 28, 1940.

(f) Nebraska Legislative Act, Session Laws, 1937, Chap. 138, page 488 (Buck v. Swanson, 33 Fed. Supp. 377).

This action in equity was filed by the plaintiffs and appellees in the United States District Court, for the District of Nebraska, Lincoln Division, on June 8, 1937, seeking to enjoin the enforcement of a Nebraska legislative anti-monopoly act, which became effective May 17, 1937. These plaintiffs below were the American Society of Composers, Authors and Publishers, called ASCAP, organized under the laws of the State of New York. This organization is officered by a board of directors, and all its members are composers of copyrighted musical compositions and publishers of such copyrighted musical compositions. Among the plaintiffs below also were some publisher members from New York and some composer members from New York and Maine. The defendants were all law enforcement officers of the State of Nebraska.

No action was taken in the State courts of Nebraska by either party, and no construction was placed on the particular statute in question by any court of this State.

Appended to the bill of complaint filed were all the typical contracts which ASCAP had entered into with the other plaintiffs and all the other members of the society, both composer members and publisher members; and all typical contracts with all of the users of the ASCAP music in Nebraska; and also ASCAP articles of association, together with a copy of the Act.

ASCAP deals exclusively in what is known as the "small rights" for profit of public performance of music played

or sung in public. The Copyright Act [Title 17, U. S. C. A., Sec. 1, (e)] grants to the copyright owner the right to receive pay for such public performances.

The petition and exhibits made a part admitted that it had assigned to it from each member the exclusive power to fix prices, control terms, and collect the money for these public performance licenses everywhere, including the State of Nebraska, and distribute it as dividends to the members.

Interlocutory injunction was granted on November 13, 1937, in favor of the appellees and plaintiffs below; likewise a motion to dismiss, filed by the appellants and defendants below, was overruled on the 13th day of November, 1937. Exceptions were filed thereto on the 18th day of November, 1937. The memorandum opinion, rendered on November 13, 1937, is attached to this statement.

No appeal was prosecuted from either of these orders; and, except for an assignment of error based upon the Court's error in overruling the motion to dismiss based upon the petition and exhibits attached to it, none of said matters are before this Court on this appeal.

The court that heard the foregoing matters, and all subsequent matters, was a three-judge Federal court consisting of United States Circuit Judge, Hon. Archibald K. Gardner, and two United States District Judges, Hon. Thomas C. Munger and Hon. James A. Donohoe (Sec. 266 of the Judicial Code; Sec. 380, Title 28, U. S. C. A.).

The appellees stated as the basis for their action that the entire Nebraska statute deprived all the plaintiffs of the rights granted to them under the Copyright Act and was in violation of Article I, Sections 8, 9, and 10; Art. III, Section 2; Article IV, Section 2; and Article VI, Section 2 of the Constitution of the United States; and the Fourteenth Amendment to the Constitution of the United States; and

Article 1, Sections 1, 3, 7, 12, 13, 15, 16, 21, and 25 of the Constitution of the State of Nebraska.

The answer was filed on the 18th day of November, 1937. In that answer, the appellants denied that the Nebraska Act was in violation of said provisions, or any of them, but instead was a proper exercise of the Nebraska legislative authority under the police power of the State declaring as unlawful any association of a substantial number of composers and publishers who combine for the purpose of fixing prices for public performance, if in restraint of trade, and providing the usual, ordinary penalties for violations thereof similar to the other anti-monopoly statutes of the State (Chap. 59, Comp. St. Neb., 1929, and Amendments, Monopolies and Unlawful Combinations; Art. 1, Trusts Generally; Art. 2, Grain Dealers; Art. 3, Fire Insurance Companies; Art. 4, Lumber and Coal Dealers; Art. 5, Local Discrimination; Art. 6, Pooling by Bridge Contractors; Art. 7, Rebate Vouchers; Art. 8, Unlawful Restraint of Trade; Art. 9, Regulation of Public Markets; Art. 10, Dairy Industry; 1937 Supp., Art. 11, Protection of Trade Marks, Brands and Names).

Much evidence, oral and documentary, was taken at the trial on September 18th to 21st, 1939, and many depositions and interrogatories were there introduced. A bill of exceptions or transcript of the oral testimony was taken and transcribed by the official court reporter and was submitted and filed with the court shortly after the hearing.

On December 28, 1939, the three-judge court entered its opinion, a copy of which is hereto attached, wherein it held that because Section 2 (B) of the Nebraska Act was a violation of the National Copyright Act therefore the whole act must fail because that subsection was inseparable from the balance of the act and was the inducing cause for its passage. The opinion ordered the plaintiffs and appel-

lees to prepare findings of fact, conclusions of law, and decree in accordance with that opinion.

The findings of fact, conclusions of law, and decree were signed and filed by the three-judge Federal court on the 25th day of January, 1940. The findings of fact made no reference to Section 2 (B) as the inducing cause and inseparable from the balance of the act, as found in the opinion, but declared the entire act non-enforceable without stating that the act was in violation of any Federal or State Constitution or the National Copyright Act, as did the opinion confined to Section 2 (B) of the Act.

The opinion and findings, however, did find extensive, definite facts in connection with the activities of ASCAP, and did find that it was a monopolistic combination; that it did fix and control prices, and controlled substantially all the commercially usable public performance rights of copyrighted vocal and instrumental musical compositions used in Nebraska; and that said ASCAP was operating through its authorized agents and representatives within the State of Nebraska, and thus carried on its activities therein; that the composer plaintiffs and appellees and publishers were acting in the State of Nebraska only by virtue of their membership in the ASCAP association, but had no direct dealings of any kind in the State, they having assigned their exclusive rights in public performance for profit to ASCAP.

On the 5th day of February, 1940, the defendants and appellants filed a motion for new trial or to correct the said opinion, findings, conclusions, and decree in the matters specifically referred to in the motion.

These papers: Opinion, findings of fact, conclusions of law, and decree, as well as motion for new trial or to correct decree are attached hereto and made a part of this statement.

On the 25th day of March, 1940, a rehearing was granted by the said three-judge Federal court; and on March 28, 1940, the said motion to correct the decree or to grant a new trial was overruled. A copy of that order so dated is attached to this statement and made a part hereof.

On this date, June 27, 1940, there was presented to the Hon. Thomas C. Munger, Judge of the United States District Court, one of the three Federal judges, a Petition for Appeal, together with Prayer for Reversal and Dismissal, Assignment of Errors and Brief, Cost Bond, and Citation. On this same day, June 27, 1940, an order allowing that appeal was duly signed by that Judge (Rule 36 of U. S. Supreme Court). All said papers were on this day, June 27, 1940, filed with the Clerk of the United States District Court at Lincoln, Nebraska.

THEREFORE, the basis for the jurisdiction of the Supreme Court of the United States to entertain this appeal is based upon Section 238 (3) of the Judicial Code, which is Section 345, Title 28, U. S. C. A., which provides for a direct appeal to the Supreme Court of the United States when a State statute has been brought in issue in the Federal court and its enforcement permanently enjoined, as was done in this case. Also Section 266 of the Judicial Code (Section 380, Title 28, U. S. C. A.) provides for direct appeal to the Supreme Court of the United States from an order granting a permanent injunction.

The court fixed the return day at forty (40) days and provided in the citation for service to be made upon the plaintiffs and appellees together with all the papers required by Rules 10 and 12 of the Supreme Court, with the appellees' attention directed in the citation to Subsection 3 of Rule 12 of the Supreme Court of the United States. The return of the service of that citation will be filed within five

(5) days with the Clerk of the United States District Court and will be shown in the record on appeal.

The prayer in the petition for appeal requested that the appeal be granted, which was done on this date by order allowing the appeal, as above referred to; and also prayed that citation issue to all the plaintiffs and appellees; and that said cause upon appeal be reversed, and the permanent injunction denied, vacated, and set aside, and the appellees' cause of action dismissed at the appellees' costs; and for such other and further relief as may be deemed just and equitable in the premises.

The appeal papers required by the rules of the court have been attached hereto chronologically.

The appellants, believing that because the statutory provisions above referred to, to-wit: Section 238 (3) (Title 28, U. S. C. A., Sec. 345) and Section 266 (Title 28, U. S. C. A., Sec. 380) of the Judicial Code provide for the jurisdiction of the Supreme Court on appeal; and it being apparent that all steps for the appeal to this point have been done within the time and in the manner provided, believe it becomes unnecessary to cite cases to sustain the United States Supreme Court's jurisdiction.

Attached to the assignment of errors is appellants' brief with law points and citation of authorities.

THEREFORE, appellants pray that the Court will assume its jurisdiction hereof and reverse and dismiss the cause as prayed in the petition for appeal.

WALTER R. JOHNSON,
Attorney General of the State of Nebraska;
JOHN RIDDELL,
Assistant to the Attorney General;
WILLIAM J. HOTZ,
Special Assistant to the Attorney General.

EXHIBIT "A".

Memorandum Opinion.

Filed Nov. 13, 1937.

No. 562 Eq.

Per CURIAM:

The plaintiff, Gene Buck, as an individual and as President of the American Society of Composers, Authors and Publishers, brought suit against Harry R. Swanson, as Secretary of State of Nebraska and against certain other state and county officials, seeking to enjoin the defendants from enforcing the provisions of an act of the legislature of Nebraska, approved May 17, 1937 (Nebraska Session Laws 1937 page 488). That Act makes it unlawful for authors, composers, proprietors, publishers or owners of copyrighted musical compositions, when the members, stockholders or interested parties constitute a substantial number of persons, firms or corporations within the United States who own or control copyrighted musical compositions, to form any organization, either in Nebraska or elsewhere, if one of the objects of the organization is the determination of license fees required for the use of copyrighted musical compositions for profit in Nebraska, for the purpose of preventing free competition between different copyright owners. There are provisions penalizing any attempt to collect license fees by owners of copyright, and requiring any author, composer or publisher, to specify on any published musical composition prepared for use in Nebraska, the selling price of such composition. Many other provisions seek to limit the rights of copyright owners or licensees to control the sale, reproduction or use of their products in the state of Nebraska. The plaintiffs have alleged that the enforcement of the Act will violate rights granted to them by the Copyright Act of Congress (17 U. S. Code, Section 1, et seq.) and that the Act is in violation of Section 8 of Article 1 of the Constitution of the United States, and also impairs the terms of existing contracts held by the plaintiff.

It is alleged that the defendants have threatened to and will enforce the provisions of this Act, to the great damage

of the plaintiffs unless restrained by an order of this court. The application for a temporary injunction has been submitted upon the complainants' bill, and upon certain affidavits filed, and also upon the defendants' motion to dismiss the bill of complaint.

On consideration of the bill, it appears that there is a grave doubt of the constitutionality of the Act of the Legislature, and the plaintiffs have shown that serious and irreparable injury will be inflicted upon them if a preliminary injunction is not awarded to them and that the plaintiffs have no adequate remedy at law. A preliminary injunction, upon the usual terms, will protect both parties, pending a final decision. An order will, therefore, be entered granting a preliminary injunction. The motion to dismiss the plaintiffs' bill will also be denied.

EXHIBIT "B".

Injunctional Order.

Filed Nov. 13, 1937.

This cause came on to be heard at this term, under Section 380, Title 28 U. S. C. A. (Jud. Code Sec. 266), and the Court sat as provided therein, and the cause was argued by counsel; thereupon, upon consideration thereof, it was Ordered and Adjudged, as follows, viz.:

1. That the motion made by the complainants for temporary injunction, be, and the same is hereby, in all respects, granted.

2. That defendants, Harry R. Swanson, individually and as Secretary of the State of Nebraska, Walter H. Jensen, individually and as State Treasurer of the State of Nebraska, William H. Price, individually and as Auditor of Public Accounts of the State of Nebraska, Richard C. Hunter, individually and as Attorney General of the State of Nebraska, James T. English, individually and as County Attorney of Douglas County, State of Nebraska, Max G. Towle, individually and as County Attorney of Lancaster County, State of Nebraska, Grace Ballard, individually and as County Attorney of Washington County, State of Nebraska, S. S. Diedrichs, individually and as County Attorney of Lincoln County, State of Nebraska, Raymond B.

Morrissey, individually and as County Attorney of Johnson County, State of Nebraska, Maynard N. Grosshaus, individually and as County Attorney of York County, State of Nebraska, Charles H. Hood, individually and as County Attorney of Saunders County, State of Nebraska, Alvin B. Lee, individually and as County Attorney of Valley County, State of Nebraska, Gerald J. McGinley, individually and as County Attorney of Keith County, State of Nebraska, Floyd Lundberg, individually and as County Attorney of Kearney County, State of Nebraska, Edwin Moran, individually and as County Attorney of Otoe County, State of Nebraska, and the respective agents, servants and employees of each of them, and all other persons acting under or through the authority of each of them, or by virtue of the authority of the office of each of them, be, and they are, each of them, severally, enjoined and restrained, pendente lite, and until the further order of this Court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding, at law or in equity, for the purpose of enforcing or executing the Statute of Nebraska, known as Legislative Bill No. 478, passed by the Fifty-second Session of the Legislature of Nebraska, and signed by the Governor on May 17, 1937, and made effective immediately (said Statute hereinafter referred to as the "State Statute") against the complainants and others similarly situated, their representatives, employees, agents or any of them, and from demanding that copies of musical compositions of complainants and others similarly situated, be filed, and from bringing any action or proceeding to adjudicate the ownership of copyrighted musical compositions owned by the corporate or individual complainants or others similarly situated, and from attempting to appoint or take any steps leading to the appointment of a receiver, and from interfering with any and all existing contracts heretofore entered into between complainants and citizens and residents of the State of Nebraska, and between the American Society of Composers, Authors and Publishers and the other complainants, or any of said Society's members, and between the American Society of Composers, Authors and Publishers and similar societies located in foreign countries, and between the complainant composers and authors and their respective pub-

lishers, and between the complainant publishers and their respective authors and composers, and from threatening to enforce against any citizens or residents of the State of Nebraska, the penalties of such State Statute, in the event such citizens and residents desire to carry out their contracts with the said American Society or other complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Nebraska, or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

3. That the motion made by the defendants herein to dismiss the bill of complaint herein, be, and the same is hereby, in all respects denied.

4. That the defendants be given thirty days from the date hereof to answer herein.

5. The court finds that unless an injunctional order of this nature be issued, the plaintiffs would be irreparably damaged and that plaintiffs have no adequate remedy at law. This order is made conditional upon the filing herein within 30 days of an approved bond by the plaintiff, in the penal sum of Five Thousand ($5,000) Dollars conditioned upon the payment to the defendants of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined by this order, such damages to be ascertained as the court may direct.

Dated Nov. 10, 1937.

ARCHIBALD K. GARDNER,
United States Circuit Judge.

Dated Nov. 13, 1937.

THOS. C. MUNGER,
United States District Judge.
J. A. DONOHOE,
United States District Judge.

Filed in Lincoln Division, Nov. 13, 1937. R. C. Hoyt, Clerk, by J. B. Nickerson, #19, Deputy.

EXHIBIT "C".

Equity No. 562

Filed in Lincoln Division, Dec. 28, 1939, Mary A. Mullen, Clerk, by J. B. Nickerson, Deputy.

Before Archibald K. Gardner, Circuit Judge, Thomas C. Munger, District Judge, and James A. Donohoe, District Judge, sitting pursuant to Section 266 of the Judicial Code.

GARDNER, Circuit Judge, delivered the opinion of the Court.

This is a suit in equity in which plaintiffs seek to enjoin the enforcement of Legislative Bill 478 of the State of Nebraska, and which by its terms became effective May 17, 1937.

The American Society of Composers, Authors and Publishers, a voluntary unincorporated association under the General Associations Law of New York, consisting of a large number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions, as authors, composers and publishers, through Gene Buck, its president, and certain individuals and corporations interested in copyrighted musical compositions are the plaintiffs. The secretary of state, the state treasurer, the auditor of public accounts, and the attorney general, all of the State of Nebraska, as well as the county attorneys of various counties of Nebraska, are the defendants.

The statute, the enforcement of which is sought to be enjoined, is too voluminous to be set out herein *in haec verba*, but it will be found in the subjoined note.

(Here follows Legislative Bill No. 478 Final Form on Third Reading.)

There are approximately 1000 composer members of the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, in the United States, and 123 publisher members who constitute the principal

publishers of the country. Each member has assigned to the society the conclusive right of public performance for profit of his copyrighted musical compositions for periods of five years at a time, the present contracts between the society and its members expiring December 31, 1940. The society has issued blank licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing such licenses.

In Nebraska there are some 350 dance pavilions and ballrooms of a class that are independent of taverns where dancing is carried on incidentally. There are ten radio stations operating within the state, of which one is affiliated with the Columbia Broadcasting Network and one with the National Broadcasting Network. The other stations initiate their own vocal and instrumental musical programs. A large number of theaters are users of music. There are 284,000 radio receiving sets in private homes, and about one-third of the population of the state at some time during the year attend dances and balls where music is played. In 1938 approximately $12,000.00 was collected by ASCAP from the theaters in the state. The largest radio station in Nebraska pays about $26,000.00 to the society annually. Another group of stations paid the society about $27,000.00 in 1938. There are 391 signed contracts with users of music in Nebraska introduced in evidence, upon which an aggregate of approximately $70,000.00 was paid ASCAP during 1938. The society is given, by its members, the exclusive right to make collections, fix prices, and otherwise carry on the public performance of all the musical compositions it controls. Some $6,000,000.00 was taken in for public performance rights by the society in the United States during 1938. Fifty per cent of its net commissions was divided among the composer members and

the other fifty per cent was divided among the publisher members. These groups are classified, but the classification does not seem to have any material bearing upon the issues presented. Of the popular music necessary for the successful operation of radio stations, dance halls, hotels, and theaters, the society has control of about 85% or 90% and also has control of from 50% to 75% of the standard or older music that is played occasionally. All of the large and more influential publishers of music in the United States are members of the society. The users of music in Nebraska can not successfully carry on their business except they deal with the plaintiff society because there is no place where any person or agency to whom users of music in Nebraska may go in order to deal for public performance rights and negotiate for music in any substantial amount sufficient to meet the ordinary needs of music users in the state, except the society.

All the contentions of plaintiffs, as well as those of the defendants, go to the constitutional validity of the statute involved. Whether or not, under the common law of Nebraska the contracts between ASCAP and its members, and between it and the users of music in Nebraska, are valid or not, we need not consider. That issue is not before us, but the single question is the constitutional validity of the challenged statute.

It appears from the evidence that prior to the organization of the plaintiff society, an author or composer who had obtained a copyright for his production had no practical means of enforcing the exclusive right given him by the Copyright Act. He was not so equipped nor organized to discover violations of his rights, and it would require much time and a large amount of money to enforce his rights by means of litigation. Users of music, on the other hand, who wished to buy the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit that the society was organized.

The control or prohibition of combinations in restraint of trade and the prohibition of monopolistic practices is recognized as a proper exercise of the police power of the state. Nebbia *v.* New York, 291 U. S. 502; Waters-Pierce Oil Co. *v.* Texas, 197 U. S. 115; Dayside Fish Flour Co. *v.* Gentry, 297 U. S. 422; Crescent Cotton Oil Co. *v.* Mississippi, 257 U. S. 129; Central Lumber Co. *v.* South Dakota, 226 U. S. 157; Paramount Pictures *v.* Langer, 23 Fed. Supp. 890. While regulation of such public practices as are deemed to be contrary to the public policy of the state is a proper exercise of its police power, yet the exercising of such power is subject to the restrictions imposed by the Federal Constitution, which must, of course, be recognized as the supreme law of the land. A state statute, though enacted in pursuance of the police power, is void if in contravention of any express provision of the Federal Constitution or of a valid federal statute, or if it constitutes an interference with matters that are within the exclusive scope of federal power.

The Act of March 4, 1909, Chap. 320, Sec. 1 (E), 35 Stat. 1073, Title 17 U. S. C. A. Secs. 1-63, enacted pursuant to the grant of power in Article 1, Section 8 of the Constitution, was intended to grant valuable enforcible rights to authors and publishers without burdensome requirements, in order to afford greater encouragement to the production of literary works of lasting benefit to the world. Washingtonian Pub. Co. *v.* Pearson, 306 U. S. 30. The policy and purpose of the statute is to grant to the individual the right to control the use of the production covered by the copyright. Of course, the Act gives him no right to combine with others to insure control of prices and the consequent power of monopoly of an entire field by combination. Plaintiffs urge necessity as a justification or warrant for their organization. It is urged that without some such means of protection, the individual copyright owner is helpless to protect his rights, but if the statute violates no rights guaranteed to the plaintiffs by the Constitution or laws of the United States, the motive for the organization or acts of ASCAP, however impelling, is not material.

It is contended that the state statute deprives copyright owners of the right to control public performance for profit of their copyrighted musical compositions, apart from the sale of sheet music. The copyright is distinct from the material object copyrighted. It is an intangible incorporeal right in the nature of a privilege or franchise quite independent of any material substance such as the manuscript or the plate used for printing. King Features Syndicate *v.* Fleischer (C. C. A. 2) 299 Fed. 533. The owner of the copyright has the right to dispose of it on such terms as he may see fit, or he may decline to dispose of it on any terms. He has an individual right of exclusive enjoyment similar to that of a patentee of an invention. United States *v.* Dubilier Condenser Corp., 289 U. S. 178; United States *v.* American Bell Telephone Co., 167 U. S. 224; Burrow-Giles Lithograph Co. *v.* Serony, 111 U. S. 53; American Tobacco Co. *v.* Werckmeister, 207 U. S. 284; Caliga *v.* Inter Ocean Newspaper Co., 215 U. S. 182; Rubber Tire Wheel Co. *v.* Milwaukee Rubber Works Co. (C. C. A. 7) 154 Fed. 358. The society as an assignee of the rights of each author is a representative of that individual right. There are too, individual plaintiffs before the courts, and they are interested individually in the public performance rights of particular musical compositions. In American Tobacco Co. *v.* Werckmeister, *supra*, it is said:

"• • • the law recognizes the artistic or literary productions of intellect or genius, not only to the extent which is involved in dominion over and ownership of the thing created, but also the intangible estate in such property which arises from the privilege of publishing and selling to others copies of the thing produced."

While the Copyright Act may not enhance the right of proprietorship, it certainly does not lessen that right. As said by the Supreme Court in Caliga *v.* Inter Ocean Newspaper Co., *supra*,

"The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period."

The right of an author in his intellectual production is similar to any other personal property right. It is assignable and it may be sold and transferred in its entirety, or a limited interest therein, less than the whole property, may be sold and assigned, and the various rights included in the entire ownership may be split up and assigned to different persons. Sales may be absolute or conditional and they may be with or without qualifications, limitations or restrictions. Atlantic Monthly Co. *v.* Post Pub. Co. (D. C. Mass.) 27 Fed. (2d) 556; American Tobacco Co. *v.* Werckmeister, *supra.*

Section 2 (a) of the state statute requires the author, composer or publisher to specify legibly upon the musical composition, in whatever form it may be published, "the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes."

The right of public performance in connection with the composition includes separate and distinct rights, among them being: (1) the right of publication; (2) the motion picture rights; (3) the stage rights; (4) the recording rights; and (5) the radio reproduction rights. The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing.

Section 2 (B) of the statute provides that,

"In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private and public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation, so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to

collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state."

Under this subsection, the copyright owner in effect must offer the public performance rights of his copyrighted composition for sale and use in Nebraska, and if he does not choose so to do any person purchasing the composition may use it in the state for public performance without any liability to the copyright owner. This provision, we think, clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act. As observed, his rights of ownership entitled him to sell or offer to sell, or to withhold from sale, as he may choose.

The state statute cannot be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use. Panhandle Eastern Pipe Line Co. *v.* State Highway Commission, 294 U. S. 613.

While the power reasonably to restrain unlawful monopolistic trade-restraining combinations from exercising any rights in the state may be conceded, an act which compels the owner of a copyright to offer it for sale in a certain way, and if he fails so to do to take it from him without compensation, violates the due process and equal protection clauses of the Constitution, and it is also violative of the Federal Copyright Act.

The state statute contains a separability provision (Section 12), which provides that,

"If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or nonenforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act."

The Supreme Court of Nebraska has held that a statutory expression of the separability of various sections or provisions of a statute is an aid merely to judicial interpretation. First Trust Co. *v.* Smith (Neb.) 277 N. W. 762; Laverty *v.* Cochran (Neb.) 271 N. W. 354; Hubble Bank *v.* Bryan (Neb.) 245 N. W. 20. In Laverty *v.* Cochran *supra*, the court in speaking of a severance clause contained in a statute said:

"The rule is that, although a statute may be invalid or unconstitutional in part, the other parts will be sustained where they can be separated from the part which is void. Muldoon *v.* Levi, 25 Neb. 457, 41 N. W. 280. But the parts of the statute which are valid must be capable of being executed independently of the invalid parts in order to be operative. State *v.* Ure, 91 Neb. 31, 135 N. W. 224. The statutory provision expressing legislative intent as to the separability of the various parts of a statute is merely an aid to judicial interpretation."

But where the connection between the invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative. The provision of the statute which we are here considering is such an essential part of the statute as not to be separable.

In view of our conclusion on this phase of the case, it is unnecessary to consider the other contentions that have been ably argued and elaborately briefed by counsel for the respective parties.

We conclude that permanent injunction restraining the enforcement of this statute must be granted. Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion.

EXHIBIT "D".

Filed in Lincoln Division, Jan. 25, 1940. Mary A. Mullen, Clerk, by J. B. Nickerson, Deputy.

Findings of Fact and Conclusions of Law.

Buck *v.* Swanson, 33 Fed. Supp. 377.

This suit having been duly commenced on June 8, 1937, by filing a subpoena and bill of complaint in this Court, and personal service of copies thereof having been made on said date upon all the defendants, except the defendants John Havekost, Ray C. Johnson, Walter R. Johnson, William T. Gleason, Zelma Derry, Rush C. Clarke, "JOHN DOE" and "RICHARD ROE," (said John Havekost hav-

ing been substituted by stipulation in place and stead of Walter H. Jensen, said Ray C. Johnson having been substituted by stipulation in place and stead of William H. Price, said Walter R. Johnson having been substituted by stipulation in place and stead of Richard C. Hunter, William T. Gleason, having been substituted by stipulation in place and stead of Charles H. Hood, Zelma Derry having been substituted by stipulation in place and stead of Gerald J. McGinley) and this court having duly granted a temporary injunction on November 13, 1937, and defendants thereafter having duly filed their answer on November 18, 1937, and this cause having come on for trial on the 18th, 19th, 20th and 21st days of September, 1939, at the District Court of the United States, District of Nebraska, Lincoln Division, in the Federal Post Office Building, City of Lincoln, Nebraska, and complainants having appeared by L. J. TePoel, Esq. (Louis D. Frohlich, L. J. TePoel and Herman Finkelstein, of Counsel), and defendants having appeared by W. R. Johnson, Attorney General (William J. Hotz, John Riddell and Andrew Bennett, of Counsel), and evidence having been adduced upon the merits of this case and due deliberation having been had, and the Court having filed its opinion, hereby makes the following Findings of Fact and Conclusions of Law.

Findings of Fact.

1. The State of Nebraska enacted Legislative Bill No. 478 which became effective May 17, 1937. Said Statute is hereinafter referred to as the "Statute."

2. The plaintiff, American Society of Composers, Authors and Publishers, is a voluntary unincorporated association organized in 1914 under the General Associations Law of New York. Its membership consists of a substantial number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions as authors, composers and publishers. It brings this suit through Gene Buck, its President, who has been duly authorized to bring this suit on behalf of the Society and all its members. Other plaintiffs are certain individuals and corporations who are members of the Society and are interested in copyrighted musical compositions. They are all citizens and residents of States other than Nebraska.

3. The Secretary of State, the State Treasurer, the Auditor of Public Accounts, and the Attorney General, all of the State of Nebraska, as well as the County Attorneys of various Counties of Nebraska, all citizens and residents of Nebraska, are the defendants.

4. There are approximately 1,000 composer-members of the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, in the United States, and 123 publisher-members who constitute some of the principal publishers of the country.

Each member has assigned to the Society the exclusive right of public performance for profit of his copyrighted musical compositions for periods of five years at a time, the present contracts between the Society and its members expiring December 31, 1940. The Society has issued blanket licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the Society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the Society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing ASCAP to grant such licenses.

5. At the time the Statute was enacted, there were in existence 391 signed contracts between the Society and establishments in the State of Nebraska, engaged in the business of publicly performing copyrighted musical compositions for profit. During the year 1938, these licensees paid the Society $68,769.54 pursuant to such contracts (Ex. 17). Among such licensees of the Society were the owners of 250 motion picture theatres, 107 dance halls and miscellaneous establishments, 10 radio broadcasting stations, and 24 hotels and restaurants. Among the 10 radio stations in Nebraska licensed by the Society, one is affiliated with the Columbia Broadcasting System and one with the National Broadcasting Corporation. Part of the program broadcast by the two affiliated stations emanate from points outside

of the State and the remaining part initiate in the studios of such Nebraska broadcasters or elsewhere within the State. The other eight stations initiate all their own vocal and instrumental musical programs. There are 284,000 radio receiving sets in private homes in the State of Nebraska. No license fees are paid by the owners of these receiving sets inasmuch as they do not engage in public performances for profit. About one-third of the population of the State at some time during the year attend dances and balls where music is played. In 1938, approximately $12,000 was collected by ASCAP from 250 motion picture theatres in the State. In 1938, all the radio broadcasting stations in the State of Nebraska paid the Society approximately $48,700.

The largest radio station in the State pays about $22,800 to the Society annually. Another group consisting of three stations, paid the Society an aggregate of about $21,700 in 1938. The cost of operation of the Society is approximately 20% of the gross amount received (Ex. 17 and 18).

6. The Society is given by its members the exclusive right to make collections, fix prices for blanket licenses, and otherwise carry on the licensing of the right of public performance for profit of all the musical compositions copyrighted by its members. Some $6,000,000 was received for public performance rights by the Society from such licensing in the entire United States during 1938, of which approximately 20% was used to defray all expenses, the balance being distributed among its members. 50% of such net income was divided among the composer- and author-members and the other 50% was divided among the publisher-members, in accordance with a method of classification defined in the Articles of Association of the Society.

7. Prior to the organization of the plaintiff Society, authors, composers and publishers who had obtained copyrights for their productions had no practical means of enforcing the exclusive right given them by the Copyright Act. They were not so equipped nor organized to discover violations of their rights, and it would require much time and a large amount of money to detect infringement and to enforce their rights by means of litigation. Few of

them secured any substantial revenue from the public performance for profit of their copyrighted musical compositions. Users of music, on the other hand, who wished to obtain the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go and could not economically obtain individual licenses for the separate performance of the large numbers of works required by them daily. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit and to give users ready access to a substantial repertoire of music for such purposes that the Society was organized.

8. The Society and its members, including the other complainants, come within the purview, terms, conditions, penalties, forfeitures, prohibitions, restrictions and regulative provisions of the Statute, and the members of the Society including complainants are affected in their rights by the terms and provisions thereof.

9. Complainants are jointly interested in the subject of the action and in obtaining the relief demanded; the questions raised by the Bill of Complaint are of common and general interest to all the members of the Society who constitute a class so numerous as to make it impracticable to bring them before the Court; complainants herein are suing on their own behalf and on behalf of all the members of the Society.

10. The value of the matter in dispute herein between each of complainants and defendants is in excess of the sum of $3,000.00, exclusive of interest and costs, as appears from the evidence in this case and the stipulation of the parties entered into in open Court.

11. The Society has control of from 85 to 90% of the popular music necessary for the successful operation of radio stations, dance halls, hotels and theaters, and has control of from 50 to 75% of the standard or older music that is played occasionally at such places.

12. The contracts between the individual composer and author members of the Society, including the individual

plaintiffs, and their respective publishers do not give the publisher the right to dispose of the right of public performance for profit, nor do they have any provision for payment by the publisher to the writers of any royalties secured from issuing such licenses. Before the Society was formed, there were no substantial royalties from this source and since the formation of the Society, both writers and publishers have relied upon the Society to collect royalties from this field on behalf of both and to distribute it equitably for the equal benefit of writers and publishers.

13. The Society's practice has been to grant blanket licenses to theaters according to their seating capacity, to radio broadcasting stations according to their income, power and coverage, and to hotels, cabarets and dance halls according to their respective size, business done, number and size of orchestras, methods of performance, income and standing. Certain of such users have for many years consistently refused to pay license fees to the Society or its members, until investigations were made by the Society, infringements ascertained and suits brought.

14. The radio broadcasting stations in the State of Nebraska are members of the National Association of Broadcasters, which association on behalf of its members, for many years last past, has acted and presently acts collectively in dealing with the Society.

15. Under the contracts between the Society and said foreign societies, the latter are not required to, and never have, filed with the Society or with any State Authority, copies of the respective compositions copyrighted by their respective members.

16. Many thousands of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded under the compulsory license provision of Section 1 (e) of the Copyright Act by manufacturers of phonograph records, music rolls and electrical transcriptions. Such manufacturers have paid to copyright owners not more than two cents for each record and said copyright owners have no right to demand any further sums from such manufacturers; complainants and others similarly situated have no control over

the sale or disposition of such phonograph records, music rolls or electrical transcriptions and they can not compel the manufacturers thereof to affix any price upon them or to collect a price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected respectively for the public performance for profit thereof. Such manufacturers have no right, title or interest in the public performance for profit of such copyrighted compositions.

17. Complainants and others similarly situated are not willing to permit their musical compositions to be performed within the State of Nebraska publicly for profit on any basis wherein the price for such performance would be included in the price paid for a copy of the sheet music, phonograph record, music roll, electrical transcription or sound track thereof.

18. The musical compositions of the Society's members and complainants have been for many years last past, and are presently being performed within the State of Nebraska in hotels, dance halls, taverns, motion picture theaters and broadcasting stations.

19. The Statute can not possibly be complied with because, among other things, under their respective contracts with the authors and composers, the publisher-members of the Society (including publisher-complainants) have the right to and do give away and distribute free of charge, professional copies of the compositions copyrighted by said publisher-members within the State of Nebraska; this is a practice in the business and is done to create a desire for such compositions on the part of the public, make said compositions popular and give them commercial value.

20. Defendants have threatened to and will enforce such Statute against these complainants and others similarly situated in the event that such complainants and others similarly situated refuse to comply with said Statute or do any of the acts made unlawful by said Statute.

21. Said Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great, that complainants have no adequate means of testing the validity of the Statute by violating the same and defend-

ing against a criminal or civil prosecution in the courts of the State of Nebraska; if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in the 93 counties of the State of Nebraska where their works are being publicly performed for profit, they will be subjected to a multiplicity of suits and prosecutions; unless defendants are restrained, complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions within the State of Nebraska.

22. Complainants have no adequate remedy at law and are relievable only in this court of equity.

CONCLUSIONS OF LAW.

I. On the Findings of Fact, the court concludes as a matter of law that complainants are entitled to a decree permanently enjoining the defendants, their deputies, their successors in office, and all persons acting for or on behalf of them, or either of them, and each of them, from bringing or permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said statute against complainants and others similarly situated, their representatives, employees, agents, or any of them, and from prosecuting criminally any members of the said American Society of Composers, Authors and Publishers, including complainants, their representatives or agents, or any of them, for violating any provision of said statute.

II. That complainants recover of the defendants their costs and disbursements to be taxed, as provided by law.

Let decree be entered accordingly.

Dated January 25, 1940.

By the Court:

(S.) ARCHIBALD K. GARDNER,
U. S. Circuit Judge;
THOS. C. MUNGER,
U. S. District Judge;
J. A. DONOHOE,
U. S. District Judge.

EXHIBIT "E".

Filed in Lincoln Division, Jan. 25, 1940. Mary A. Mullen, Clerk, by J. B. Nickerson, Deputy.

Final Decree.

No. 562. Equity.

Buck *v.* Swanson, 33 Fed. Supp. 377.

This cause came on to be heard at this term, under Section 380 Title 28, U. S. C. A. (Jud. Code Sec. 266), on the 18th, 19th, 20th and 21st days of September, 1939, and the Court sat as provided therein; and the cause was tried and testimony taken and argument heard; thereupon, the court having made its Finding of Fact and Conclusions of Law, upon consideration thereof, it is Ordered, Adjudged and Decreed, as follows, viz.:

1. The temporary injunction order awarded and entered herein on the 13th day of November, 1937, be and the same is hereby made permanent and perpetual.

2. That defendants, Harry R. Swanson, individually and as Secretary of the State of Nebraska, John Havekost, individually and as State Treasurer of the State of Nebraska, Ray C. Johnson, individually and as Auditor of Public Accounts of the State of Nebraska, Walter R. Johnson, individually and as Attorney General of the State of Nebraska, James T. English, individually and as County Attorney of Douglas County of the State of Nebraska, Max G. Towle, individually and as County Attorney of Lancaster County of the State of Nebraska, Grace Ballard, individually and as County Attorney of Washington County of the State of Nebraska, S. S. Diedrichs, individually and as County Attorney of Lincoln County of the State of Nebraska, Raymond B. Morrissey, individually and as County Attorney of Johnson County of the State of Nebraska, Maynard N. Grosshaus, individually and as County Attorney of York County of the State of Nebraska, William T. Gleason, individually and as County Attorney of Saunders County of the State of Nebraska, Alvin B. Lee, individually and as County Attorney of Valley County of the State

of Nebraska, Zelma Derry, individually and as County Attorney of Keith County of the State of Nebraska, Floyd Lundberg, individually and as County Attorney of Kearney County of the State of Nebraska, Edwin Moran, individually and as County Attorney of Otoe County of the State of Nebraska, Rush C. Clarke, individually and as County Attorney of Scotts-Bluff County of the State of Nebraska, and the respective agents, servants and employees of each of them, and all other persons acting under or through the authority of each of them, or by virtue of the authority of the office of each of them, be and they are, each of them, severally, enjoined and restrained permanently from bringing, directly or indirectly and from permitting to be brought directly or indirectly, any proceeding at law or in equity, for the purpose of enforcing or executing the statute of Nebraska, known as Legislative Bill No. 478, passed by the Fifty-second Session of the Legislature of Nebraska, and signed by the Governor on May 17, 1937, and made effective immediately (said statute hereinafter referred to as the "State Statute") against the complainants and others similarly situated, their representatives, employees, agents or any of them, and from threatening to enforce against any citizens or residents of the State of Nebraska, the penalties of such State Statute, in the event such citizens and residents desire to carry out their contracts with the said American Society or other complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives, or agents, or any of them, or others similarly situated, for doing any legal act to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Nebraska or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

3. That the defendants pay to the Complainants their proper costs herein as taxed by the Clerk of this Court, amounting to the sum of $——, and now here decreed to the complainants, and that if the same be not paid within thirty

days from this date, then at the request of the complainants or their counsel, an execution shall issue for the enforcement of the payment of the said costs.

Dated January 25, 1940.

By the Court:

(S.) ARCHIBALD K. GARDNER,
United States Circuit Judge.
THOS. C. MUNGER,
United States District Judge.
J. A. DONOHOE,
United States District Judge.

EXHIBIT "F".

Equity No. 562.

Defendants' Motion for New Trial With 22 Affidavits Attached.

Filed With Return of Service in Lincoln Division, Febr. 5, 1940.

I.

The defendants move the Court to grant a new trial in pursuance of Rule 59; or, instead of a new trial, to:

(1) Set aside certain Findings of Fact because clearly erroneous, as provided in Rule 52; and

(2) In pursuance of said Rule 59,

(a) Amend the Findings of Fact; and
(b) Make additional Findings of Fact; and
(c) Amend the Conclusions of Law; and
(d) Amend and direct the entry of a new Decree; and

(3) Remedy the inconsistencies in the directory opinion of this Court, dated and filed 12/28/39, with the final Findings of Fact, Conclusions of Law, and Decree, dated and filed 1/25/40; and

(4) Grant partial retrial of the factual issue in reference to the inducing cause for passage of the Act in question, referred to in the opinion of 12/28/39; or

(a) Accept the affidavits of a majority of the legislators, filed herewith, and as a part hereof; as Exhibits 1 to 22, and served on the plaintiffs with this motion, as conclusive of the question of what was the inducing cause for the passage of the Act and the separability of the various parts thereof; and

(5) Grant a partial retrial of the factual issue in reference to public performance rights by one deposition or one short set of interrogatories because the facts in reference to public performance rights are erroneously set forth by the Court and yet are made the dominating basis for the defeat of the entire Act.

(6) Correct all errors in the Court's final Findings, legal Conclusions, and Decree dated 1/25/40, and enter new final papers based upon

(a) The record as made; and
(b) The showing accompanying this motion; and
(c) The law applicable to the issues involved; and
(d) The new evidence by deposition or interrogatories adduced upon order of this Court under Rule 59 and Rule 52.

II.

Regarding Defendants' Lack of Opportunity to Object to the Final Opinion, Findings, Conclusions, and Decree.

The defendants state that the opinion of the Court of 12/28/39, as well as the final Findings of Fact, Conclusions of Law, and Decree entered 1/25/40, were filed with no opportunity for the defendants to object, at the time of the said rulings and orders, and no opportunity was given to defendants to make known their objections to the action of the Court and their grounds therefor; and consequently, as permitted by Rule 46, the defendants move the Court for a specific order ruling that the absence of such objections shall not constitute a waiver by the defendants, nor prejudice the defendants in raising at this time, or in any future

proceedings herein, any objection to the said opinion, Findings of Fact, Conclusions of Law, or Decree now on file herein; and that the matters herein set forth as grounds for new trial may constitute the objections, the same and in all particulars as if made known to the Court with the defendants' desires in reference thereto at the time of the rulings of the Court on each of the matters in the motion declared objectionable to defendants' cause.

III.

Defendants' More Specific Statements of the Grounds Set Forth in Paragraph I Above for Setting Aside Certain Findings of Fact, and Amending Others, and Making Different Conclusions of Law and Decree.

1. In the opinion of 12/28/39, on Page 3 thereof, appears the following which should be stricken:

"Whether or not, under the common law of Nebraska the contracts between ASCAP and its members, and between it and the users of music in Nebraska, are valid or not, we need not consider. That issue is not before us, • • •"

The question of the alleged illegal ASCAP contracts as defined, and the authorities cited to sustain the same, on Page 23 and 31 in the Conclusions of Law, found in defendants' proposed Conclusions filed 10/4/39, and which are hereby referred to and made a part hereof, should be followed.

2. On Page 5 of the opinion of 12/28/39, appears:

"The Society as an assignee of the rights of each author is a representative of that individual right."

The same should be stricken unless the Court modifies its findings by declaring that the individual monopolistic rights under the Copyright Law do not permit a monopolistic combination as defined in Section 1 of the Act.

3. On Page 6 of the opinion of 12/28/39, the Court attempts to define five (5) separate public performance rights. These definitions do not coincide with those set forth in the Federal Copyright Law, Title 17, U. S. C. A., and therefore should be stricken or corrected to read properly in accord-

ance with the law and evidence. More specific corrective facts should be required by the Court, or the erroneous statement stricken.

4. Strike from the paragraph on Page 6, the following:

"The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing."

The Act specifically provides, Section 2 (A), that the National Copyright Act is in full force and effect in Nebraska. The defendants admit herein that the interpretation that should be placed upon said Section 2 (A) is that the individual copyright owner may either grant or withhold such of his public performance rights, or all his public performance rights, as he so desires. He may make known the price he wishes for any one or all of the public performance rights he wishes to grant or sell, and make his rights known if he desires to do so. Such requirement is not an interference with the National Copyright Act, and the same only applies to the individual.

Section 2 (C) specifically provides that nothing in the Act shall be construed to give to any purchaser of copyrighted musical compositions the right to "resell, copy, print, publish, or vend the same", which language is copied verbatim from the National Copyright Act, Title 17, U. S. C. A.

5. Strike from Page 7 of the opinion of 12/28/39, the following language:

"Under this subsection, the copyright owner in effect must offer the public performance rights of his copyrighted composition for sale and use in Nebraska, and if he does not choose so to do any person purchasing the composition may use it in the state for public performance without any liability to the copyright owner. This provision, we think clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act."

This finding is clearly erroneous as the Act does just the opposite and complies with the Court's finding, in reference to the National Copyright Law, which is as follows:

"As observed, his rights of ownership entitled him to sell or offer to sell, or to withhold from sale, as he may choose."

This last above worded portion of the opinion of this Court of 12/28/39, is precisely the proper interpretation to be placed upon the Nebraska Act in reference to the individual as it specifically provides, and the defendants admit, that the individual copyright owner may withhold from sale, or from offering for sale, as he may choose, or may grant, or withhold any part or all public performance rights, and may do so without any penalty whatever.

6. Strike from Page 7 of the opinion the following:

"The state statute cannot be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use."

Said wording is in contravention of, and in direct opposition to, the announced findings of the Court on 12/28/39 that ASCAP is an unlawful monopoly acting in restraint of trade; and that it is within the purview of the Nebraska Legislature to bar such an unlawful combination, even though the subject matter is copyrighted musical compositions. Defendants' Conclusions of Law dated 10/4/39, last part of Page 31 to 34, fully confirm the facts and law in opposition to the portion of the opinion above quoted.

7. Strike the reference to Section 2 (B) on Page 6 of the opinion of 12/28/39, and on through to the end of the opinion on Page 8, for the reason that said Section 2 (B) may readily be blue-penciled and eliminated from the Act, and because entirely separable from the balance of the section and from the balance of the Act, and held unconstitutional; that the said Section 2 (B) was not the inducing cause for the passage of the Act, as conclusively appears from the 22 affidavits of the legislators submitted with this

motion and attached hereto as Exhibits 1 to 22 and made a part hereof. If said Section 2 (B) is unconstitutional, the same may be so held by the Court and stricken without interference with the main and important features of L. B. 478, as defined in Section 1 of said Act, because Section 1 is the main feature of said Act in that it deals with the unlawful combination of copyright owners acting in restraint of trade, while Section 2 (A) and Section 2 (B) deal with the individual composer and publisher, and all of Section 2 is separable from the entire balance of the Act. Either Section 2 (A), or 2 (B), or 2 (D), or all three (3) parts, might be stricken from the Act as unconstitutional without in any way interfering with the workability, or the obvious and ostensible purposes of the anti-monopolistic legislation, which is the main title and gist of the Act.

It is, therefore, inequitable and a denial of the defendants' rights for the Court to hold:

"The invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts."

and therefore

"the whole act must be held inoperative."

The contrary now appears of record by said affidavits of the legislators attached. Furthermore, said issue was not presented by the plaintiffs in the form of evidence; and the Federal Courts should not surmise at the factual questions involved in the passage of state legislation. The plaintiffs introduced no evidence whatever that would justify this Court in holding, but for Section 2 (B) or Section 2 (A) the Act would not have been passed. The affidavits submitted are proof positive to the contrary, and defendants are entitled to a clear finding of fact and conclusion of law accordingly.

8. The defendants have made the foregoing criticisms in reference to the opinion of 12/28/39, rather than the Findings of Fact of 1/25/40, because the Court stated in the concluding paragraphs of the opinion of 12/28/39, as follows:

"Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion."

This was not accurately done by plaintiffs. While the defendants recognize that final Findings of Fact, Conclusions of Law, and Decree as filed become the Court's when signed by it, nevertheless, as filed on 1/25/40, they are hopelessly inconsistent with said opinion of 12/28/39.

IV.

The following should be stricken from the Final Findings of Fact and Conclusions of Law filed 1/25/40.

1. The introductory paragraph on Pages 1 and 2 is not an accurate statement of the appearances of the respective counsel and does not contain, as in said opinion, reference to L. B. 478 to be printed in the footnotes. The entire Act should be copied in the footnotes verbatim in the same way as provided in the opinion of 12/28/39, and the appearances of counsel listed as shown by the court reporter's record.

2. There should be inserted the word "the" before "person" in Line 4 of Paragraph 2 of the Findings of Fact, and "in the United States" added after the word "corporations", and the words "authors, composers, and publishers" stricken, so that the same shall properly read:

"Its membership consist of a substantial number of the persons, firms and corporations in the United States who own or control copyrighted vocal or instrumental musical compositions."

3. In the last line of Page 2 of Paragraph 4 of the Findings of Fact, the words "some of" should be stricken because the 123 publisher members constitute all of the principal publishers of the country; there should be added to said paragraph the following:

"The publisher members of the Society in almost every instance are the owners of the copyrights, including the rights of public performance for profit."

This is a material finding, and the contracts in evidence (and attached to Bill of Complaint) existing between the composer and the publisher show that the composer transfers to the publisher his public performance rights; in view of the fact that no composer is able to publish his music without the aid and assistance of a publisher, and substantially all the publishing houses in the United States being members of ASCAP, that fact becomes the power of ASCAP's vast control.

The publishers are, in effect, ASCAP; no music can be published by any composer or author of lyrics without a music publisher. The publishers are all in ASCAP. Therefore, no composer can function without ASCAP's consent. The organization thus controls the prices and terms for both the supply (composer) and the demand (user). A finding of these important facts should be made. There is no evidence to the contrary and ample evidence to sustain this feature.

4. The Findings of Fact referred to on Pages 18, 19, and 20 of defendants' proposed Findings of Fact of 10/4/39, on file herein, give the proper resume of the important line of evidence last above referred to and which should be so found as an important factor in the case.

5. There should be stricken from Paragraph 5, the seven lines from the bottom of the page, reading as follows:

"No license fees are paid by the owners of these receiving sets inasmuch as they do not engage in public performances for profit."

That was not an issue in the case; no evidence was heard on the subject, and the same is an attempt to have adjudicated by a court "sales talk". ASCAP may be engaging the Court in attempting to lay the ground work for the extension of its monopolistic practices to include private radios, if played, so that they may be heard by the public gathered in the vicinity. A Belgian case (citation will be furnished on request) by an ASCAP foreign affiliate is now so attempting.

6. In the Findings of Fact of 1/25/40, at the end of Paragraph 5 on Page 4, there should be stricken:

"The cost of operation of the Society is approximately 20% of the gross amount received."

The evidence clearly showed that it was at least 22%. It was not a proper subject for a special finding because the interrogatories propounded before trial in that regard were not answered by the plaintiffs. There should be no binding findings or conclusion that 20% is accurate for cost of operation. The same was not gone into by the plaintiffs or defendants, excepting as a conclusion based on an estimate of plaintiffs. It has no material bearing in the case, and the same should be eliminated as prejudicial to the rights of the defendants; or, the Court, under permissive Rules 52 and 59, should permit that subject to be further gone into by deposition or the questions answered by ASCAP, its books examined, and a proper conclusion reached. However, the pleadings make no issue of cost of operation.

7. There should be stricken from Paragraph 7 on Page 4 of the Findings of 1/25/40, the following:

"Few of them secured any substantial revenue from the public performance for profit of their copyrighted musical compositions."

Further on in the paragraph, there should be stricken:

"and could not economically obtain individual licenses for the separate performance of the large number of works required by them daily."

and also, there should be stricken:

"and to give users ready access to a substantial repertoire of music for such purposes that the Society was organized."

There was no evidence introduced on this subject of any probative force, or of evidentiary value; the same was only

casually referred to and is not a material issue in the case. It is manifestly unfair to defendants to permit plaintiffs to build sales propaganda in a Court's Findings of Fact.

8. Paragraphs 9, 12, 13, 14, 15, 16, 17, 19, and 21 on Pages 5, 6, and 7 of the Findings of Fact of 1/25/40, should be stricken for the reason that the matters therein are likewise "sales talk" and ASCAP propaganda placed in the findings; the same are baseless conclusions, with no material evidence to support them, and are contrary to the Court's instructions in the opinion of 12/28/39. That said paragraphs are more in the nature of a pleading or bill of complaint and are not, as a matter of practice, in proper language for findings, nor do the paragraphs contain proper matter for findings of fact and can therefore serve no useful purpose. On the contrary, the same are all harmful to the rights of the defendants when it is considered that Findings of Fact of a Trial Court are final truths.

9. Paragraph 22 should be stricken from the Findings of Fact of 1/25/40, for the reason that the plaintiffs do have an adequate remedy at law, as the facts and the evidence clearly show. The Act in question gives to the plaintiffs full and complete protection in the courts of the State of Nebraska in defense of any charge, civil or criminal, that may or might be instituted in the enforcement of the Act. No summary proceedings are permitted by the Act. Sections 9, 10, and 11 of the Act give full and adequate protection and due process of law, and equal protection to all.

V.

The Conclusions of Law of the Court, filed on 1/25/40, should be stricken because they are not properly drawn, nor are they compiled as defined in the decisions and rules; nor do they contain the supporting authorities and decisions to sustain them. In this regard, the defendants respectfully urge the Court to review the defendants' proposed Conclusions of Law, set forth on Pages 30 to 43, and submitted to the Court, and filed on 10/4/39. Said Conclusions of Law are respectfully referred to and made a part hereof, as if incorporated herein.

VI.

The Decree should be stricken and redrawn so as to provide that the Act is enforceable, unless the Court should continue its decision, after further facts on the actual operation of all public performance rights, that Section 2 (B) is non-enforceable because its provisions contravene the Copyright Act; then this Court should amend its Decree so that particular section is non-enforceable. The same might be true of other sections, such as certain parts of Section 2 (A) or Section 2 (D), as well as Section 2 (B). However, the Court should hold that such provisions were not the inducing causes for the passage of the Act; that each one of such subsections as may be invalid may be entirely separated from the main and important features of the Act in reference to the monopolistic control in restraint of trade by ASCAP of the copyrighted musical compositions used in the State of Nebraska.

VII.

The defendants move the court to amend its findings of fact to include the following important and material matters clearly and unmistakably in the record:

1. That radio stations are charged 5% of their gross receipts exclusive of political speeches and advertising commissions paid, and must be paid irrespective of the kind and form of program and whether ASCAP music is used or not; that blanket licenses only are demanded by and acceptable to ASCAP; that ASCAP refuses radio users a per-piece or per-program charge based upon the ASCAP musical numbers used, excepting in the one instance of the newspaper contract found among the 391 contracts introduced in evidence pertaining to the newspaper owned radio station at Norfolk; that such conduct is discriminatory and unfair to music users; that repeated demands for per-piece or per-program rates have been demanded by radio stations especially, as the evidence clearly shows (J. J. Gillin Testimony), but ASCAP insists, and enforces through its monopolistic control, the blanket license which it demands and which is based upon percentage of gross business done

plus a sustaining fee, irrespective of the program (Radio station contracts in evidence).

2. That in the past ten (10) years one hundred (100) lawsuits for copyright infringement were instituted in Nebraska and terminated in dismissals by ASCAP, or the release of judgments by ASCAP, when the defendants signed the blanket license contracts demanded by it and paid the rates therein fixed and determined by ASCAP.

3. That the radio stations in Nebraska are required to enter into contracts with the national networks, which compel the stations in Nebraska to enter into contracts with ASCAP to save them (networks) harmless from infringements. (See Columbia and National contracts in evidence.)

4. That theaters pay ASCAP on the basis of seat capacity and not on whether ASCAP music is used or not used, or how much of it is used in the theater. (See theater contracts in evidence.)

5. That hotels pay on any sort of a basis that the agent of ASCAP in Nebraska can arrange; and the same is true with dance halls, taverns, amusement parks, and similar places, with each of the same at the complete mercy of ASCAP. (Malec, Hedlin testimony and contracts in evidence.)

6. That the users of music have large investments in Nebraska and must have the music controlled by ASCAP to protect the same or go out of existence as music users at great inconvenience and loss. (Malec, Gillin, Hedlin, and Searle testimony.)

7. That the National Association of Broadcasters does not speak for the radio stations in Nebraska (Gillin), nor does the National Hotel Association speak for the hotels (Hedlin) in Nebraska. The negotiations for prices are actually accepted in Nebraska, and the contracts signed in Nebraska by the agent of ASCAP operating within the state. (Blazer testimony.)

8. That the composers of music have entered into contracts with their publishers and ASCAP, after which they

have no further control in reference to public performance rights that are thus given to ASCAP by the composers and publisher, and are placed in a classification in which the first group, of about 50 composers, receive as much as $17,500 per year, and the publisher members in the first group $150,000 per year (Buck, Mills, Paine testimony; all depositions); that the classification is scaled down so that the vast majority of composers belonging to ASCAP receive virtually nothing (Irving Ceasar Deposition); and through the scheme of the publisher members taking one-half of the profits and the selected classification (By-Laws—Complaint) of the upper groups, by the self-perpetuating board of directors, all the income for public performance rights is thus taken and controlled and distributed among a comparative few composers and publishers, and the officers named in the evidence in charge for years back.

9. That the officers receive $50,000 a year salary and bonuses of $5,000 to $8,000; that $30,000 a year rent is paid in New York for the headquarters (Buck); that ASCAP is a substantial business organization doing business in the State of Nebraska through a local agent known as an attorney at law and in fact (Blazer) and whose name appears on all the contracts for ASCAP.

10. That the purpose of showing that there were 284,000 (Gillin) radio sets in Nebraska and 24 hotels (contracts) and 10 radio stations, and that a third of the population at sometime during the year entertained itself in dancing; and that there are 350 dance halls (Malec) and music rooms in the State of Nebraska, is to prove the matter of the public interest in the matter of copyrighted music within the State of Nebraska; and defendants are entitled to such finding because the evidence so shows.

11. That it is clear from the evidence that there is no interference with commerce because the networks pay nothing to ASCAP (Contracts) (Mills); that the public performances are all within the State of Nebraska; and that which comes over the wire, sent by the networks, has no usable value whatever until it is reformed by machinery

and apparatus and equipment located and operated within the State of Nebraska (Gillin, Searle), and at which time, and only at such time, do the public performance rights attach within the State of Nebraska. Interstate commerce is in no way affected. A Finding of Fact should be made accordingly.

12. The foregoing suggestions in reference to commerce require additional Findings of Fact, and which may be found in the proposed Findings of Fact set out on pages 13 to 29 inclusive of the defendants' findings submitted 10/4/39, and which are hereby referred to and made a part hereof the same and in all particulars as if copied at length herein.

VIII.

As a Further Grounds for this Motion for New Trial, the Defendants Move the Reconsideration and Adoption by the Court of the Conclusions of Law and the Authorities in Support Set Forth on Pages 30 to 43 Inclusive of the Defendants' Proposed Conclusions Dated 10/4/39.

IX.

In Reference to the Interference of the Nebraska Act with the National Copyright Law, and Therefore Unconstitutional, the Defendants move for the correction and additions to the Findings of Fact, conclusions of law, and decree in the following manner and for the following reasons, either at this time or after some additional evidence asked for herein above on public performance rights has been furnished.

1. The National Copyright Act was passed in 1909. At that time, radio had not developed, and the use of music in the manner it is used today by hotels, in their rooms, by taverns, cafes, etc. had not been developed, nor even known. Consequently, the National Copyright Act does not cover many of the new phases of the business. Thus the Act does not prevent a state from passing reasonable regulations for the use of copyrighted material within the State of Nebraska so long as it does not interfere with the free use

by the individual. Defendants contend that a monopolistic organization such as ASCAP has no rights under the Copyright Act to combine unlawfully.

2. The deposition of Ella Herbert Bartlett shows that she and her publisher deal in reference to dramatico musical rights by making special deals and special transactions with the moving picture houses, producers, theaters, and others. ASCAP is not interested therein, and those rights are separate and distinct and have no bearing upon or concern in this case; nor are such rights limited or curtailed in any way by the Nebraska Act. Ella Herbert Bartlett, for example (Refer to her deposition), received $50,000 for one of her father's rights for dramatico musical purposes. That music for that purpose was sold and concluded. ASCAP admittedly has no interest directly or indirectly in that transaction. The Nebraska Act conforms to that right and does not interfere with such transactions.

3. The Copyright Act specifically provides that there shall be collected upon all mechanical reproductions 2¢ per each part (17 U. S. C. A., page 5), and which must be collected by the manufacturer when he sells the mechanical parts, rolls, discs, etc., including coin operated machines. The composer receives that sum direct from the manufacturer. ASCAP admittedly has no interest in such transactions. It is one of the separate rights that the composer and his publisher have, and which they handle independently of ASCAP and independently of all else, and all other publishers and composers. Consequently, there is no conflict with that provision of the National Act and the Nebraska Act, as the matter of price at 2¢ per roll must be collected and fixed by the composer by the National law.

4. With electrical transcriptions and other mechanical devices, ASCAP is not interested. The National Act provides that others who use the same must pay that price so fixed, and each must pay it. There is no interference by the Nebraska Act in reference to mechanical reproductions, including electrical or otherwise. That, too, is a matter for accounting between the composer and his publisher, and the manufacturer. The Nebraska Act in no way interferes with

that right because the same agreement for price that might be made with a manufacturer in New York could likewise be made with a manufacturer (if there were one) in the State of Nebraska, and the price for such manufacturing right to all mechanical devices is thus fixed and determined. Nothing in the Nebraska Act conflicts with this provision of the National Copyright Act.

5. As far as the sale of sheet music is concerned, that is admittedly an item upon which the evidence clearly shows that ASCAP is in no way interested. That is a matter purely between the composer and his publisher, and the evidence shows (See each deposition of composer and publisher on file) that they collect three cents per piece when the sheet music is sold at the music stores, and that three cents is remitted as a part of the purchase price, and the publisher gives one-half or all of it to the composer as his royalty on each piece of sheet music that is sold, as they might agree. In most instances, however, the evidence clearly shows that the publisher is the owner of the copyright and thus that three cents for each copy of sheet music is collected for the publisher. That is immaterial to this case, ASCAP not being interested therein, and that transaction is in no way interfered with by the Nebraska Act.

6. It then becomes only a question of what is known as the "small public performance rights". That is what ASCAP owns; that is what ASCAP completely controls and dominates free from interference by the composer or publisher under the terms of the contracts in evidence. Consequently the Court erred in its opinion of 12/28/39, and the same in its Findings of Fact of 1/25/40, when the Court erroneously found that Section 2 (B) or 2 (A) interfered with these respective rights. It does not. In fact, the enactment of Section 2 was evidently for the purpose of protecting the individual composer and his publisher in the State of Nebraska after ASCAP was dissolved by permitting or requiring the composers to handle their own small public performance rights in Nebraska by selling the same if they wished. The stamping on the music sold in Nebraska could read specifically to include or exclude any one or all of the rights above granted,—and so far as public performance

rights are concerned, why is it not a reasonable regulation and a good one to require the composer to make known the price for his public performance rights and collected at the source? Wherein does the Copyright Act restrict state legislation on that score? That merely requires the composer to make his wants known. Repeated public performance,—is that the objection? How is it handled now? Outside the scope of the National Copyright Law is the method now used by ASCAP in collecting for public performance rights. The National Act gives no such right as ASCAP is exercising, in the State of Nebraska, in the matter of its monopolistic practices in restraint of trade. Nor, does the National Copyright Act, by its terms, provide for any such means or methods of arriving at fees and licenses, and the distribution thereof, as ASCAP has invented.

7. The Copyright Act does not define the means and the methods of the collection of what is known as the small public performance rights that have been given to ASCAP and which amount in the nation to some $6,000,000 per year, and in the State of Nebraska to $70,000 per year or more.

8. The Nebraska Act, Section 2 (A), does not require those public performance rights to be given or granted when the sheet music is sold. The publisher may stamp thereon, if he desires to do so, all limitations of and the prices for public performance.

9. ASCAP only being interested in the small public performance rights, the material feature is whether or not there is interference with the Copyright Act in requiring the composer and his publisher, when they sell music in the State of Nebraska, to sell the small public performance rights with it, if they wish,—and if they wish,—then and only then to state the terms on the music, and what parts are granted and what parts withheld and what uses are granted by the sale. Defendants admit that interpretation of Section 2. For example, in the deposition of Ella Herbert Bartlett, she stated that in 1937, her publisher sold 300,000 copies of her father's copyrighted music; she received three cents a copy directly from her publisher for the ordinary sheet music royalty, which she and her publisher fixed and determined ahead of time. The Nebraska

Act would not stop that. She received $50,000 for one piece for the dramatico-musical rights, and she received large sums of money on the basis of 2¢ per roll for mechanical reproductions. The Nebraska Act would not stop that. This she collected at 2¢ per part from the manufacturer through her publisher acting as her agent or under contract with her. Therefore, on some of the sheet music that she sold,—if she stamped public performance rights, defining its limitations, if she collected one dollar per copy for public performance rights copies so sold for that purpose, on 10,000 of the 300,000 sold, she would have received $10,000 directly from the music houses for small public performance rights. There is nothing in the Nebraska Act (Section 2 A) to prevent her from estimating what her public performance rights were worth for these small public performance rights for the music that was sold for public performance purposes within the State of Nebraska. She received from ASCAP in 1937 $7500 for those rights. If she wished to charge $5.00, or $10.00, or $1.00 per copy for those sold in Nebraska for that purpose, she could so do; or, she could withhold that right completely and sell only the sheet music that would carry with it, as now, no public performance rights. This is not an interference with the Copyright Act, but is a legitimate exercise of the rights of the State to remedy a situation which Congress has not remedied in the Copyright Act, and which is not within the exclusive purview of the Copyright Act. It gives the right, but not how it shall be performed. If the right is in no way curtailed, the method of collection is not violative of the provision of the National Copyright Law.

10. The cases cited on Pages 36 and 37 of the defendants' proposed Conclusions of Law, filed on 10/4/39, are respectfully referred to because in some of those cases the Supreme Court of the United States has held, as shown in those cases, that it was not the intention of Congress to curtail states in a matter similar to Section 2 (A).

X.

In Reference to Additional Testimony Under Rule 59 and 52, to Bring Out All Phases of the Various Public Performance Rights, Defendants Move the Court:

1. To grant a partial retrial by receiving additional evidence in the form of either affidavits, or depositions, or the answering of interrogatories by the plaintiffs to establish exactly in what manner the respective parts of public performance rights of the National Copyright Act are dealt in by composers and publishers, because the Court in its opinion of 12/28/39 and in its finding of 1/25/40, erroneously defines those rights, and then finds an interference therewith as the dominating issue in the case, and thereby defeats the whole Act. One or two short depositions, or the answering of a short set of interrogatories, in addition to the evidence of record, should rectify the erroneous findings of the Court.

2. The reference to public performance rights in the last half of Page 6 and all of Pages 7 and 8 of the opinion of 12/28/39, and Paragraphs 16 and 19 on Pages 6 and 7 of the Findings of Fact of 1/25/40, are the objectionable findings and are erroneous, and should be stricken or clarified to speak the truth by some new evidence.

3. It was the duty of the plaintiffs to have given the Court complete and adequate evidence on all phases of public performance rights; they have not done so, and yet the Court has held, without adequate evidence to support its findings, upon the request of ASCAP a quite complete resume of public performance definitions and how applicable. These findings, defendants claim, are in error. In justice to the defendants, the same should be corrected, and amended findings, conclusions, and decree granted, upon new evidence, or the same entirely stricken from the consideration of the case. As it now stands, it is the controlling finding.

XI.

The attitude taken by the defendants is that Section 2 (B) and Section 2 (D) as well as Section 2 (A), might readily be blue-penciled from the Act and held non-enforceable without in any way curtailing or hampering the other main features of the Act in reference to monopoly.

1. The defendants state that in connection with Section 2 (A), while they believe the same to be a proper exercise of the legislative function of Nebraska and believe in its con-

stitutionality, and that it is not a violation of the National Copyright Act, still if the Court should hold, as to Section 2 (A) that it is unconstitutional, the whole Act should not fail. That is manifestly unjust to defendants. All of Section 2 is easily separable. The main monopolistic features of the Act will stand after the separation.

XII.

Elimination of the finding that the Nebraska Act is drastic in its provisions.

In the Findings of Fact and Conclusions of Law of 1/25/40, it has been stated that the Act is too drastic in its penalties. We respectfully urge the Court to read the cases from Nebraska on Pages 33 and 34 of defendants' proposals of 10/4/39, and the other penalties provided for monopolistic practices in other lines in the State of Nebraska, as well as the Sherman Act, and it will be readily seen that the penalties are not any more severe than in other similar acts held valid. A Finding of Fact on that matter should be entered, or the "drastic" references in the Findings (Par. 12, Page 7, Findings of 1/25/40) should be stricken.

XIII.

In reference to the separability of Section 2 from the balance of the Act.

1. A careful reading of the Nebraska cases cited in the opinion of 12/28/39, in reference to the inseparability of parts of an act, will convince the Court that those cases are in themselves adequate authority to sustain the defendants' contention herein that Sections 2 (A), 2 (B), and 2 (D) of L. B. 478 might readily be stricken and still the Act be enforceable and proper in all its other phases.

2. The objectionable parts of the Nebraska Act, being Section 2, pertain to the individual composer and his publisher. Section 1 and all the balance of the Act, except said Section 2, pertains to the unlawful combination. If Section 1 and its enforcing provisions are held constitutional, and Section

2 (A), 2 (B) and 2 (D) are held unconstitutional, we respectfully submit that the main and important feature of the Nebraska Act will be left entirely intact and enforceable. A reading of the Act, with Section 2 eliminated, should convince the Court. Certainly there was no ulterior motive of the Nebraska Legislature in its attempt to give the individual composer and his publisher the right to collect themselves for public performance rights if they wished. If the Legislature in so doing overstepped its limitation in the Sections 2 (B) and 2 (D), those two might be stricken, and Section 2 (A) would be perhaps more clear. This is what defendants wish the Court to reconsider. But, even if all of Section 2, including 2 (A), is classified as non-enforceable with 2 (B) and 2 (D), defendants submit that the Act, L. B. 478, shorn of all those parts, or some of them, must stand as a proper exercise of the state legislative power to prohibit unlawful combinations from carrying on their business in Nebraska.

Respectfully submitted,

WILLIAM J. HOTZ,
of Omaha, Nebraska;
JOHN RIDDELL,
Assistant to Attorney General Walter R. Johnson of the State of Nebraska, Lincoln, Nebraska;
ANDREW BENNETT,
for Defendant Grosshaus, of Washington, D. C.; and
GORDON DIESING,
of Omaha, Nebraska,
Assisting William J. Hotz on Brief,
Attorneys for Defendants.

(S.) WILLIAM J. HOTZ,
1530-5 City National Bank Building,
Omaha, Nebraska,
For Defendants.

February 5, 1940.

Affidavit in Support of Defendants' Motion for New Trial.

Equity No. 562.

GENE BUCK, for ASCAP, et al., *Complainants*,

vs.

HARRY R. SWANSON, as Secretary of State of Nebraska, et al., *Defendants*.

STATE OF NEBRASKA,
County of Douglas, ss:

Amos Thomas, being first duly sworn upon oath, deposes and says that he was a member of the Nebraska Legislature on May 13, 1937, and was present and voted for the final passage of L. B. 478; that the title to said bill shows that the main features of the same were an act relating to unlawful monopolies in copyrighted vocal or instrumental musical compositions and prohibiting combinations composed of copyright owners, their heirs, successors, or assigns; that said bill had been debated on the floor repeatedly previous to its passage and was reported out by the Judiciary Committee; that the Nebraska Legislature at said time was a Unicameral Legislature consisting of 43 members; that the roll call of record on final passage showed 32 votes for the bill, 7 against the bill, and 4 not voting.

Affiant further states that he is familiar with Section 2-B, relating to the rights given to users in the event the individual composer refused to fix upon the music the selling price for public performance and other uses; and also is familiar with Section 2-D, which required the filing of the copies of the musical composition with the Secretary of State at 25¢ per copy; and is also familiar with Section 2-A that required the individual composer to fix the selling price for public performance rights and stamp it upon the musical composition if the composer or publisher desired to grant or sell his public performance rights.

Affiant further states that none of said parts of Section 2 were the inducing causes for the passage of the bill, nor for the affirmative vote of this affiant; that there was incorpo-

rated in the said act the saving clause, known as Section 12, in reference to the enforcement of the balance of the act in the event any part was held non-enforceable; and furthermore, the act specifically provided that all benefits of the national copyright law would be granted to all authors and composers, and their heirs and assigns, within the State of Nebraska.

Affiant further states that the inducing cause, and the legislative intent, and this affiant's affirmative vote, in passing L. B. 478, were fundamentally and mainly to prohibit the operation of an unlawful combination of copyright owners acting in restraint of trade and in the fixing of prices within the State of Nebraska; and that Sections 2-B and 2-D, as well as Section 2-A, were not the main or the inducing reasons for the passage of the bill, nor for this affiant's affirmative vote, but said sections were merely incidental to the main issue in reference to monopoly, and separable therefrom.

AMOS THOMAS.

Subscribed in my presence and sworn to before me this 30th day of January, 1940.

HAROLD A. MOORE,
Notary Public.

[SEAL.]

My commission expires January 28, 1943.

(Copy). Ex. 19. Exh. 1 to 22 exact copies hereof.

Certificate.

I, Grace A. Bowen, a notary public, do hereby certify that the following named persons, in the following named counties, and on the following named dates, and before the following named notaries public, signed and acknowledged affidavits in the exact wording of the affidavit of Amos Thomas attached hereto; and that all the said original affidavits, being 22 in number, were filed with the Clerk of the United States District Court at Lincoln, Nebraska, in said cause, Equity No. 562, and attached to the Motion for New

Trial; that said affidavits were drawn, and copies thereof made, by the undersigned.

(S.) GRACE A. BOWEN,
[SEAL.] *Notary Public.*

Dated: February 3, 1940.

Name	Date Signed and Acknowledged	County	Notary
Armstrong, Robert M. Exh. 1	1/30/40	Nemaha, Nebr.	Oscar A. Flau
Ashmore, Hugh B. Exh. 2	1/30/40	Hitchcock, Nebr.	J. E. Blum
Brady, Frank J. Exh. 3	1/29/40	Holt, Nebr.	J. B. Nickerson
Brodecky, Emil E. Exh. 4	1/31/40	Colfax, Nebr.	James A. Fiala
Cady, P. L. Exh. 5	1/31/40	Washington, Nebr.	Tom Dowell
Carlson, Swan Exh. 6	1/30/40	Phelps, Nebr.	J. M. Larson
Frost, Tracy T. Exh. 7	1/30/40	Howard, Nebr.	Pearl Dobry
Howard, R. M. Exh. 8	1/31/40	McPherson, Nebr.	Clay Wright
Knickrehm, John Exh. 9	1/30/40	Douglas, Nebr.	Grace A. Bowen
Murphy, L. B. Exh. 10	1/30/40	Scottsbluff, Nebr.	Maude Glover
Neubauer, E. M. Exh. 11	1/31/40	Orleans, Nebr.	Geo. S. Austin
Norton, J. N. Exh. 12	1/31/40	Washington, D. C.	Helen A. Bonorden
Peterson, Carl H. Exh. 13	1/29/40	Madison, Nebr.	Kathleen Kulp
Peterson, John B. Exh. 14	1/30/40	Saunders, Nebr.	C. N. Walton
Regan, R. C. Exh. 15	1/30/40	Platte, Nebr.	Carl N. Hoge
Reynolds, John D. Exh. 16	1/30/40	Knox, Nebr.	E. A. Houston
Schultz, Edwin Exh. 17	1/31/40	Antelope, Nebr.	Rosa Martin
Slepicka, Alois Exh. 18	2/1/40	Saline, Nebr.	J. J. Grimm
Thomas, Amos Exh. 19	1/30/40	Douglas, Nebr.	Harold A. Moore
Tvrdik, Charles F. Exh. 20	1/31/40	Douglas, Nebr.	Otto Smolek
Von Seggern, E. M. Exh. 21	1/31/40	Douglas, Nebr.	Grace A. Bowen
Wells, Franklin S. Exh. 22	1/31/40	Jefferson, Nebr.	E. R. Bee

Acknowledgment of Service.

The undersigned, one of the attorneys for the plaintiffs in the above entitled cause, hereby acknowledges receipt of copy of the Defendants' Motion for New Trial and the Affidavits Attached, the same being served upon the undersigned this 5th day of February, 1940.

Dated at Omaha, Nebraska, this 5th day of February, 1940.

L. J. TEPOEL,
One of the Attorneys of Record for the Plaintiffs.

Filed in Lincoln Division, Feb. 5, 1940, Mary A. Mullen, Clerk, by J. B. Nickerson, # 56, Deputy.

EXHIBIT "G".

No. 562 Equity.

Order.

Filed District of Nebraska, at —M #57, Mar. 28, 1940. Mary A. Mullen, Clerk, by J. B. Nickerson, Deputy.

The Defendants' Motion for a New Trial, and for other relief, filed on February 5, 1940, in the above entitled case, which has heretofore been submitted to the Court, consisting of Archibald K. Gardner, Circuit Judge, Thomas C. Munger, District Judge, and J. A. Donohoe, District Judge, is hereby overruled.

(S.) ARCHIBALD K. GARDNER,
United States Circuit Judge;
THOMAS C. MUNGER,
United States District Judge;
J. A. DONOHOE,
United States District Judge.

EXHIBIT "H".

Legislative Bill No. 478.

Introduced by Frank J. Brady of Holt.

AN ACT relating to monopolies; declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which fixes and determines the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit within this state copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composition copyright owners or their heirs, successors or assigns; to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of each other and of any combination as herein declared unlawful in determining license fees and other rights within this state; to require the author, composer, printer and publisher to specify upon the musical composition the selling price thereof for all uses that may be made thereof including public performance for profit within this state; to declare that any purchaser thereof, who pays such price therefor, shall

have the right to render such music privately or publicly for profit within this state; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit within this state with any combination of persons, firms or corporations herein declared unlawful to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit within this state without interference by such unlawful combination; to provide for the appointment of a receiver and injunctive relief and the dissolution of such combination as herein declared unlawful; to determine in such action the legal owner of such copyrighted musical compositions; to adjust and fix in such action the license fee to be paid, if any, and the terms for the use of such musical compositions in this state; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting, radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside the State of Nebraska against the collection of license fees or other exactions by such out-of-the-state affiliates for or on account of any combination declared unlawful under Section 1 hereof; to provide that the responsibility and all liability for any infringement of copyrighted musical compositions conveyed by radio broadcast, air, wire, electrical transcription, or sound production apparatus, or by personal performance coming from outside this state, and used herein, to rest entirely with the out-of-the-state person, firm or corporation originally emanating or sending the same into this state for use herein; to provide penalties for the violation hereof; to empower the County Attorneys and the Attorney General, upon complaint of any party aggrieved by any violation hereof, to proceed to enforce the penalties hereof against such combination and any of its representatives, members or agents, and against the property of such unlawful combination within this state; to define the method of service of process upon such combination as herein declared illegal; to empower any party aggrieved

by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions hereof; to provide for the recovery of costs, expenses and attorney's fees; to provide for the filing of each said composition in the office of the Secretary of State before selling or disposing of the same, together with the amount of filing fee therefor; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof; and to declare an emergency.

Be it Enacted by the People of the State of Nebraska:

Section 1. It shall be unlawful for authors, composers, proprietors, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, club, firm, partnership, corporation, or other group or entity, called herein a combination, either within this state or outside thereof, when the members, stockholders, or interested parties therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when at least one of the objects of any such combination is the determination and the fixation of license fees or other exactions required by such combination for itself or its members, stockholders or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit within this state for the purpose of preventing free competition among or with different and competing copyright owners or among or with persons, firms, corporations or associations in this state using or rendering such copyrighted matter by public performance for profit; or for the purpose of dividing among them the proceeds of the earnings of such copyright owners; or for the purpose of fixing the exactions and fees for the rendition or use of copyrighted matter which any copyright owner must charge; and the collection or attempted collection within this state of such license fee or other exaction so fixed and determined, by any member, agent or representative of any such

combination herein declared unlawful, from any person, firm, corporation or association within this state, including theatres, radio receiving, radio broadcasting and radio rebroadcasting stations, moving picture houses, athletic associations, hotels, cafes, restaurants, clubs, dance halls, recreation rooms, amusement parks, pavilions, churches, colleges, schools, universities, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered, or permit to be rendered, such copyrighted vocal or instrumental musical compositions privately or publicly for profit within this state through personal performance, or through radio, or any instrumentality or sound producing apparatus, shall be and the same is hereby declared unlawful and illegal; and such license fees or other exactions shall not be collected in any court within the boundaries of this state; and each collection or attempted collection of such license fee or other exaction by such combination or its agents, representatives, members, stockholders or interested parties shall be a separate offense hereunder; and any such combination of authors, composers, publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this state; and such fixing of prices for use or rendition of copyrighted musical compositions within this state by such unlawful combination and the collecting or attempting to collect such license fees or other exactions by it or for its stockholders, members or other interested parties within this state is hereby declared illegal and in restraint of trade, and such collection or attempted collection thereof is declared to be an illegal intrastate transaction within this state and shall be subject to the terms and penalties of this Act. In any action, civil or criminal, instituted under the provisions of this Act, it shall be prima facie evidence against any party to such action of the existence of such unlawful combination for the purposes in this Act enumerated, if a substantial number of all authors, composers, proprietors, publishers, owners or their heirs, successors or assigns of copyrighted vocal or instrumental musical compositions in the United States, are shown to be

members of any society, association, club, firm, partnership, corporation, group or entity.

Sec. 2. (A). All authors and composers, and their heirs and assigns, shall have within this state all the benefits conferred by the Copyright Laws of the United States, being the act of March 4, 1909, c. 320 Section 1 (e). 35 Stat. 1073, Title 17, U. S. C. A. Each author, composer and publisher shall act independently of any and all substantial number or numbers of other authors, composers and publishers, and also independently of any such combination as in Section 1 hereof declared unlawful, in determining and fixing the price to be charged for the use or rendition of his copyrighted musical compositions within this state, and the author, composer or publisher, or his, her, or its heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition within this state, the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this state and pays the selling price so specified thereon to the seller or publisher of said copyrighted musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered within this state, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radios, loud speakers, radio receiving, radio broadcasting and radio rebroadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise within this state, and the same may be so rendered either privately or publicly for profit when so purchased and paid for without further license fees or other exactions; and such copyright owner or proprietor, in the event of such payment, shall be deemed to have received full compensation for the rendition and all

uses of such musical compositions for private purposes or for public performance for profit by such purchaser within this state.

(B). In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private or public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state.

(C). Nothing in this section, or this Act, shall be construed to give to any purchaser of copyrighted music compositions, as herein provided, the right to resell, copy, print, publish, or vend the same.

(D). Any composer, author or publisher of vocal or instrumental copyrighted musical compositions, or any person, firm or corporation controlling the sale or distribution of said compositions, whether or not within the purview of the combination described in Section 1 of this Act, shall, before selling or disposing of any such composition in this state, file in the office of the Secretary of State a copy of each said composition upon which shall be written, printed or typed over his or its signature a statement to the effect that he or it controls the sale or disposition of such composition; and provided further, said person, firm or corporation who shall make such filing shall accompany the same with a fee of Twenty-five Cents (25¢) with each copy of said composition so filed to reimburse the Secretary of State for keeping in current and convenient form, easily accessible to the public, the titles of said compositions and the names of the persons, firm or corporations who shall file said copies from time to time; and provided further,

said Secretary of State shall deposit all the fees received hereunder weekly with the state Treasurer who shall credit said fees to the general fund of the state.

Sec. 3. All existing contracts, agreements, licenses or arrangements now existing within this state made by any person, firm or corporation with any combination, declared unlawful under Section 1 hereof, are hereby declared void and nonenforceable in any court within the boundaries of this state, and are hereby declared to have been entered into as intrastate transactions with such unlawful combination and in restraint of trade; and further, all such contracts, agreements, licenses, arrangements and the attempted enforcement thereof within this state, may be enjoined by any person, firm or corporation sought to be bound thereby; and any member, representative or agent of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, license or arrangement within this state shall be guilty of a violation of the terms of this Act, and for each such collection or attempted collection shall be subject to the penalties hereinafter provided.

Sec. 4. (A). Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this state, shall be and is hereby authorized to receive, broadcast and rebroadcast copyrighted vocal or instrumental musical compositions within this state, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and noncollectible by the terms hereof.

(B). When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or rebroadcast within this state, in accordance with the terms of any affiliation agreement or other contract, then

such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this state, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio rebroadcasting station within this state, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this state to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible within this state, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Sec. 5. (A). Any person, firm or corporation who owns, leases, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this state, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered within this state, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever within this state, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

(B). When such theatre or theatres, moving picture house or houses, or other places for amusement or performance within this state is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this state, or supply such persons, firms, or corporations in this state with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this state shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect within this state, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this state, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions within this state; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this state against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Sec. 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of

copyrighted vocal or instrumental musical compositions within this state, and which radio stations and theatres, and other persons, firms or corporations, aforementioned, are affiliated with persons, firms or corporations outside this state from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this state, then any responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this state and thus rendered in this state shall rest with and be upon such affiliated person, firm or corporation from outside this state who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this state; and, if the owner of any copyrighted musical composition commences any action within this state on account of any use or rendition thereof in this state through such affiliate or affiliates, then any defendant in such action may interplead such affiliate or affiliates in such action; and any judgment which may be rendered in favor of the copyright owner shall be paid and satisfied by such affiliate or affiliates; and, if paid or satisfied by the defendant user in this state, such defendant shall be subrogated in said action or otherwise to all rights of the plaintiff in said judgment as against said affiliate or affiliates, whether the latter is or are a party or parties in said action or not; and in any event such affiliate or affiliates shall be liable to such user to the full extent of his liability to such copyright owner, in the absence of any agreement to the contrary; and any combination declared unlawful by Section 1 of this Act which is the owner or proprietor of or controls the copyrighted vocal or instrumental musical compositions, its agents or representatives shall be and are hereby prohibited from suing for infringement, loss or damage within the boundaries of this state, for the use or rendition of such copyrighted vocal or instrumental musical compositions so originating or emanating because such persons, firms or corporations used, rendered or performed the same within this state; the use

or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this state, or otherwise, of such copyrighted musical compositions within this state in the manner set forth in this section, shall be considered, for the purpose of this Act, as intrastate business of this state and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this state.

Sec. 7. (A). Any person, firm or corporation within this state who shall act as the representative of any combination herein declared unlawful as defined in Section 1, hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this state, and service of any process against such combination may be had upon such representative or the agent of any such representative as herein defined within this state; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this state.

(B). Furthermore, any person or persons who negotiates for, or collects within this state, or attempts to collect license fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Sec. 8. Any combination as in Section 1 hereof declared unlawful and any other person, firm or corporation, acting or attempting to act, within this state in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination, as defined in Section 1 hereof, in the violation of any of the terms of this Act in

any manner whatsoever within this state, shall be deemed guilty of a misdemeanor and shall be fined in any sum not more than $5,000.00 or imprisoned for not more than one (1) year, or both, such fine and imprisonment for each and every violation of the terms hereof.

Sec. 9. (A). The County Attorney in each county in this state wherein a violation of any of the terms of this Act takes place, in whole or in part, is hereby authorized upon the complaint of any party aggrieved to institute a civil or criminal action, or both, under the terms hereof against any combination declared unlawful as defined in Section 1 hereof, and against any of its members, stockholders or other interested parties, and its agents or representatives as herein defined, and to enforce any of the rights herein conferred, and to impose any of the penalties herein provided.

(B). The Attorney General of the State of Nebraska is hereby empowered to proceed upon the request of any County Attorney to aid and assist, or to take charge of, any prosecution or suit for any violations of any of the terms hereof.

(C). Or, the Attorney General, on the complaint of any party aggrieved, because of the violation of any of the terms of this Act anywhere within this state, shall proceed in the District Court in any county in which all or any part of the offense or violation was committed, to institute action against any combination defined as unlawful by Section 1 hereof, and against the representatives or agents of any such combination, either in a criminal action to enforce the penalties hereof, or in a civil action to enforce all rights hereunder, or to dissolve any such combination as declared unlawful by Section 1 hereof, or he may proceed by both civil and criminal actions; in such action or actions, the plaintiff shall be the State of Nebraska; and any interested party may, upon application, be granted leave to intervene in such a civil action.

(D). The District Court shall, in such dissolution or other civil suit, upon the application and intervention in said

action of any member, stockholder or other interested party of said unlawful combination, adjudicate the ownership of any copyrighted vocal or instrumental musical composition theretofore owned or controlled by said unlawful combination; and furthermore, such District Court shall have and is hereby granted the power and authority to appoint a receiver and to issue injunctive and mandatory temporary and permanent orders in reference to any of the issues involved in such action; and any person, firm or corporation within this state who is a user in any manner of any copyrighted vocal or instrumental musical compositions theretofore owned or controlled by such unlawful combination may, upon application, intervene in such action and therein have adjusted, determined and adjudicated all rights for or against the person, firm or corporation whom the Court shall finally determine to be the owner or proprietor of such copyrighted vocal or instrumental musical compositions; and said parties shall be permitted no other remedy in any other court within the boundaries of this State, whether the same be for damages, infringement or otherwise, until final decree has been had in said action determining the ownership and terms for use of such copyrighted musical compositions.

Sec. 10. (A). Any person, firm or corporation within this state aggrieved by any violation of the terms hereof by any unlawful combination, as defined in Section 1 hereof, or any of its representatives or agents, may proceed in his or its own name and right in the District Court in the county in which the violation, or a part thereof, took place, to recover any right, loss or damage that may have resulted from any violation of the terms hereof; the plaintiff in such action shall be entitled to recover his or its costs and expenses and a reasonable attorney's fee to be fixed by the court in such action.

(B). In the event of the failure or refusal of a County Attorney, or the Attorney General, to promptly act, as herein provided, when requested so to do by any aggrieved party, then such party may institute in his own behalf, or upon behalf of the plaintiff and all others similarly situated,

the same civil action as such County Attorney or Attorney General might have instituted under the terms of this Act, and with like procedure, powers, authority, rights, privileges, effect and final decree as the said County Attorney or Attorney General might have done under the terms of this Act.

Sec. 11. (A). In any action, either civil or criminal that may be had or instituted under the provisions hereof for any violation of the terms hereof, the plaintiff in any form of action brought hereunder, and in which action any combination declared unlawful, as defined in Section 1 hereof, or the members, stockholders, or other interested parties, or their agents or representatives of such unlawful combination, are defendants, any attorney of record for the plaintiff may file a request in writing with the Clerk of the District Court in which said action is pending, demanding that the defendant or defendants furnish plaintiff, or file with the Clerk of the Court, in which the action is pending, exact copies of all documentary evidence, facts and figures, records or data in the possession or under the control of the defendant or defendants pertaining to the issues as alleged by the plaintiff to establish or refute any issues in the case; and the District Court, upon the presentation to it of such written demand by the plaintiff, shall thereupon determine that part or all of such evidence which shall be produced, and shall enter an order fixing a time for the defendant or defendants to furnish and file such information as ordered. A copy of said order shall be mailed to each defendant at his or its last known address, which shall be deemed sufficient notice and service upon said defendant or defendants; or the same may be served by mail in the same manner upon each attorney of record for the defendant or defendants, and when so served, the same shall be deemed notice and service upon the defendant or defendants for whom said attorneys appear of record.

(B). If said defendant or defendants shall fail to furnish plaintiff or his or its attorney, or file with the Clerk of the Court in which the action is pending, said copy or copies of said documentary evidence, facts, figures, records.

books and data as set forth in said order within the time specified in said order, the Court shall adjudge said defendant or defendants guilty of contempt of court, and the Court shall assess a fine of $100.00 against such of the defendants for each and every day that such defendant or defendants fails to comply with said order; and judgment shall from time to time be rendered therefor, and the plaintiff may collect the same against the defendant or defendants with 6% interest thereon and the costs, including expenses and attorney's fees to be fixed by the Court, in the same manner as other judgments are collected in this state. The Court shall find and determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs, expenses and any attorney's fees that may be allowed.

Sec. 12. If any section, sub-division, sentence or clause in this Act shall, for any reason, be held void or non-enforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act.

Sec. 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Nebraska.

Sec. 14. Whereas an emergency exists, this Act shall be in full force and take effect, from and after its passage and approval, according to law.

Approved, May 17, 1937.

(Act construed in Buck *v.* Swanson, 33 Fed. Supp. 377.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF THE STATE OF NEBRASKA, ET AL.,

Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

APPELLANTS' BRIEF IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

WALTER R. JOHNSON,
Attorney General of Nebraska;
JOHN RIDDELL,
Assistant to the Attorney General of Nebraska;
WILLIAM J. HOTZ,
Special Assistant to the Attorney General of Nebraska,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF THE STATE OF NEBRASKA, ET AL.,

Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

APPELLANTS' BRIEF AND ANSWER TO THE APPELLEES' MOTION TO DISMISS OR AFFIRM THE APPEAL.

Filed July 16, 1940.

To the Honorable Supreme Court of the United States:

I.

Statement of the Case.

(*Buck* v. *Swanson*, 33 Fed. Supp. 377.)

1. An original petition was filed and the case thus started on June 7, 1937, in the United States District Court at

Lincoln, Nebraska, under Section 266 of the Judicial Code by the plaintiffs (now appellees) who sought to restrain and enjoin the defendants (now appellants), who are the law enforcement officials of the State of Nebraska, from enforcing the provisions of a certain anti-monopoly statute (Session Laws Nebr. 1937, Chap. 138, Page 488), passed by the Nebraska Legislature on May 17, 1937. The State Act so passed was directed against any combinations in substantial numbers of owners or those in control of the public performance rights of vocal and instrumental musical compositions, if the combination operated in restraint of trade in Nebraska and in violation of the terms of the said State statute. There was and is now no State court ruling upon the Act in question. A permanent injunction, after hearing on the merits on September 18th to 21st, 1939, became final for the purpose of this appeal on March 28, 1940, because on that day motion for rehearing or to correct and amend the findings of fact, conclusion of law, and decree of January 25, 1940, was overruled by the three-judge court which sat especially to hear the motions. A temporary injunction had been granted to the appellees on November 1, 1937, from which no appeal was taken. Therefore, appellants on June 27, 1940, perfected an appeal by serving and by having signed and filed the hereinafter mentioned appeal papers, seeking a reversal of the cause and a dismissal of the permanent injunction, as permitted by Sections 266 and 238 (3) of the Judicial Code.

2. The appellees filed on July 3, 1940, under Rule 12 (3), the motion to dismiss or affirm, which is now before the United States Supreme Court for decision thereon. Appellants answer that motion and pray that it be denied because of the following facts and hereinafter cited supporting rules and United States Supreme Court decisions.

3. The appellants state that all the following papers are found chronologically listed, indexed, and referred to in R. Vol. I.

A.

On December 28, 1939, the three-judge Federal court filed its opinion on the merits of the controversy, after the trial on the merits was concluded on September 21, 1939.

B.

By direction in that opinion, the plaintiffs (now appellees) were instructed to prepare findings of fact, conclusions of law, and decree *in accordance with* that opinion.

C.

On January 25, 1940, the final findings of fact, final conclusions of law, and final decree, so prepared, were signed by the three-judge Federal court and duly filed in the office of the Clerk of the U. S. D. C. at Lincoln, Nebraska, on that date.

> [A complete stenographic, typewritten transcript of all the evidence, statements, and exhibits introduced at the trial was prepared and filed with the Court, by agreement of both sides, upon submission of the cause.]

D.

On February 5, 1940 (February 4th fell on Sunday. Rule 6, Code of Civil Procedure), the appellants, in pursuance of Rules 52 and 59 of the Code of Civil Procedure, served the appellees and filed with the Clerk of the U. S. D. C. at Lincoln, Nebraska, a motion for new trial, rehearing, or to amend and correct the findings of fact, conclusions of law, and decree, supported by twenty-two (22) affidavits. All this showing appears in R. Vol. I, there duly indexed.

E.

On March 25, 1940, said last mentioned motions were duly entertained by oral argument presented by both sides and briefs submitted and filed by both sides at a hearing duly granted before the same three-judge Court. Thus, the motions attacking the objectionable decree of January 25, 1940, were entertained.

F.

On March 28, 1940, the three-judge court overruled said motions without further findings or opinion.

[This date, appellants contend, started the three calendar months' time for perfecting the appeal. (Title 28, U. S. C. A., Sec. 350).]

G.

On June 27, 1940, there was presented to one of the three United States judges who heard the case on the merits (Rule 36 of the U. S. Supreme Court, and Rule 72 of the Code of Civil Procedure) the following appeal papers (Rules 9, 10, and 12 of the U. S. Supreme Court): (a) Petition for Appeal; (b) Prayer for Relief; (c) Order Allowing Appeal; (d) Citation; (e) Cost Bond; (f) Assignment of Errors and Brief in Support; and (g) Jurisdictional Statement of Fact with Designation of Law Points and Brief in Support. The said Order Allowing Appeal and Citation, and the order fixing the amount of appeal bond and its approval, were duly signed by said United States Judge on said June 27, 1940. On the same day, all these papers were filed with the Clerk of the U. S. D. C. at Lincoln, Nebraska. There was no supersedeas bond requested or filed.

H.

On June 28, 1940, copies of all the foregoing papers, and a certified copy of the Citation, together with a statement

calling the appellees' attention to Rule 12 (3) of the U. S. Supreme Court Rules, were all duly served upon the appellees.

I.

On July 1, 1940, the proof of service upon the appellees of all the appeal papers mentioned in the above Paragraphs VII and VIII were duly filed with the Clerk of the U. S. D. C. at Lincoln, Nebraska.

J.

On July 3, 1940, appellees served upon appellants, and filed the same with the Clerk of the U. S. D. C. at Lincoln, their motion to dismiss the appeal or affirm the trial court's decree under Rule 12 (3).

K.

On July 16, 1940, the appellants filed in the office of the Clerk of the U. S. D. C., at Lincoln, this brief and answer to the appellees' motion to dismiss or affirm; and on the same day appellants served a copy hereof upon the appellees' attorney of record, as shown on the return filed herein.

II.

To prove to the U. S. Supreme Court that the appeal papers were properly and timely served and likewise filed in such manner as to perfect an appeal from the objectionable permanent injunction of January 25, 1940, appellants copy the pertinent wording from the following designated appeal papers filed and served as above set forth:

(1) The Citation, dated June 27, 1940, and served on appellees June 28, 1940, required the appellees to show cause:

> "* * * why the decree rendered against the said appellants on March 28, 1940, as in said appeal men-

tioned, should not be corrected and why speedy justice should not be rendered, and the cause reversed and dismissed * * *."

(2) The Petition for Appeal, served on appellees on June 28, 1940, and allowed by the Court and filed on June 27, 1940, stated, among other things:

"Theretofore, in the above cause, an opinion of Your Honors was filed and entered on December 28, 1939; and thereafter, findings of fact, conclusions of law, and decree were filed and entered on the 25th day of January, 1940. The said motion for new trial and rehearing and to correct the decree had twenty-two (22) affidavits attached, and was filed on February 5, 1940. The final decision overruling the motion to correct the decree, as above stated, was entered on March 28, 1940.

"Thus, this petition for appeal is presented for allowance within the three (3) calendar months provided by statute."

(3) The prayer in said Petition for Appeal, among other things, stated:

"That said cause upon appeal be reversed and the permanent injunction denied, vacated, and set aside, and the appellees' cause of action dismissed at the appellees' costs."

(4) The Order Allowing Appeal, signed and filed June 27, 1940, and served on the appellees June 28, 1940, stated:

"The appellants in the above entitled cause, who were the defendants, and each of them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the opinion, findings of fact, conclusions of law and decree, and the order overruling the motion for new trial, rehearing and to correct said decree, made and entered on March 28, 1940, in the above entitled cause by the United States District Court, District of Nebraska, Lincoln Division, sitting as a three-judge federal court

under Section 266 of the Judicial Code; and having presented their petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction, pursuant to the statute and the rules of the Supreme Court of the United States in such cases made and provided:

"It is Now Here Ordered that an appeal be, and the same is, hereby allowed to the Supreme Court of the United States from the District Court of the United States, for the District of Nebraska, Lincoln Division."

(5) The fourteen Assignments of Error, with brief attached, dated and filed June 27, 1940, and served on the appellees June 28, 1940, specifically states:

"III.

The Court erred in granting the permanent injunction after it had found in its opinion of December 28, 1939, that the following facts [(a) to (n)] had been established by competent evidence at the trial."

"XIII.

The Court erred in granting the permanent injunction when it did not directly or indirectly in any part of its findings of fact, conclusions of law, or decree of January 25, 1940, state, find, conclude, or decree that the Nebraska act in question was violative of any provisions of the Federal or State Constitution or of the National Copyright Act."

"XIV.

The Court erred in failing to correct its decree of January 25, 1940, for the additional reasons set forth in appellants' motion for rehearing filed February 5, 1940, which reasons and grounds are made a part of this assignment of error as if copied verbatim herein."

[The last mentioned assignment of error (No. XIV; R. Vol. 1) advised the Court and appellees that just that one among the fourteen errors to be relied upon for reversal was the overruling of the motions to correct the findings, conclusions, and decree of January

25, 1940, because of the reasons in said motions and supporting affidavits set forth.]

(6) There will be no dispute about the fact that the papers above mentioned were signed, served, and filed on the dates above stated.

(7) Having fully set forth the facts and the references to the record above, the appellants now direct the Court's attention to the supporting brief to sustain appellants' contention that the appeal papers were timely filed and properly compiled, as well, to perfect an appeal from the objectionable permanent injunction of January 25, 1940, and are sufficient to present to the Supreme Court of the United States for review the question of whether or not the three-judge trial court erred in granting the permanent injunction on January 25, 1940; that such decree became final, for the purpose of this appeal on March 28, 1940, upon which date the motions for rehearing, new trial, or to correct the findings, conclusions, and decree were overruled.

WHEREFORE, the appellants pray for an order denying the appellees' motion to dismiss or affirm.

Dated at Omaha, Nebraska, this 16th day of July, 1940.

WILLIAM J. HOTZ,
Special Assistant to the Attorney General,
1530-5 City National Bank Bldg.,
Omaha, Nebraska.
WALTER R. JOHNSON,
Attorney General of the State of Nebraska,
Lincoln, Nebraska.
JOHN RIDDELL,
Assistant to the Attorney General
of the State of Nebraska.
Attorneys for Appellants.

WILLIAM J. HOTZ.

BRIEF IN SUPPORT.

PART I.

A motion for either a rehearing, or to correct the decree, or for new trial (Code of Civil Procedure, Rules No. 52 and 59), if timely filed and entertained by the court, extends the time for filing the appeal from the objectionable decree, attacked by such motion, to a period not to exceed three calendar months from the date of the overruling thereof. The appeal, if allowed within that time, and if the appeal includes an appeal from the previously entered objectionable final decree, brings before the appellate court for review the entire merits of the controversy, limited only by the assignment of errors and the designation of the law points relied upon for reversal.

(1) Section 266 of the Judicial Code (Title 28, U. S. C. A., Sec. 380), while providing for an appeal directly to the Supreme Court of the United States from a permanent injunction against a State law, granted by a three-judge Federal court, does not fix the time in which the appeal may be perfected. However, in the textbook entitled, "Jurisdiction of the Supreme Court of the United States" (Robertson and Kirkham), page 295, sec. 177, the authors state:

> "Unlike all of the other statutes which provide for direct appeal from the District Courts to the Supreme Court, section 266 of the Judicial Code contains no special time limit upon the taking of an appeal; and the provisions of section 8 (a) of the Act of February 13, 1925 (Title 28, U. S. C. A., Sec. 350), would appear to be controlling. That section provides generally that no appeal to the Supreme Court shall be allowed or entertained unless application therefor be duly made within three months after the entry of the judgment or decree sought to be reviewed."

(2) In the above mentioned sections and citations, reference is made to page 720, Sec. 354 of that text, commenting

upon extensions of time for making application for appeals. Therein, it is stated, with supporting authorities:

> "It is well settled that where the court below entertains a petition for rehearing, its judgment does not become final for purposes of Supreme Court review until that petition is overruled or otherwise disposed of and the three months' period for applying for Supreme Court review begins to run from the date of such denial or other disposition."

PART II.

By the decisions of the Supreme Court of the United States, all the points raised by appellees in their motion to dismiss or affirm have heretofore in similar cases been definitely decided against Appellees' contentions.

For example:

(1) In *U. S.* v. *Seminole Nation,* 299 U. S. 417, 57 S. Ct. 283, at page 286, it is held:

> "It is well settled that the time within which application may be made for review in this Court does not commence to run until after disposition of motion for a new trial seasonably filed and entertained." (Citing many cases.)

(2) In *Brockett* v. *Brockett,* 2 How. 238, 11 L. Ed. 251 (15 S. Ct. Curtis 107), the Court comments upon and decides the question of appealing from an order overruling a motion to correct a former previous objectionable decree and from the objectionable decree as well.

> "But an appeal has also been taken to the first decree (which was a final decree) rendered by the court. That decree was rendered on the 10th of May, 1843. During the same term, a petition was filed by the defendants on the 26th day of the same month, to have the final decree opened for certain purposes; and the court took

cognizance of the petition and referred it to a master commissioner. His report was made on the 9th of June following, the same term still continuing; and the court then refused to open the final decree; and from this refusal as well as from the final decree, the defendants took an appeal, and gave bond with sufficient sureties, on the 15th day of the same month, and the appeal was then allowed by the court."

On a motion to dismiss similar to the one at bar, the Court said:

"Upon the whole, we are of opinion that the motion to dismiss the appeal ought to be overruled, and it is accordingly overruled."

(3) In *Texas Pac. Ry. Co.* v. *Murphy,* 111 U. S. 488, 4 S. Ct. 497, at 498, 28 L. Ed. 492, the Court held that a motion for rehearing extended the time for review; also that a reference made in the appeal papers to the order refusing a rehearing of the previous decree was sufficient notice of an appeal from that objectionable previous decree. The Court held:

"The writ of error as issued is on its face for the review of the final judgment, not of the order refusing a rehearing. The judgment is sufficiently described for the purposes of identification. We are of the opinion, therefore, that the judgment as entered on the twenty-ninth of May is properly before us for consideration. The motion to dismiss is overruled."

(4) In *U. S.* v. *Elliott,* 223 U. S. 524, 32 S. Ct. 334, 56 L. Ed. 535, it is held:

"The grounds for the motion to dismiss are these: (a) that the appeal was not taken within ninety days after judgment * * *, and (b) that the appeal prayed for and allowed was not from the judgment of January 4, 1909, 'but was merely from the order overruling the motion for a new trial.' "

The Court held that the motion was without merit. In the opinion, the Court said:

> "It is, we think, also manifest that the appeal was taken upon the hypothesis just stated, that the judgment entered did not become a final judgment for the purposes of appeal until the motion for a new trial had been disposed of."

The Court then proceeded to decide the merits of the case on the appeal.

(5) *Citizens' Bank of Michigan City* v. *Opperman*, 249 U. S. 448, 39 S. Ct. 330, 63 L. Ed. 701, states:

> "Where a petition for rehearing is entertained, the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of, and the three months' limitation begins to run from date of such denial or other disposition."

(6) In *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498, 48 S. Ct. 112, 72 L. Ed. 393, the Court held:

> "The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a petition for rehearing."

(7) *Voorhees* v. *John T. Noys Mfg. Co.*, 151 U. S. 135, 14 S. Ct. 295, 38 L. Ed. 101, states:

> "The appeal was allowed January 7, 1891, but the decree did not take final effect as of that date for the purposes of an appeal, nor until February 17, 1892, because the application for rehearing was entertained by the court, filed within the time granted for that purpose, and not disposed of until then."

(8) In *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31, 14 S. Ct. 4, 37 L. Ed. 986, the Court said:

"The rule is that if a motion or a petition for rehearing is made or presented in season, and entertained by the court, the time limit for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal."

(9) In *Zimmern* v. *U. S.*, 298 U. S. 167, 56 S. Ct. 706, the Court stated in passing upon the effect of advancing the time for appeal of an application or petition to amend and correct a decree:

"Until such action had been taken, it was no longer a decree at all. The judge had plenary power while the term was in existence to modify his judgment for error of fact or law or even revoke it altogether. (Citing cases.) Finality was lacking until his choice had been announced.

"The appeals being timely, the decree which dismissed them should be reversed, and the cause remanded to the Court of Appeals for the Fifth Circuit for further proceedings in harmony with this opinion."

PART III.

The application for new trial and for rehearing or to correct the decree and findings of January 25, 1940, filed by the appellants on February 5, 1940, was based upon the new Code of Civil Procedure, Rules 52, 59, and 6, which became effective September 1, 1938.

(1) Rules 52 and 59 provide for a new trial in suits in equity tried without a jury, as was the case at bar; and also provide that the court may open the judgment, if one has been entered, take additional testimony, amend findings of fact, conclusions of law, or make new findings of fact and conclusions and direct the entry of a new judgment. This is exactly what was requested by appellants in their timely

filed motions to that effect, and which were entertained and heard by the three-judge court though overruled on March 28, 1940. Therefore, the objectionable findings of fact, conclusions of law, and decree of January 25, 1940, became final on March 28, 1940, for the purposes of appeal for all previous errors committed, if shown in the record.

(2) Rules 9, 10, 12, and 36 of the Supreme Court of the United States have been followed by appellants in each particular in perfecting the appeal to this point, as the record clearly shows.

(3) The appeal papers, excerpts of which appear in Part I hereof (and all of which may be found copied verbatim in R. Vol. I), make it very certain that appellants are not appealing alone from an abuse of discretion of the trial court in overruling a motion for new trial in a federal case. On the contrary, the record is clear that the application for review is from the final decree and its supporting findings of fact and conclusions of law dated January 25, 1940; that the overruling of the motion to amend and correct these final papers of January 25, 1940, for the reasons given therein, is only one of the fourteen assignments of errors to be considered when reached by the appellate court. Perhaps the Supreme Court might decide to make the corrections as moved by appellants and denied by the trial court. In any event, the appeal is to reverse the cause and dismiss the permanent injunction granted and to vacate the decree holding as invalid the state law in question.

Conclusion.

The appellees' motion to dismiss or affirm should be denied with such costs and penalties awarded the appellants as the Court may deem just and proper in the premises.

Dated at Omaha, Nebraska, this 16th day of July, 1940.

Respectfully submitted,

WILLIAM J. HOTZ,
Special Assistant to the Attorney General,
1530-5 *City National Bank Bldg.,*
Omaha, Nebraska,
WALTER R. JOHNSON,
Attorney General of the State of Nebraska,
Lincoln, Nebraska,
JOHN RIDDELL,
Assistant to the Attorney General
of the State of Nebraska,
Attorneys for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF THE STATE OF NEBRASKA, ET AL.,

Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' "SUGGESTION OF DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI"

WALTER R. JOHNSON,
Attorney General of Nebraska
JOHN L. RIDDELL,
Assistant to the Attorney General
WILLIAM J. HOTZ,
Special Assistant to the Attorney General, Omaha, Nebraska

Counsel for Appellants.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The appellants' opposition to the granting of appellees' motion of January 11, 1941, to enlarge the record on this appeal is based upon two principal grounds:

I. THE RECORD FOR APPEAL NOW ON FILE IN THIS COURT (TRIED BELOW IN EQUITY WITHOUT A JURY) WAS FIRST SETTLED BY THE THREE-JUDGE FEDERAL COURT AFTER A FULL AND COMPLETE HEARING THEREON, AND A FINAL ORDER OF SETTLEMENT OF THE RECORD WAS ENTERED BELOW ON OCTOBER 12, 1940. A CERTIFIED COPY OF THAT FINAL ORDER WAS FILED WITH THE CLERK OF THE SUPREME COURT ABOUT THE 12TH DAY OF NOVEMBER, 1940.

II. THE APPELLEES HAVE SET FORTH IN THEIR MOTION NO GOOD REASONS FOR ENLARGING THE THREE VOLUME RECORD ON APPEAL HERETOFORE FILED BY APPELLANTS.

THEREFORE THE APPELLEES' MOTION OF JANUARY 11, 1941 SHOULD BE DENIED.

We call the Court's attention to the following facts:

Comments Upon Point No. I

1. The transcript of record on appeal, as prepared by the appellants, consists of three volumes. These were filed with the Clerk of the Supreme Court on August 6, 1940. Each volume contains an index of its contents. Volume I contains all pleadings and decisions of the lower court and all the appeal papers with proof of service thereof; Volume II, properly indexed, contains a condensed statement in narrative form of all the evidence of all the witnesses given at the trial, in the depositions, and in the interrogatories; Volume III, properly indexed, contains all the exhibits, many in complete and others in condensed form to avoid duplication and for simplification of the record on appeal.

2. The order below allowing the appeal was signed June 27, 1940. (R. Vol. I, p. 72).

3. On June 28, 1940, there was personally served upon the appellees, through their counsel of record, certified copies of the following papers:

(a) Citation
(b) Petition for Appeal
(c) Order Allowing Appeal
(d) Cost Bond and Order Fixing Amount Thereof
(e) Assignment of Errors, with Brief and Law Points Relied upon for Reversal
(f) Jurisdictional Statement of Fact, with Citations to Statutory Reference of Jurisdiction, together with Opinions and All Rulings of the Court from which the Appeal Was Taken, and
(g) Direction to the Appellees Calling Their Attention to Sub-section 3 of Rule 12 of the Supreme Court of the United States.

The affidavit of service of the above papers was filed with the Clerk of the United States District Court on July 1, 1940 (R. Vol. I, pp. 161-2).

4. On July 27, 1940, which was thirty days after the appeal had been allowed and the citation issued and service made on the appellees, the appellants filed their praecipe for designation of record on appeal with the Clerk of the United States District Court (R. Vol. I, p. 181) and served the same upon the appellees on July 27, 1940. Affidavit showing that service is of record (R. Vol. I, p. 184). Appended to that praecipe, and showing in the service and return thereof, were the entire three volumes of the transcript of the record on appeal subsequently filed in the Supreme Court of the United States on August 6, 1940 (R. Vol. I, pp. 184-5).

5. Thus, within the forty days provided by the rules of the court, the record on appeal as designated by the appellants, in each and all particulars, together with all the appeal papers, were served upon the appellees in the exact form they now appear in the office of the Clerk of the Supreme Court.

6. Because this three volume record on appeal was compiled in condensed and abbreviated form, in accordance with Rule 75 (e) and Rules 10 and 12 of the Supreme Court of the United States, there was included with said papers when served upon the appellees, assignments of error *and* the law points relied upon for reversal in combined form, though each separately set forth (R. Vol. I, pp. 77-84; 85-91). Service of all these papers and the entire three volume record was made upon the appellees on July 27, 1940 (R. Vol. I, pp. 184-5).

7. However, before the appellants had an opportunity to complete their designation of record, the appellees filed a counter-designation even before they had seen the appellants' designation. This unwarranted appellees' counter-designation was dated July 26, 1940.

8. Thereafter and when the appellants' designation of record was served upon the appellees on July 27, 1940, the appellees filed (about the same as the previous one) another counter-designation of record dated July 31, 1940; and then on September 21, 1940, appellees filed still another counter-designation in substance the same as the other two. (These are now of record with the Clerk of the United States Supreme Court).

9. On the 8th day of October, 1940, the appellants filed a resistance to these counter-designations setting forth the lack of necessity in printing in substance the entire record which appellees were demanding in their counter-designations. (Appellees are now demanding the same things by their motion of January 11, 1941, to which this opposition is directed.)

10. On the 31st day of July, 1940, the appellees filed in the lower court a motion, the prayer of which was as follows:

> "WHEREFORE, plaintiffs-appellees move the Court that a time and place be fixed by this Court to settle the differences as to the said record, proceedings and evidence heard in said cause in the District Court, and the record made to conform to the truth. Said hearing shall be before this Court and at such time and place as the Court may direct, and the Clerk shall give notice thereof to all the parties."

This matter was then fully heard in the lower court on October 12, 1940.

11. However, on August 2, 1940, the Clerk of the United States District Court mailed to the Clerk of the Supreme Court of the United States all the above papers covering the matters thus put in issue for the settlement of the record below at the proposed hearing.

12. There was lodged with the Clerk of the Supreme Court these counter-designations of the appellees, their own motion directed to the lower court to settle the record, and the resistance thereto filed by the appellants asking either the Supreme Court or the lower court to deny the counter-designations for reasons set forth in the appellant's opposition. Therefore, the issues now before this Court were fully presented to the lower court and finally ruled upon, because the Clerk of the United States Supreme Court suggested that the differences in connection with the record be settled by the lower court. [Code Civ. Proc. 75 (h)].

13. Accordingly, a formal hearing on the settlement of the record was thus had before the Honorable Archibald K. Gardner, Circuit Judge, Honorable Thomas C. Munger and Honorable James A. Donohoe, District Judges, on October 12, 1940. The following order was then entered by that lower court:

"This cause having come on for hearing this 12th day of October, 1940 on the objections of the appellees to the proposed designation by appellants of portions of the record on appeal, and on appellees proposed designation of additional portions of the record on appeal, and upon the objections of appellants to such proposed additional portions of the record, and the court having heard the arguments of counsel for the respective parties, and being duly advised in the premises,

"IT IS ORDERED, that appellees said objections be overruled and that appellants objections to the appellees designation of proposed additional portions of the record be sustained.

ARCHIBALD K. GARDNER,
U. S. Circuit Judge
THOS. C. MUNGER,
U. S. District Judge
J. A. DONOHOE,
U. S. District Judge

14. As above stated, a certified copy of this final order settling the record was lodged with the Clerk of the Supreme Court of the United States about the 12th day of November, 1940.

15. Rule 75 (h) of Civil Procedure, which by reference is made a part of Supreme Court Rule 10 (2), recites:

"Power of Court to Correct Record. . . . but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth."

16. The appellees had requested by motion above referred to that the record be settled and adjusted and the differences presented to the lower court; an order for hearing was so entered and the hearing was held, as above stated, and resulted in the

foregoing final order of the three-judge federal court on October 12, 1940. This order was lodged with the Clerk of the Supreme Court.

17. It will also be observed that the lower three-judge federal court, which had heard the case on the merits, sitting in equity and without a jury, had before it the entire original record in the case, with all the exhibits and all the testimony, depositions, interrogatories, and pages upon pages and box upon box of exhibits. These the Court compared with the three volume transcript of the record (now lodged with the Clerk of the Supreme Court) theretofore prepared and filed by the appellants, and which had been served upon the appellees long previous to this hearing (R. Vol. I, p. 184). The records show that the attorneys for the appellees appeared to argue their cause and to urge the inclusion in the final record on appeal all the matters contained in their counter-designations. The attorneys for the appellants were likewise in court to present their opposition on file. There was before the lower court the assignment of errors and the law points relied upon for reversal, all of which, as above stated, had been served upon the appellees within the times provided by the rules. All the matters now before the Supreme Court were argued and the same objections to the record, as will be readily seen, that are now substantially if not exactly contained in appellees' "Suggestion of Diminution of the Record and Motion for Writ of Certiorari" filed on January 11, 1941, were all before the lower court in the three counter-designations filed by the appellees and the resistance filed by the appellants. These papers are all certified and are of record with the Clerk of the Supreme Court of the United States, as above stated.

Conclusion on Point No. I

THEREFORE, the appellants pray that the appellees "Suggestion of Diminution of the Record and Motion for Writ of Certiorari" dated January 11, 1941, be denied because the sub-

ject matter thereof was adjudicated properly in the lower court on October 12, 1940.

Comments Upon Point No. II

1. There are court rules, and decisions of the courts construing them, applicable to the present situation, and upon which this Court, in the interest of justice, may deny the appellees' motion now made in the Supreme Court of the United States.

2. Appellees' printed "Suggestion of Diminution of the Record and Motion for Writ of Certiorari" dated January 11, 1941, contains at the outset items 1 to 13, which the appellees now wish to have printed as part of the record on appeal. This is all the testimony in question and answer form of all the witnesses given at the trial and by depositions. The testimony and evidence in that form was denied by the lower court and should be denied by this court because no assignment of error nor law point relied upon for reversal raised any objection to the admission or the rejection of any part of said evidence by either side. No ruling of the lower court is challenged on this appeal on the admission or rejection of any of the evidence, either at the trial or in the depositions. Furthermore, the appellees have failed and now fail to point out wherein the condensed testimony in narrative form, prepared by appellants and submitted to appellees, misstates or omits any of the evidence, or that it in any manner fails to conform to the truth of the record.

3. Furthermore, the lower court in its opinion, 33 Fed. Supp. 377, finds from such of the evidence as is set forth in the three volume record now before this court on appeal, obvious facts that are not in dispute and which are borne out by the appellees' bill of complaint and their exhibits as well as the oral testimony of their own witnesses.

4. This cause was one in equity and was tried without a jury. Appellees filed no cross appeal.

5. Items 14 to 27 of appellees' printed brief of January 11, 1940, request the Court to require the Clerk to have printed exhibits which contain the titles to virtually thousands of musical compositions of the different witnesses. These are not in dispute as to title, or numbers, or ownership. Nowhere have these numbers been challenged in the pleadings, or in the assignment of errors, or in the law points relied upon for reversal. For example, in the transcript of record Volume III, instead of setting forth verbatim thousands upon thousands of copies of the names of musical compositions of the many witnesses, the appellants, after indexing the place in the record where the exhibit was introduced, summarize such exhibit as follows (R. Vol. III, p. 47, Ex. 18):

> "PL. DEP. EX. 18 P. 337 (MEYER), R. Vol. II, p. 97: List of compositions by George W. Meyer, one of the appellees, showing about 450 musical compositions copyrighted by the witness from 1907 up to 1936, with some copyright renewals. The publishers vary, but consist largely of Leo Feist, Inc., J. H. Remick & Co., and other ASCAP publisher members, for the most part. Some of the compositions are: 'Cuddle Up,' 'Daisy Went and Told on Me,' 'Dance and Grow Thin,' 'Do the Black Bottom with Me,' 'Do It in the Dark,' 'Don't Be Bashful,' 'Every Night He Goes over the Top,' 'For Me and My Gal,' 'I Love to Do It,' 'I Wouldn't Fool a Little Girl Like You,' 'I'd Do It All Over Again,' 'It's an Old Spanish Custom in the Moonlight,' 'When the Old Oaken Bucket Was New.'"

6. Another example is the demand to print a list of some 185 compositions of Gene Buck Exhibit 1 (R. Vol. III, p. 29):

"PL. EX. 1 (O.R. 6) (R. Vol. II, 2): List of about 185 compositions of Gene Buck. Typical line:

Composition	Collaborators	Publisher	Copyright Date	Remarks
'Ain't It Funny What a Difference Just a Few Drinks Make?'	Jerome Kern	T. B. Harms	6-21-16	Ziegfeld Follies

These compositions date from 1912 to 1931."

7. The lower court held that items 1 to 27 need not be printed in full in question and answer form, nor the exhibits verbatim.

8. Items 28 to 53 in appellees' printed motion of January 11, 1941, refer to exhibits other than musical compositions which appellees want printed verbatim. These are largely the contracts that existed between music publishers, the composers, and ASCAP (R. Vol. III, pp. 2-7). Appellants have set forth verbatim all the typical contracts attached to the appellees' bill of complaint, and with all the others that were introduced at the trial, most of which were identical with those contract exhibits; where differing in any particular, the different or supplementing paragraphs are copied by appellants for the record on appeal. A typical example is Plaintiffs' Exhibit 21 A, B, C, D, and E — Bartlett (R. Vol. III, p. 48). Those contracts were dated in 1898, 1905, 1906, 1903, and 1919. Actually they have no bearing on the subject matter of this case and are not in dispute; but, in fairness to the appellees, the exhibits were summarized in all particulars. No good purpose could be served by printing these huge documents showing the terms of the contracts that existed between Victor Herbert and various music publishing houses, running back as far as 1898 and occupying many pages. No error is predicated concerning them.

9. The lower court ruled that items 28 to 53 need not be copied verbatim for the record on appeal and were proper as epitomized by appellants.

10. Items 54, 55, 56, and 57 are requests by the appellees to have printed in the record all the interrogatories, consisting of many dozens of questions, that were asked of the witnesses Walter Fischer, Saul Bornstein, Gene Buck, and Gustave Schirmer. Each one of these interrogatories contained great lists of musical compositions and other voluminous documents that were produced and not used by either side at the trial, though the interrogatories and exhibits were all introduced in evidence at the trial. Furthermore, all of the witnesses whose interrogatories were taken testified in person at the trial or by deposition; and the same matters that were covered by the interrogatories were in that manner recorded. Consequently, it would only be a repetition of the testimony of these witnesses if again printed with the voluminous catalogues of music and volumes of names contained in the exhibits. No error is predicated upon any matters excluded or included in the interrogatories or the exhibits attached to them. These exhibits are, however, each epitomized in the record.

11. The lower court held that these items 54 to 57 inclusive need not be printed verbatim, and were in proper form as summarized by appellants.

12. There is one statement made under the heading of "Reasons for This Motion" (Section d) in the printed motion of the appellees of January 11, 1941, which is to the effect that Assignment of Error No. VII raised the point that the state statute in question should have been upheld in view of the "fraud and unlawful practices" perpetrated by the appellees in Nebraska. If the record before the court fails to show "fraud and unlawful practices," it would seem that in such event the appellants would be confronted with the lack of proof and the appellees should

have no complaint. However, the lower court in its opinion, 33 Fed. Supp. 377, sets forth the facts based upon the articles of association and the contracts of record, all of which are set forth verbatim in the transcript of record on appeal. The "fraud and unlawful practices" consisted in the formation by ASCAP of a combination of composers and publishers transferring to it all the public performance rights of such members and granting the power and authority in ASCAP to fix prices and control licenses in restraint of trade and in violation of the terms of the statute. That is the "fraud and unlawful practice" before the United States Supreme Court. These facts are admitted by appellees in their bill of complaint and exhibits attached.

13. The lower court passed upon this point adversely to appellees and denied them the right to have the whole record in the lower court printed because of that assignment.

14. The appellees also claim in their printed motion of January 11, 1941, that Assignments of Errors IX and XI (R. Vol. I, pp. 81-3) raise questions of fact. There is no dispute about such facts. Appellants in their assignment of errors claim the Court should have found a few additional facts concerning which there was and is no dispute. For example, the amount of rent admittedly annually paid by ASCAP for its quarters in New York; the salary admittedly paid to its officers; the admitted contracts with the radio stations and the license fees charged, as shown by ASCAP's own exhibits; the number of infringement suits in the State of Nebraska by certified copies introduced in evidence from the record of the Clerks of the United States District Courts; the increase in the amount of fees for users of music shown by the ASCAP contracts of record; and the testimony undisputed of the disposition made of the income of ASCAP by its board of directors. These facts are all taken from the records and exhibits of ASCAP and concerning which there is no dispute. The record on appeal Vol. II and III adequately support the assignment of errors on ASCAP's own admissions.

15. In the appellees' printed motion of January 11, 1941 is Item No. 58 wherein the appellees ask that all the docket entries in the court below be printed in the record on appeal. That was also before the lower court, and it ruled against the appellees thereon. Such a list of docket entries can serve no good purpose. The index to Volumes I, II, and III of the record on appeal before this Court is a justification for denying appellees Item No. 58 because the index is complete in itself for all matters before this Court on appeal.

16. Items 59, 60, and 61 are the three appellees' counter-designations which they wish printed in the record on appeal. These papers together with the motion of the appellees to have the lower court settle the record and adjust the differences on the counter-designations, together with the appellants' resistance thereto filed on the 8th day of October, 1940, and the final order of the Court dated October 12, 1940, were all certified by the Clerk of the United States District Court and sent to the Clerk of the Supreme Court, where now lodged. These items have no place whatever in the printed record on appeal. These items properly are before the Court now in this matter as to whether or not the appellees' motion should be denied, but would have no place in a printed record on appeal. Furthermore, the counter-designations of appellees are in themselves voluminous and would serve no useful purpose in the printed record on appeal.

17. Items 62 and 63 for the same reason have no place in the printed record on appeal. These two items are requests of the appellees to the Clerk and the certificate of the Clerk dated December 16, 1940 and December 23, 1940, in which it is apparent that the appellees in defiance of the lower court's order of October 12, 1940, attempted to order the Clerk of the United States District Court to make up the record on appeal as directed in the counter-designations exactly contrary to the ruling of the Court, and then sought to direct the Clerk of the Supreme Court of the

United States to likewise print the material contained in these counter-designations.

Evidently the Clerk of the Supreme Court refused to do so without an order of this Court, and hence the "motion" and "writ" of January 11, 1941, asking for the certification of records from below which appellees took upon themselves to lodge in the Supreme Court and actually did so in contravention of the Order of October 12, 1940.

Conclusion as to Point No. II

The printed motion of appellees dated January 11, 1941, should be denied because no facts or reasons have been presented to this Court to sustain it, and no facts are set forth to prove that the three volume record on appeal contains misstatements, errors or untruths — some of which matters must be proved if appellees' motion is to be sustained [Rules Civ. Proc. 75 (h)].

LIST OF CASES TO SUPPORT APPELLANTS' CONTENTION THAT THE THREE VOLUME TRANSCRIPT OF RECORD FILED WITH THE SUPREME COURT OF THE UNITED STATES ON AUGUST 6, 1940, IS PROPER AS THE RECORD ON APPEAL IN THIS CAUSE.

Texts:

(1) Present Rules of the Supreme Court of the United States 28 U.S.C.A., Secs. 241 to 370; 1940 Pocket Part, pp. 63-69.

(2) Previous Rules of the Supreme Court of the United States (1925), 28 U.S.C.A., Secs. 241 to 370, Rules 7 and 9, ————, pages 389 and 393.

[There are no material changes in reference to the condensation of the record on appeal of the testimony and exhibits, from Equity Rule 75 (b) and the present Rules of Civil Procedure 75 (c), (e), and (h)].

(3) New Rules of Civil Procedure, Rules 75 and 76, Title 28, U.S.C.A., Secs. 721 to 723; 1940 Pocket Part, pages 393 and 399.

(4) *Jurisdiction of the Supreme Court of the United States*, Robertson & Kirkham, Sec. 375, pages 763 to 766.

Decisions:

(1) In *Newton* v. *Consolidated Gas Co. of New York*, 258 U.S. 165, 42 S.Ct. 264, the Court on page 266 of the Opinion states:

"Equity rules 75 and 76 (33 Sup. Ct. xl, xli) direct that records on appeal shall not set forth the evidence fully but in simple condensed form and require omission of nonessentials and mere formal parts of documents. Without apparent attempt to comply with these rules and with assent of appellee's counsel, appellants in No. 257 have filed a record of 21 volumes — 20,000 printed pages — made up largely of stenographic reports of preceedings before the master with hundreds of useless exhibts and many thousand pages of matter without present value. This is indefensible practice, which we shall hereafter feel at liberty to punish to the limit of our discretion — possiby by dismissal of the appeal. These rules were intended to protect the courts against useless, burdensome records and litigants from unnecessary costs and delay. Counsel ought to comply with them, and trial courts should enforce performance of this plain duty."

(2) In *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, 48 S. Ct. 183, the Court at page 189 of the Opinion states:

"As the rule places the duty of condensing and narrating the evidence primarily on the appellant, and most of the proceedings since the appeal have been attributable to the failure to discharge that duty, the appellant should be required, as one of the terms of the remission, to pay into the Circuit Court of Appeals $5,000 for the benefit of the appellee, by way of reimbursing it for counsel fees and expenses incurred in securing the elimination of the irregular and objectionable statement of the evidence, and also to pay, as one of such terms, the costs in this court and those in the Circuit Court of Appeals up to the time our mandate reaches that court."

(3) In *Krauss Bros. Lumber Co.* v. *Mellon*, 276 U. S. 386, 48 S. Ct. 358, the Court at page 360 of the Opinion states:

"By this it is not meant that the evidence shall be set forth at length in the words of the witnesses, and of the writings and documents admitted, but only that the purport and substance of all of it be included. In setting it forth, regard should be had to the requirements of paragraph 2 of Rule 7 of the Rules prescribed by this court. 266 U. S. 653. *Lincoln* v. *Claflin*, 7 Wall. 132, 136, 19 L. Ed. 106; *Zellers' Lessee* v. *Eckert*, 4 How. 289, 297, 298, 11 L. Ed. 979."

(4) In *Ray* v. *United States*, 301 U. S. 158, 57 S. Ct. 700, the Court at page 704 of the Opinion states:

"Rule 8 of the rules of this court (28 U.S.C.A. following section 354), to which rule 9 refers, provides (rule 8, par. 2):

'Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may

require that parts of it be set forth otherwise.' See Equity Rule 75 (b), 226 U. S. Appendix, p. 23, as amended, 286 U. S. 570, 28 U.S.C.A. following section 723."

"The ruling in the instant case that the trial judge could 'no longer act to put the evidence in narrative form' and that the appellate court had 'no power to order him to do so' is erroneous."

(5) In *Moss* v. *Gilchrist-Fordney Co.*, 24 F. (2d) 931, 5th Cir., the Court at page 932 of the Opinion states:

"There remains a feature of the appeal of which we feel constrained to take notice. The testimony taken before the master appears in the printed record as it fell from the lips of the witnesses, and not in condensed narrative form, as required by equity rule 75b. This rule is not to be evaded by agreement of counsel, or an order of the District Court permitting the bringing up of all the evidence in its original form, though the rule contemplates the inclusion in the transcript of some of the testimony in the form of question and answer, in a proper case. *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.*, 48 S. Ct. 183, 72 L. Ed. ———, decided January 3, 1928. We have heretofore announced our views as to the necessity of observing the rule. *Roxana Pet. Co.* v. *Rush* (C. C. A.) 295 F. 844; *Buckeye Cotton Oil Co.* v. *Ragland* (C. C. A.) 11 F. (2d) 231. In the exercise of discretion, we have disregarded the violation of the rule in this case; but it should be understood that a violation may lead to a refusal to consider the evidence improperly brought up and a decision on the appeal consistent therewith.

"The judgment of the District Court was right. It is affirmed."

(6) In *Hughes* v. *Reed*, 46 F. (2d) 435, 10th Cir., the Court at page 438 of the Opinion states:

"The record is not in compliance with equity rule 75 (28 U. S. C. A. Sec. 723) which provides in part:

'The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness.'

"The rule is applicable to 'the evidence,' and is not confined to 'the testimony of witnesses.' An effort has been made to avoid printing the testimony of witnesses in question and answer form, although parts of that are a mere combination of question and answer, rather than a narration. But no effort has been made to 'state in simple and condensed form' the 340 exhibits introduced. These exhibits occupy 479 pages of the printed record, of which 296 pages are in fine type. More than 200 pages are devoted to printing in full all reports of the national bank examiner from 1919 on, repeating in each case the printed instructions on the blank. Each report occupies 15 pages of fine print; perhaps one or two lines in each are material. The minutes of every directors' meeting since 1918 are printed in full, including resolutions authorizing small donations to the Red Cross, proxies for meetings of the Federal Reserve Bank, and other details of not possible relevance here. Deposit tickets, notes, and checks are printed in full. To require these hundreds of pages to be set and printed is a sheer waste of money; and the result is a record which this court could only master at the expense of other work of the circuit. It is a clear violation of a rule in force since 1913, and to which the courts have called attention repeatedly. If it were not for the fact that reversible error appears from a superficial examination, the appellant would be required to comply with the rules."

(7) In *Trust Co. of Florida v. Gault*, 69 F. (2d) 133, 5th Cir., the Court at page 135 of the Opinion states:

"The provision of that rule that, if either party desires it and the judge so directs, any part of the testimony shall be reproduced in the exact words of the witness, cannot be

extended to embrace all the testimony nor to justify inclusion of motions, arguments, and rulings and other occurrences which are not evidence at all. *Barber Asphalt Paving Co.* v. *Standard Co.*, 275 U. S. 373, 48 S. Ct. 183, 72 L. Ed. 318. The very purpose of the rule is to prevent these things being done and to save the appellate court from the labor of winnowing the evidence and the party losing the appeal from the needless costs. *Newton* v. *Consolidated Gas Co.* 258 U. S. at page 174, 42 S. Ct. 264, 66 L. Ed. 538."

(8) In *Ruth* v. *Climax Molybdenum Co.*, 93 F. (2d) 699, 10th Cir., the Court at page 701 of the Opinion states:

"Equity Rule 75, 28 U. S. C. A. following section 723, provides, in substance, that in the preparation of the record on appeal the evidence shall be stated in condensed and narrative form, and that all parts not essential to a decision of the questions presented shall be omitted. The rule is not confined to the testimony of witnesses. It applies to exhibits. *Hughes* v. *Reed*, 10 Cir., 46 F. 2d 435. It was violated in the preparation of the record in these cases. Much testimony which could readily have been condensed was set forth verbatim; numerous explanations and arguments of counsel were included; and no effort was made to condense the exhibits or to omit parts of them not essential to a decision of the questions presented."

(9) In *American Electrotype Co.* v. *Kerschbaum*, 105 F. (2d) 764, U.S.C.A. for D. C., 1939, the Court at page 765 of the Opinion states:

"At the present term of court we have been confronted with records running as high as a thousand pages, which might easily have been reduced to one-fourth that number if counsel had exhibited a proper regard for the interests of their clients and a desire to save the court from unnecessary consumption of time. We cannot too strongly admonish the members of the bar of their responsibility in this respect. The practice of dumping into the record unnecessary papers and cumulative evidence, besides the drain upon the court's

time, frequently results in making the cost of litigation prohibitive to the man of moderate means and creates a scandal in the administration of justice."

So totally lacking are the appellees in their knowledge of the record before the Court, and as settled by the lower court, they have designated their motion of January 11, 1941, as an "Appeal from the Supreme Court of the State of Nebraska." As a matter of fact, the record shows that the case is one that was tried in equity before a three-judge federal court under Section 266 of the Judicial Code, and is a direct appeal from that three-judge federal court to the Supreme Court of the United States (33 Fed. Supp. 377).

Respectfully submitted,

WALTER R. JOHNSON,
Attorney General of Nebraska

JOHN L. RIDDELL,
Assistant Attorney General of Nebraska

William J. Hotz
Special Assistant to Attorney General of Nebraska

1530-5 City National Bank Building, Omaha, Nebraska.
Counsel for Appellants

Dated:
January 27, 1941.

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF STATE OF NEBRASKA, ET AL.,

Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

BRIEF OF APPELLANTS

WALTER R. JOHNSON,
Attorney General of Nebraska.

JOHN RIDDELL,
Assistant to Attorney General.

WILLIAM J. HOTZ of Omaha, Nebr.,
Special Assistant to Attorney General.

GORDON DIESING and

WILLIAM F. DALTON, both of Omaha, Neb., *assisting Wm. J. Hotz on Brief.*

Attorneys for Appellants.

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF STATE OF NEBRASKA, ET AL.,

Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

BRIEF OF APPELLANTS

REFERENCE TO THE OFFICIAL REPORT OF THE OPINION DELIVERED BY THE THREE JUDGE FEDERAL COURT BELOW

Buck v. Swanson, et al., District Court, D. Nebraska, Lincoln Division, December 28, 1939. 33 Fed. Supp. 377 (R. Vol. I, 125).

Findings of Fact and Conclusions of Law, January 25, 1940 (R. Vol. I, 132-9).

Final Decree, January 25, 1940 (R. Vol. I, 139-141).

KINDRED CASE APPEALED

Buck v. Gibbs, District Court N. D. Florida, Gainesville Division, August 5, 1940. 34 Fed. Supp. 510. Appeals docketed No. 610 and No. 611, October Term, 1940.

KINDRED CASES UNAPPEALED

Buck, et al. v. Gallagher, et al., District Court, W. D. Washington, S. D., December 23, 1940. 36 Fed. Supp. 405. No appeal lodged.

Buck v. Harton, District Court, M. D. Tennessee at Nashville, February 19, 1940. 33 Fed Supp. 1014. No contest, counsel for defendants having "consented in writing" to the entry of the decree. No appeal.

STATEMENT AS TO JURISDICTION

The jurisdiction of the Supreme Court of the United States to entertain this appeal is based upon Section 238 (3) of the Judicial Code (Section 345, Title 28, U. S. C. A.), which provides for a direct appeal to the Supreme Court of the United States when a state statute has been brought in issue in the federal court and its enforcement permanently enjoined as was done in this case by the three-judge court below. Section 266 of the Judicial Code (Section 380, Title 28, U. S. C. A.) provides that the hearing shall be held before a court comprised of three federal judges, when, as in this case, a state statute is sought to be enjoined. The three-judge court heard and decided the case and granted a permanent injunction against the enforcement of all parts of the state act in question.

No provisions in the final decree (R. Vol. I, 139) were made for modification to comply with subsequent state court interpretation of purely state matters involved, providing the final injunction was granted on a state question of "inducing cause" and "inseparability" of certain sections of the act in question, which were new issues brought into the case by the court.

Probable jurisdiction was noted herein by the Supreme Court of the United States on the 9th day of December, 1940, based upon a separate printed statement as to jurisdiction filed in accordance with Supreme Court Rule 12. That jurisdictional statement contained per curiam opinion (R. Vol. I, 121), injunctional order (R. Vol. I, 123), opinion on merits (R. Vol. I, 125), findings of fact and conclusions of law (R. Vol. I, 132), final decree (R. Vol. I, 139), motion for new trial (R. Vol. I, 141), affidavits in support (R. Vol. I, 160-162), order overruling motion for new trial (R. Vol. I, 162), and legislative bill in question (R. Vol. I, 74-88).

STIPULATION THAT THE AMOUNT INVOLVED DOES EXCEED $3,000 PLUS INTEREST AND COSTS (R. Vol. I, 168)

KINDRED CASES ON JURISDICTIONAL AMOUNT

Gibbs v. Buck, 307 U. S. 66, 59 S. Ct. R. 725, 83 L. Ed. 1111.

Buck v. Gallagher, 307 U. S. 95, 59 S. Ct. R. 740, 83 L. Ed. 1128.

STATEMENT OF THE CASE

This action in equity was filed by the plaintiffs and appellees in the United States District Court, for the District of Nebraska, Lincoln Division, on June 8, 1937 (R. Vol. I, 1-34), seeking to enjoin the enforcement of a Nebraska legislative anti-monopoly act, which became effective May 17, 1937. These plaintiffs below were the American Society of Composers, Authors and Publishers, called ASCAP, organized under the laws of the State of New York. This organization is officered by a board of directors, and all its members are composers of copyrighted musical compositions and publishers of such copyrighted musical compositions. Among the plaintiffs below also were some publisher members from New York and some composer members from New York and Maine. The defendants were all law enforcement officers of the State of Nebraska.

No action was taken in the state courts of Nebraska by either party, and no construction was placed on the particular statute in question by any court of the state, nor did the final decree contain any provision that further relief might be had upon an appropriate showing that the state court had construed the statute or determined the question of its validity under state law in a manner inconsistent with the decision of the three-judge federal court appealed from herein (Final decree, R. Vol. I, 139).

Appended to the *bill of complaint* filed (R. Vol. I, 1) were all the typical contracts which ASCAP had entered into with the other plaintiffs and all the other members of the society, both composer members and publisher

members (R. Vol. I, 36-45); and all typical contracts with all of the users of the ASCAP music in Nebraska (R. Vol. I, 88-97); and also ASCAP articles of association (R. Vol. I, 46-74); together with a copy of the Act (R. Vol. I, 74-88).

ASCAP deals exclusively in what is known as the small rights for profit of public performance of music played or sung in public. The Copyright Act [Title 17, U. S. C. A., Sec. 1, (e)] grants to the copyright owner the right to receive pay for such public performances.

The bill of complaint, and exhibits made a part, admitted that ASCAP had assigned to it from each member the exclusive power to fix prices, control terms, and collect the money for these public performance licenses everywhere, including the State of Nebraska, and distribute it as dividends to the members (Opinion, R. Vol. I, 125; Findings of Fact, R. Vol. I, 132).

Interlocutory injunction was granted on November 13, 1937, in favor of the appellees and plaintiffs below; likewise a motion to dismiss (R. Vol. I, 98) filed by the appellants and defendants below, was overruled on the 13th day of November, 1937. Exceptions were filed thereto on the 18th day of November, 1937 (R. Vol. I, 102).

No appeal was prosecuted from either of these orders; and, except for an assignment of error (R. Vol. I, 113) based upon the Court's error in overruling the motion to dismiss based upon the petition and exhibits attached to it, none of said matters are before this Court on this appeal.

The court that heard the foregoing matters, and all subsequent matters, was a three-judge Federal court consisting of United States Circuit Judge, Hon. Archibald K. Gardner, and two United States District Judges, Hon. Thomas C. Munger and Hon. James A. Donohoe (Sec. 266 of the Judicial Code; Sec. 380, Title 28, U. S. C. A.).

The appellees stated as the basis for their action that the entire Nebraska statute deprived all the plaintiffs of the rights granted to them under the Copyright Act and was in violation of Article I, Sections 8, 9, and 10; Article III, Section 2; Article IV, Section 2; and Article VI, Section 2 of the Constitution of the United States; and the Fourteenth Amendment to the Constitution of the United States; and Article 1, Sections 1, 3, 7, 12, 13, 15, 16, 21, and 25 of the Constitution of the State of Nebraska (Bill of Complaint, R. Vol. I, 34).

The *answer* was filed on the 18th day of November, 1937 (R. Vol. I, 103). In that answer, the appellants denied that the Nebraska Act was in violation of said provisions, or any of them, but instead was a proper exercise of the Nebraska legislative authority under the police power of the State declaring as unlawful any association of a substantial number of composers and publishers who combine for the purpose of fixing prices for public performance, if in restraint of trade, and providing the usual, ordinary penalties for violations thereof similar to the other anti-monopoly statutes of the State (Chap. 59, Comp. St. Neb. 1929, and Amendments, Monopolies and Unlawful Combinations; Art. 1, Trusts Generally; Art. 2, Grain Dealers; Art. 3, Fire Insurance

Companies; Art. 4, Lumber and Coal Dealers; Art. 5, Local Discrimination; Art. 6, Pooling by Bridge Contractors; Art. 7, Rebate Vouchers; Art. 8, Unlawful Restraint of Trade; Art. 9, Regulation of Public Markets; Art. 10, Dairy Industry; 1937 Supp., Art. 11, Protection of Trade-marks, Brands and Names).

Much evidence, oral and documentary, was taken at the trial on September 18th to 21st, 1939, and many depositions (R. Vol. II, 611-777) and interrogatories (R. Vol II, 885-1027) were there introduced. A bill of exceptions or transcript of the oral testimony was taken and transcribed by the official court reporter and was submitted and filed with the court shortly after the hearing (R. Vol. I, 168-466).

On December 28, 1939, the three-judge court entered its opinion (R. Vol I, 125) wherein it held that because Section 2(B) of the Nebraska Act (R. Vol. I, 79) was a violation of the National Copyright Act therefore the whole act must fail because that subsection was inseparable from the balance of the act and was the inducing cause for its passage (R. Vol. I, 130-131). The opinion ordered the plaintiffs and appellees to prepare findings of fact, conclusions of law, and decree *in accordance with that opinion* (R. Vol. 1, 132).

The findings of fact, conclusions of law, and decree were signed and filed by the three-judge Federal court on the 25th day of January, 1940 (R. Vol. 132). The findings of fact made no reference to Section 2 (B) as the inducing cause and inseparable from the balance of the act, as found in the opinion, but declared the entire act non-enforceable without stating that the act was

in violation of any Federal or State Constitution or the National Copyright Act, as did the opinion confined to Section 2 (B) of the Act (Opinion, R. Vol. I, 125; Findings of Fact and Conclusions of Law, R. Vol. I, 132-139).

The opinion and findings, however, did find extensive, definite facts in connection with the activities of ASCAP, and did find that it was a monopolistic combination; that it did fix and control prices, and controlled substantially all the commercially usable public performance rights of copyrighted vocal and instrumental musical compositions used in Nebraska; and that said ASCAP was operating through its authorized agents and representatives within the State of Nebraska, and thus carried on its activities therein; that the composer plaintiffs and appellees and publishers were acting in the State of Nebraska only by virtue of their membership in the ASCAP association, but had no direct dealings of any kind in the State, they having assigned their exclusive rights in public performance for profit to ASCAP.

On the 5th day of February, 1940, the defendants and appellants filed a motion for new trial or to correct the said opinion, findings, conclusions, and decree in the matters specifically referred to in the motion (R. Vol. I, 141).

On the 25th day of March, 1940, a rehearing was granted by the said three-judge Federal court; and on March 28, 1940, the said motion to correct the decree or to grant a new trial was overruled (R. Vol. I, 162).

On June 27, 1940, there was presented to the Hon. Thomas C. Munger, Judge of the United States District Court, one of the three Federal judges, a Petition

for Appeal (R. Vol. I, 110) together with Prayer for Reversal and Dismissal, Assignment of Errors and Brief (R. Vol. I, 113), Cost Bond (O. R. 124) and Citation (O. R. 123). On June 27, 1940, an order allowing that appeal was duly signed by that Judge (R. Vol. I, 112) (Rule 36 of U. S. Supreme Court). All said papers were on June 27, 1940, filed with the Clerk of the United States District Court at Lincoln, Nebraska.

The return of the service of the citation was filed within five (5) days with the Clerk of the United States District Court and is shown of record in this appeal (R. Vol. I, 165).

The *prayer in the petition for appeal* (R. Vol. 110-112), requested that the appeal be granted, which was done on said date by order allowing the appeal (R. Vol. I, 112), as above referred to; and also prayed that citation issue to all the plaintiffs and appellees; and that said cause upon appeal be reversed, and the permanent injunction denied, vacated, and set aside, and the appellees' cause of action dismissed at the appellees' costs; and for such other and further relief as may be deemed just and equitable in the premises.

The Court in its opinion of December 28, 1939 (R. Vol. I, 125) found the following facts as distinguished from the law:

> "There are approximately 1,000 composer members of the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, in the United States, and 123 publisher members who constitute the principal publishers of the country. Each member has assigned to the society the exclusive right of public performance for profit of his copyrighted musical compositions for periods of

five years at a time, the present contracts between the society and its members expiring December 31, 1940. The society has issued blanket licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing such licenses.

"In Nebraska there are some 350 dance pavilions and ballrooms of a class that are independent of taverns where dancing is carried on incidentally. There are ten radio stations operating within the state, of which one is affiliated with the Columbia Broadcasting Network and one with the National Broadcasting Network. The other stations initiate their own vocal and instrumental musical programs. A large number of theaters are users of music. There are 284,000 radio receiving sets in private homes, and about one-third of the population of the state at sometime during the year attend dances and balls where music is played. In 1938 approximately $12,000.00 was collected by ASCAP from the theaters in the state. The largest radio station in Nebraska pays about $26,000.00 to the society annually. Another group of stations paid the society about $27,000.00 in 1938. There are 391 signed contracts with users of music in Nebraska introduced in evidence, upon which an aggregate of approximately (2) $70,000.00 was paid ASCAP during 1938. The society is given, by its members, the exclusive right to make collections, fix prices, and otherwise carry on the public performance of all the musical compositions it controls. Some $6,000,000.00 was taken in for public performance rights by the society

in the United States during 1938. Fifty per cent of its net commissions was divided among the composer members and the other fifty per cent was divided among the publisher members. These groups are classified, but the classification does not seem to have any material bearing upon the issues presented. Of the popular music necessary for the successful operation of radio stations, dance halls, hotels, and theaters, the society has control of about 85% or 90% and also has control of from 50% to 75% of the standard or older music that is played occasionally. All of the large and more influential publishers of music in the United States are members of the society. The users of music in Nebraska can not successfully carry on their business except they deal with the plaintiff society because there is no place where any person or agency to whom users of music in Nebraska may go in order to deal for public performance rights and negotiate for music in any substantial amount sufficient to meet the ordinary needs of music users in the state, except the society.

"All the contentions of plaintiff, as well as those of the defendants, go to the constitutional validity of the statute involved. Whether or not, under the common law of Nebraska the contracts between ASCAP and its members, and between it and the users of music in Nebraska, are valid or not, we need not consider. That issue is not before us, but the single question is the constitutional validity of the challenged statute.

"It appears from the evidence that prior to the organization of the plaintiff society, an author or composer who had obtained a copyright for his production had no practical means of enforcing the exclusive right given him by the Copyright Act. He was not so equipped nor organized to discover violations of his rights, and it would require much time and a large amount of money to enforce his rights by means of litigation. Users of music, on the other hand, who wished to buy the rights of public performance for profit, were unable to ascertain who

the copyright owner was and to whom to go. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit that the society was organized." (Continued on page 22 hereof.)

The findings of fact the Court ordered to be prepared by appellees, dated January 25, 1940 (R. Vol. I, 132-9) are as follows:

"1. The State of Nebraska enacted Legislative Bill No. 478 which became effective May 17, 1937. Said Statute is hereinafter referred to as the 'Statute.'

"2. The plaintiff, American Society of Composers, Authors and Publishers, is a voluntary unincorporated association organized in 1914 under the General Associations Law of New York. Its membership consists of a substantial number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions as authors, composers and publishers. It brings this suit through Gene Buck, its President, who has been duly authorized to bring this suit on behalf of the Society and all its members. Other plaintiffs are certain individuals and corporations who are members of the Society and are interested in copyrighted musical compositions. They are all citizens and residents of States other than Nebraska.

"3. The Secretary of State, the State Treasurer, the Auditor of Public Accounts, and the Attorney General, all of the State of Nebraska, as well as the County Attorneys of various Counties of Nebraska, all citizens and residents of Nebraska, are the defendants.

"There are approximately 1,000 composer-members of the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, in the United States, and 123 publisher-members who

constitute some of the principal publishers of the country.

"Each member has assigned to the Society the exclusive right of public performance for profit of his copyrighted musical compositions for periods of five years at a time, the present contracts between the Society and its members expiring December 31, 1940. The Society has issued blanket licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the Society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the Society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing ASCAP to grant such licenses.

"5. At the time the Statute was enacted, there were in existence 391 signed contracts between the Society and establishments in the State of Nebraska, engaged in the business of publicly performing copyrighted musical compositions for profit. During the year 1938, these licensees paid the Society $68,769.54 pursuant to such contracts (Ex. 17). Among such licensees of the Society were the owners of 250 motion picture theatres, 107 dance halls and miscellaneous establishments, 10 radio broadcasting stations, and 24 hotels and restaurants. Among the 10 radio stations in Nebraska licensed by the Society, one is affiliated with the Columbia Broadcasting System and one with the National Broadcasting Corporation. Part of the program broadcast by the two affiliated stations emanate from points outside of the State and the remaining part initiate in the studios of such Nebraska broadcasters or elsewhere within the State. The other eight stations initiate all of their own vocal and instrumental musical pro-

grams. There are 284,000 radio receiving sets in private homes in the State of Nebraska. No license fees are paid by the owners of these receiving sets inasmuch as they do not engage in public performances for profit. About one-third of the population of the State at some time during the year attend dances and balls where music is played. In 1938, approximately $12,000 was collected by ASCAP from 250 motion picture theatres in the State. In 1938, all the radio broadcasting stations in the State of Nebraska paid the Society approximately $48,700.

"The largest radio station in the State pays about $22,800 to the Society annually. Another group consisting of three stations, paid the Society an aggregate of about $21,700 in 1938. The cost of operation of the Society is approximately 20% of the gross amount received (Ex. 17 and 18).

"6. The Society is given by its members the exclusive right to make collections, fix prices for blanket licenses, and otherwise carry on the licensing of the right of public performance for profit of all the musical compositions copyrighted by its members. Some $6,000,000 was received for public performance rights by the Society from such licensing in the entire United States during 1938, of which approximately 20% was used to defray all expenses, the balance being distributed among its members. 50% of such net income was divided among the composer and author-members and the other 50% was divided among the publisher-members, in accordance with a method of classification defined in the Articles of Association of the Society.

"7. Prior to the organization of the plaintiff Society, authors, composers and publishers who had obtained copyrights for their productions had no practical means of enforcing the exclusive right given them by the Copyright Act. They were not so equipped nor organized to discover violations of their rights, and it would require much time and a large amount of money to detect infringement and

to enforce their rights by means of litigation. Few of them secured any substantial revenue from the public performance for profit of their copyrighted musical compositions. Users of music, on the other hand, who wished to obtain the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go and could not economically obtain individual licenses for the separate performance of the large numbers of works required by them daily. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit and to give users ready access to a substantial repertoire of music for such purposes that the Society was organized.

"8. The Society and its members, including the other complainants, come within the purview, terms, conditions, penalties, forfeitures, prohibitions, restrictions and regulative provisions of the Statute, and the members of the Society including complainants are affected in their rights by the terms and provisions thereof.

"9. Complainants are jointly interested in the subject of the action and in obtaining the relief demanded; the question raised by the Bill of Complaint are of common and general interest to all the members of the Society who constitute a class so numerous as to make it impracticable to bring them before the Court; complainants herein are suing on their own behalf and on behalf of all the members of the Society.

"10. The value of the matter in dispute herein between each of complainants and defendants is in excess of the sum of $3,000.00, exclusive of interest and costs, as appears from the evidence in this case and the stipulation of the parties entered into in open Court.

"11. The Society has control of from 85 to 90% of the popular music necessary for the successful

operation of radio stations, dance halls, hotels and theaters, and has control of from 50 to 75% of the standard or older music that is played occasionally at such places.

"12. The contracts between the individual composer and author members of the Society, including the individual plaintiffs, and their respective publishers do not give the publisher the right to dispose of the right of public performance for profit, nor do they have any provision for payment by the publisher to the writers of any royalties secured from issuing such licenses. Before the Society was formed, there were no substantial royalties from this source and since the formation of the Society, both writers and publishers have relied upon the Society to collect royalties from this field on behalf of both and to distribute it equitably for the equal benefit of writers and publishers.

"13. The Society's practice has been to grant blanket licenses to theaters according to their seating capacity, to radio broadcasting stations according to their income, power and coverage, and to hotels, cabarets and dance halls according to their respective size, business done, number and size of orchestras, methods of performance, income and standing. Certain of such users have for many years consistently refused to pay license fees to the Society or its members, until investigations were made by the Society, infringements ascertained and suits brought.

"14. The radio broadcasting stations in the State of Nebraska are members of the National Association of Broadcasters, which association on behalf of its members, for many years last past, has acted and presently acts collectively in dealing with the Society.

"15. Under the contracts between the Society and said foreign societies, the latter are not required to, and never have, filed with the Society or with

any State Authority, copies of the respective compositions copyrighted by their respective members.

"16. Many thousands of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded under the compulsory license provision of Section 1 (e) of the Copyright Act by manufacturers of phonograph records, music rolls and electrical transcriptions. Such manufacturers have paid to copyright owners not more than two cents for each record and said copyright owners have no right to demand any further sums from such manufacturers; complainants and others similarly situated have no control over the sale or disposition of such phonograph records, music rolls or electrical transcriptions and they can not compel the manufacturers thereof to affix any price upon them or to collect a price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected respectively for the public performance for profit thereof. Such manufacturers have no right, title or interest in the public performance for profit of such copyrighted compositions.

"17. Complainants and others similarly situated are not willing to permit their musical compositions to be performed within the State of Nebraska publicly for profit on any basis wherein the price for such performance would be included in the price paid for a copy of the sheet music, phonograph record, music roll, electrical transcription or sound track thereof.

"18. The musical compositions of the Society's members and complainants have been for many years last past, and are presently being performed within the State of Nebraska in hotels, dance halls, taverns, motion picture theaters and broadcasting stations.

"19. The Statute can not possibly be complied with because, among other things, under their respective contracts with the authors and composers, the publisher-members of the Society (including pub-

lisher-complainants) have the right to and do give away and distribute free of charge, professional copies of the compositions copyrighted by said publisher-members within the State of Nebraska; this is a practice in the business and is done to create a desire for such compositions on the part of the public, make said compositions popular and give them commercial value.

"20. Defendants have threatened to and will enforce such Statute against these complainants and others similarly situated in the event that such complainants and others similarly situated refuse to comply with said Statute or do any of the acts made unlawful by said Statute.

"21. Said Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great, that complainants have no adequate means of testing the validity of the Statute by violating the same and defending against a criminal or civil prosecution in the courts of the State of Nebraska; if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in the 93 counties of the State of Nebraska where their works are being publicly performed for profit, they will be subjected to a multiplicity of suits and prosecutions; unless defendants are restrained, complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions within the State of Nebraska."

"22. Complainants have no adequate remedy at law and are relievable only in this court of equity."

Conclusions of Law of January 25, 1940

"I. On the Findings of Fact, the court concludes as a matter of law that complainants are entitled to a decree permanently enjoining the defendants, their deputies, their successors in office, and all persons acting for or on behalf of them, or either

of them, and each of them, from bringing or permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said statute against complainants and others similarly situated, their representatives, employees, agents, or any of them, and from prosecuting criminally any members of the said American Society of Composers, Authors and Publishers, including complainants, their representatives or agents, or any of them, for violating any provision of said statute.

"II. That complainants recover of the defendants their costs and disbursements to be taxed, as provided by law.

"Let decree be entered accordingly.

"Dated January 25, 1940.

"By the Court:

(S.) ARCHIBALD K. GARDNER,
U. S. Circuit Judge;
THOS. C. MUNGER,
U. S. District Judge;
J. A. DONOHOE,
U. S. District Judge."

Filed in Lincoln Division, Jan. 25, 1940.

Final Decree (R. Vol. I, 139)

"This cause came on to be heard at this term, under Section 380 Title 28, U. S. C. A. (Jud. Code Sec. 266), on the 18th, 19th, 20th and 21st days of September, 1939, and the Court sat as provided therein; and the cause was tried and testimony taken and argument heard; thereupon the court having made its Findings of Fact and Conclusions of Law, upon consideration thereof, it is Ordered, Adjudged and Decreed, as follows, viz.:

1. The temporary injunction order awarded and entered herein on the 13th day of November, 1937, be and the same is hereby made permanent and perpetual.

2. That defendants, Harry R. Swanson, individually and as Secretary of the State of Nebraska, John Havekost, individually and as State Treasurer of the State of Nebraska, Ray C. Johnson, individually and as Auditor of Public Accounts of the State of Nebraska, Walter R. Johnson, individually and as Attorney General of the State of Nebraska, James T. English, individually and as County Attorney of Douglas County of the State of Nebraska, Max G. Towle, individually and as County Attorney of Lancaster County of the State of Nebraska, Grace Ballard, individually and as County Attorney of Washington County of the State of Nebraska, S. S. Diedrichs, individually and as County Attorney of Lincoln County of the State of Nebraska, Raymond B. Morrissey, individually and as County Attorney of Johnson County of the State of Nebraska, Maynard N. Grosshaus, individually and as County Attorney of York County of the State of Nebraska, William T. Gleason, individually and as County Attorney of Saunders County of the State of Nebraska, Alvin B. Lee, individually and as County Attorney of Valley County of the State of Nebraska, Zelma Derry, individually and as County Attorney of Keith County of the State of Nebraska, Floyd Lundberg, individually and as County Attorney of Kearney County of the State of Nebraska, Edwin Moran, individually and as County Attorney of Otoe County of the State of Nebraska, Rush C. Clarke, individually and as County Attorney of Scotts Bluff County of the State of Nebraska, and the respective agents, servants and employees of each of them, and all other persons acting under or through the authority of each of them, or by virtue of the authority of the office of each of them, be and they are, each of them, severally, enjoined and restrained permanently from bringing, directly or indirectly and from permitting to be brought directly or indirectly any proceeding at law or in equity, for the purpose of enforcing or executing the statute of Nebraska, known as Legislative Bill No. 478, passed by the Fifty-second Session of the

Legislature of Nebraska, and signed by the Governor on May 17, 1937, and made effective immediately (said statute hereinafter referred to as the "State Statute") against the complainants and others similarly situated, their representatives, employees, agents or any of them, and from threatening to enforce against any citizens or residents of the State of Nebraska, the penalties of such State Statute, in the event such citizens and residents desire to carry out their contracts with the said American Society or other complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives, or agents, or any of them, or others similarly situated, for doing any legal act to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Nebraska or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

3. That the defendants pay to the Complainants their proper costs herein as taxed by the Clerk of this Court, amounting to the sum of $_____, and now here decreed to the complainants, and that if the same be not paid within thirty days from this date, then at the request of the complainants or their counsel, an execution shall issue for the enforcement of the payment of the said costs.

Dated January 25, 1940.

By the Court:

(S.) ARCHIBALD K. GARDNER,
United States Circuit Judge.

THOS. C. MUNGER,
United States District Judge.

J. A. DONOHOE,
United States District Judge."

The balance of the opinion, concerning the law of the case (R. Vol. I, 128-132) **filed December 28, 1939, is in material conflict with the conclusions of law above quoted, dated January 15, 1940** (R. Vol. I, 139). (Continued from page 12 hereof.)

Herewith, we quote verbatim the law as announced in the said opinion (R. Vol. I, 128):

> "The control or prohibition of combinations in restraint of trade and the prohibition of monopolistic practices is recognized as a proper exercise of the police power of the state. Nebbia v. New York, 291 U. S. 502; Waters-Pierce Oil Co. v. Texas, 197 U. S. 115; Dayside Fish Flour Co. v. Gentry, 297 U. S. 422; Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129; Central Lumber Co. v. South Dakota, 226 U. S. 157; Paramount Pictures v. Langer, 23 Fed. Supp. 890. While regulation of such public practices as are deemed to be contrary to the public policy of the state is a proper exercise of its police power, yet the exercising of such power is subject to the restrictions imposed by the Federal Constitution, which must, of course, be recognized as the supreme law of the land. A state statute, though enacted in pursuance of the police power, is void if in contravention of any excess provision of the Federal Constitution or of a valid federal statute, or if it constitutes an interference with matters that are within the exclusive scope of federal power.
>
> "The Act of March 4, 1909, Chap. 320, Sec. 1 (E), 35 Stat. 1073, Title 17 U. S. C. A. Secs. 1-63, enacted pursuant to the grant of power in Article 1, Section 8 of the Constitution, was intended to grant valuable enforcible rights to authors and publishers without burdensome requirements, in order to af-

ford greater encouragement to the production of literary works of lasting benefit to the world. Washingtonian Pub. Co. v. Pearson, 306 U. S. 30. The policy and purpose of the statute is to grant to the individual the right to control the use of the production covered by the copyright. Of course, the Act gives him no right to combine with others to insure control of prices and the consequent power of monopoly of an entire field by combination. Plaintiffs urge necessity as a justification or warrant for their organization. It is urged that without some such means of protection, the individual copyright owner is helpless to protect his rights, but if the statute violates no rights guaranteed to the plaintiffs by the Constitution or laws of the United States, the motive for the organization or acts of ASCAP, however impelling, is not material.

"It is contended that the state statute deprives copyright owners of the right to control public performance for profit of their copyrighted musical compositions, apart from the sale of sheet music. The copyright is distinct from the material object copyrighted. It is an intangible incorporeal right in the nature of a privilege or franchise quite independent of any material substance such as the manuscript or plate used for printing. King Features Syndicate v. Fleischer (C. C. A. 2) 299 Fed. 533. The owner of the copyright has the right to dispose of it on such terms as he may see fit, or he may decline to dispose of it on any terms. He has an individual right of exclusive enjoyment similar to that of a patentee of an invention. United States v. Dubilier Condenser Corp., 289 U. S. 178; United States v. American Bell Telephone Co., 167 U. S. 224; Burrow-Giles Lithograph Co. v. Serony, 111 U. S. 53; American To-

bacco Co. v. Werckmeister, 207 U. S. 284; Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., (C. C. A. 7) 154 Fed. 358. The society as an assignee of the rights of each author is a representative of that individual right. There are too, individual plaintiffs before the courts, and they are interested individually in the public performance rights of particular musical compositions. In American Tobacco Co. v. Werckmeister, *supra*, it is said:

"'* * * the law recognizes the artistic or literary production of intellect or genius, not only to the extent which is involved in dominion over and ownership of the thing created, but also the intangible estate in such property which arises from the privilege of publishing and selling to others copies of the thing produced.'

"While the Copyright Act may not enhance the right of proprietorship, it certainly does not lessen that right. As said by the Supreme Court in Caliga v. Inter Ocean Newspaper Co., *supra*,

"'The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period.'

"The right of an author in his intellectual production is similar to any other personal property right. It is assignable and it may be sold and transferred in its entirety, or a limited interest therein, less than the whole property, may be sold and assigned, and the various rights included in the entire ownership may be split up and assigned to different persons. Sales may be absolute or conditional and they may be with or without qualifications, limitations or restrictions. Atlantic Monthly Co. v. Post Pub. Co.

(D. C. Mass.), 27 Fed. (2d) 556; American Tobacco Co. v. Werckmeister, *supra.*

"Section 2 (a) of the state statute requires the author, composer or publisher to specify legibly upon the musical composition, in whatever form it may be published, 'the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes.'

"The rights of public performance in connection with the composition include separate and distinct rights, among them being: (1) the right of publication; (2) the motion picture rights; (3) the stage rights; (4) the recording rights; and (5) the radio reproduction rights. The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing.

"Section 2 (B) of the statute provides that,

" 'In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private and public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation, so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by

such copyright proprietor or owner in any court within the boundaries of this state.'

"Under this subsection, the copyright owner in effect must offer the public performance rights of his copyrighted composition for sale and use in Nebraska, and if he does not choose so to do any person purchasing the composition may use it in the state for public performance without any liability to the copyright owner. This provision, we think, clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act. As observed, his rights of ownership entitled him to sell or offer to sell, or to withhold from sale, as he may choose.

"The state statute cannot be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use. Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U. S. 613.

"While the power reasonably to restrain unlawful monopolistic trade-restraining combinations from exercising any rights in the state may be conceded, an act which compels the owner of a copyright to offer it for sale in a certain way, and if he fails so to do to take it from him without compensation, violates the due process and equal protection clauses of the Constitution, and it is also violative of the Federal Copyright Act.

"The state statute contains a separability provision (Section 12), which provides that,

" 'If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or nonenforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act.'

"The Supreme Court of Nebraska has held that a statutory expression of the separability of various sections or provisions of a statute is an aid merely to judicial interpretation. First Trust Co. v. Smith

(Neb.), 277 N. W. 762; Laverty v. Cochran (Neb.), 271 N. W. 354; Hubbell Bank v. Bryan (Neb.), 245 N. W. 20. In Laverty v. Cochran, *supra,* the court in speaking of a severance clause contained in a statute said:

"'The rule is that, although a statute may be invalid or unconstitutional in part, the other parts will be sustained where they can be separated from the part which is void. Muldoon v. Levi, 25 Neb. 457, 41 N. W. 280. But the parts of the statute which are valid must be capable of being executed independently of the invalid parts in order to be operative. State v. Ure, 91 Neb. 31, 135 N. W. 224. The statutory provision expressing legislative intent as to the separability of the various parts of a statute is merely an aid to judicial interpretation.'

"But where the connection between the invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative. The provision of the statute which we are here considering is such an essential part of the statute as not to be separable.

"In view of our conclusion on this phase of the case, it is unnecessary to consider the other contentions that have been ably argued and elaborately briefed by counsel for the respective parties.

"We conclude that permanent injunction restraining the enforcement of this statute must be granted. Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion."

No Issue Raised on Separability and Inducing Cause

Nowhere in the pleadings nor in the issues in the case was the question raised that Section 2 (A) or Section 2 (B) of the act in question were the inducing causes and inseparable from the balance of the act. That issue came as a surprise as did other matters that were contained

in the findings of fact and conclusions of law and which were not in the issues in the evidence nor in the opinion. These inconsistencies and illegalities in the decree were attempted to be corrected by a timely motion for new trial which was entertained by the Court.

Defendants' Motion for New Trial with 22 Affidavits Attached (R. Vol. I, 141-162).

Filed with Return of Service in Lincoln Division, February 5, 1940. Here follows the motion verbatim:

I.

"The defendants move the Court to grant a new trial in pursuance of Rule 59; or, instead of a new trial, to:

(1) Set aside certain Findings of Fact because clearly erroneous, as provided in Rule 52; and

(2) In pursuance of said Rule 59,

(a) Amend the Findings of Fact; and

(b) Make additional Findings of Fact; and

(c) Amend the Conclusions of Law; and

(d) Amend and direct the entry of a new Decree; and

(3) Remedy the inconsistencies in the directory opinion of this Court, dated and filed 12/28/39 (R. Vol. I, 125), with the final Findings of Fact, Conclusions of Law, and Decree, dated and filed 1/25/40 (R. Vol. I, 132); and

(4) Grant partial retrial of the factual issue in reference to the inducing cause for passage of the Act in question, referred to in the opinion of 12/28/39; or

(a) Accept the affidavits of a majority of the legislators, filed herewith, and as a part hereof; as Exhibits 1 to 22, and served on the plaintiffs with this motion, as conclusive of the question of what was the inducing cause for the passage of the Act and the separability of the various parts thereof; and

(5) Grant a partial retrial of the factual issue in reference to public performance rights by one deposition

or one short set of interrogatories because the facts in reference to public performance rights are erroneously set forth by the Court and yet are made the dominating basis for the defeat of the entire Act.

(6) Correct all errors in the Court's final Findings, legal Conclusions, and Decree dated 1/25/40, and enter new final papers based upon

(a) The record as made; and

(b) The showing accompanying this motion; and

(c) The law applicable to the issues involved; and

(d) The new evidence by deposition or interrogatories adduced upon order of this Court under Rule 59 and Rule 52.

II.

Regarding Defendants' Lack of Opportunity to Object to the Final Opinion, Findings, Conclusions, and Decree.

The defendants state that the opinion of the Court of 12/28/39, as well as the final Findings of Fact, Conclusions of Law, and Decree entered 1/25/40, were filed with no opportunity for the defendants to object, at the time of the said rulings and orders, and no opportunity was given to defendants to make known their objections to the action of the Court and their grounds therefor; and consequently, as permitted by Rule 46, the defendants move the Court for a specific order ruling that the absence of such objections shall not constitute a waiver by the defendants, nor prejudice the defendants in raising at this time, or in any future proceedings herein, any objection to the said opinion, Findings of Fact, Conclusions of Law, or Decree now on file herein; and that the matters herein set forth as grounds for new trial may constitute the objections, the same and in all particulars as if made known to the Court with the defendants' desires in reference thereto at the time of the rulings of the Court on each of the matters in the motion declared objectionable to defendants' cause.

III.

Defendants' More Specific Statement of the Grounds Set Forth in Paragraph I above for Setting Aside Certain Findings of Fact, and Amending Others, and Making Different Conclusions of Law and Decree.

1. In the opinion of 12/28/39, on Page 3 thereof, appears the following which should be stricken (R. Vol. I, 127):

> "Whether or not, under the common law of Nebraska the contracts between ASCAP and its members, and between it and the users of music in Nebraska, are valid or not, we need not consider. That issue is not before us, * * *"

The question of the alleged illegal ASCAP contracts as defined, and the authorities cited to sustain the same, on Pages 23 and 31 in the Conclusions of Law, found in defendants' proposed Conclusions filed 10/4/39, and which are hereby referred to and made a part hereof, should be followed.

2. On Page 5 of the opinion of 12/28/39 (R. Vol. I, 129), appears:

> "The Society as an assignee of the rights of each author is a representative of that individual right."

The same should be stricken unless the Court modifies its findings by declaring that the individual monopolistic rights under the Copyright Law do not permit a monopolistic combination as defined in Section 1 of the Act (R. Vol. I, 74).

3. On Page 6 of the opinion of 12/28/39, the Court attempts to define five (5) separate public performance rights (R. Vol. I, 130). These definitions do not coincide

with those set forth in the Federal Copyright Law, Title 17, U. S. C. A., and therefore should be stricken or corrected to read properly in accordance with the law and evidence. More specific corrective facts should be required by the Court, or the erroneous statement stricken.

4. Strike from the paragraph on Page 6 (R. Vol. I, 130), the following:

> "The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing."

The Act specifically provides, Section 2 (A), that the National Copyright Act is in full force and effect in Nebraska (R. Vol. I, 78). The defendants admit herein that the interpretation that should be placed upon said Section 2 (A) is that the individual copyright owner may either grant or withhold such of his public performance rights, or all his public performance rights, as he so desires. He may make known the price he wishes for any one or all of the public performance rights he wishes to grant or sell, and make his rights known if he desires to do so. Such requirement is not an interference with the National Copyright Act, and the same only applies to the individual.

Section 2 (C) (R. Vol. I, 79) specifically provides that nothing in the Act shall be construed to give to any purchaser of copyrighted musical compositions the right to "resell, copy, print, publish, or vend the same," which language is copied verbatim from the National Copyright Act, Title 17, U. S. C. A.

5. Strike from page 7 of the opinion of 12/28/39, the following language (R. Vol. I, 131):

> "Under this subsection, the copyright owner in effect must offer the public performance rights of his copyrighted composition for sale and use in Nebraska, and if he does not choose so to do any person purchasing the composition may use it in the state for public performance without any liability to the copyright owner. This provision, we think clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act."

This finding is clearly erroneous as the Act does just the opposite and complies with the Court's finding in reference to the National Copyright Law, which is as follows:

> "As observed, his rights of ownership entitled him to sell or offer to sell, or to withhold from sale, as he may choose."

This last above worded portion of the opinion of this Court of 12/28/39 (R. Vol. I, 131) is precisely the proper interpretation to be placed upon the Nebraska Act in reference to the individual as it specifically provides, and the defendants admit, that the individual copyright owner may withhold from sale, or from offering for sale, as he may choose, or may grant, or withhold any part or all public performance rights, and may do so without any penalty whatever.

6. Strike from page 7 of the opinion the following (R. Vol. I, 131):

> "The state statute cannot be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use."

Said wording is in contravention of, and in direct opposition to, the announced findings of the Court on 12/28/39 (R. Vol. I, 126-8) that ASCAP is an unlawful monopoly acting in restraint of trade; and that it is within the purview of the Nebraska Legislature to bar such an unlawful combination, even though the subject matter is copyrighted musical compositions. Defendants' Conclusions of Law dated 10/4/39, last part of pages 31 to 34, fully confirm the facts and law in opposition to the portion of the opinion above quoted. (Omitted in printing.)

7. Strike the reference to Section 2 (B) on page 6 of the opinion of 12/28/39 (R. Vol. I, 130-2), and on through to the end of the opinion on page 8, for the reason that said Section 2 (B) may readily be blue-penciled and eliminated from the Act, and because entirely separable from the balance of the section and from the balance of the Act, and held unconstitutional; that the said Section 2 (B) was not the inducing cause for the passage of the Act, as conclusively appears from the 22 affidavits of the legislators submitted with this motion and attached hereto as Exhibits 1 to 22 and made a part hereof (R. Vol. I, 160-2). If said Section 2 (B) is unconstitutional, the same may be so held by the Court and stricken without interference with the main and important features of L. B. 478, as defined in Section 1 of said Act (R. Vol. I, 74), because Section 1 is the main feature of said Act in that it deals with the unlawful combination of copyright owners acting in restraint of trade, while Section 2 (A) and Section 2 (B) deal with the individual composer and publisher, and all of Section 2 is separable from the entire balance of the Act. Either Section 2 (A), or 2 (B), or 2 (D), or all three (3) parts, might be

stricken from the Act as unconstitutional without in any way interfering with the workability, or the obvious and ostensible purposes of the anti-monopolistic legislation, which is the main title and gist of the Act (R. Vol. I, 78-9).

It is, therefore, inequitable and a denial of the defendants' rights for the Court to hold (R. Vol. I, 132):

> "The invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts."

and therefore

> "the whole act must be held inoperative."

The contrary now appears of record by said affidavits of the legislators attached (R. Vol. I, 160-2). Furthermore, said issue was not presented by the plaintiffs in the form of evidence; and the Federal Courts should not surmise at the factual questions involved in the passage of state legislation. The plaintiffs introduced no evidence whatever that would justify this Court in holding, but for Section 2 (B) or Section 2 (A) the Act would not have been passed. The affidavits submitted are proof positive to the contrary, and defendants are entitled to a clear finding of fact and conclusion of law accordingly.

8. The defendants have made the foregoing criticisms in reference to the opinion of 12/28/39, rather than the Findings of Fact of 1/25/40, because the Court stated in the concluding paragraphs of the opinion of 12/28/39, as follows (R. Vol. I, 132):

> "Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion."

This was not accurately done by plaintiffs. While the defendants recognize that final Findings of Fact, Conclusions of Law, and Decree as filed become the Court's when signed by it, nevertheless, as filed on 1/25/40, they are hopelessly inconsistent with said opinion of 12/28/39 (R. Vol. I, 125; R. Vol. I, 133).

IV.

The following should be stricken from the Final Findings of Fact and Conclusions of Law filed 1/25/40.

1. The introductory paragraph on Pages 1 and 2 is not an accurate statement of the appearances of the respective counsel and does not contain, as in said opinion, reference to L. B. 478 to be printed in the footnotes. The entire act should be copied in the footnotes verbatim in the same way as provided in the opinion of 12/28/39, and the appearances of counsel listed as shown by the court reporter's record.

2. There should be inserted the word "the" before "person" in Line 4 of Paragraph 2 of the Findings of Fact, and "in the United States" added after the word "corporations," and the words "authors, composers, and publishers" stricken, so that the same shall properly read (R. Vol. I, 133):

> "Its membership consists of a substantial number of the persons, firms and corporations in the United States who own or control copyrighted vocal or instrumental musical compositions."

3. In the last line of Page 2 of Paragraph 4 of the Findings of Fact, the words "some of" should be stricken because the 123 publisher members constitute all of the principal publishers of the country; there should be added to said paragraph the following (R. Vol. I, 134):

"The publisher members of the Society in almost every instance are the owners of the copyrights, including the rights of public performance for profit."

This is a material finding, and the contracts in evidence (and attached to Bill of Complaint) (R. Vol. I, 36-7) existing between the composer and the publisher show that the composer transfers to the publisher his public performance rights; in view of the fact that no composer is able to publish his music without the aid and assistance of a publisher, and substantially all the publishing houses in the United States being members of ASCAP, that fact becomes the power of ASCAP's vast control.

The publishers are, in effect, ASCAP; no music can be published by any composer or author of lyrics without a music publisher. The publishers are all in ASCAP. Therefore, no composer can function without ASCAP's consent. The organization thus controls the prices and terms for both the supply (composer) and the demand (user). A finding of these important facts should be made. There is no evidence to the contrary and ample evidence to sustain this feature.

4. The Findings of Fact referred to on Pages 18, 19, and 20 of defendants' proposed Findings of Fact of 10/4/39, on file herein, give the proper resume of the important line of evidence last above referred to and which should be so found as an important factor in the case.

5. There should be stricken from Paragraph 5, the seven lines from the bottom of the page, reading as follows (R. Vol I, 135):

"No license fees are paid by the owners of these receiving sets inasmuch as they do not engage in public performances for profit."

That was not an issue in the case; no evidence was heard on the subject, and the same is an attempt to have adjudicated by a court "sales talk." ASCAP may be engaging the Court in attempting to lay the ground work for the extension of its monopolistic practices to include private radios, if played, so that they may be heard by the public gathered in the vicinity. A Belgian case (citation will be furnished on request) by an ASCAP foreign affiliate is now so attempting.

6. In the Findings of Fact of 1/25/40, at the end of Paragraph 5 on Page 4, there should be stricken:

> "The cost of operation of the Society is approximately 20% of the gross amount received" (R. Vol. 1, 135).

The evidence clearly showed that it was at least 22%. It was not a proper subject for a special finding because the interrogatories propounded before trial in that regard were not answered by the plaintiffs (R. Vol. II, 913-914). There should be no binding findings or conclusion that 20% is accurate for cost of operation. The same was not gone into by the plaintiffs or defendants, excepting as a conclusion based on an estimate of plaintiffs. It has no material bearing in the case, and the same should be eliminated as prejudicial to the rights of the defendants; or, the Court, under permissive Rules 52 and 59, should permit that subject to be further gone into by deposition or the questions answered by ASCAP, its books examined, and a proper conclusion reached. However, the pleadings make no issue of cost of operation.

7. There should be stricken from Paragraph 7 on Page 4 of the Findings of 1/25/40, the following (R. Vol. I, 135):

"Few of them secured any substantial revenue from the public performance for profit of their copyrighted musical compositions."

Further on in the paragraph, there should be stricken:

"and could not economically obtain individual licenses for the separate performance of the large number of works required by them daily" (R. Vol. I, 136).

and also, there should be stricken:

"and to give users ready access to a substantial repertoire of music for such purposes that the Society was organized."

There was no evidence introduced on this subject of any probative force, or of evidenciary value; the same was only casually referred to and is not a material issue in the case. It is manifestly unfair to defendants to permit plaintiffs to build sales propaganda in a Court's Findings of Fact (R. Vol. I, 136-9).

8. Paragraphs 9, 12, 13, 14, 15, 16, 17, 19 and 21 on Pages 5, 6, and 7 of the Findings of Fact of 1/25/40, should be stricken for the reason that the matters therein are likewise "sales talk" and ASCAP propaganda placed in the findings; the same are baseless conclusions, with no material evidence to support them, and are contrary to the Court's instructions in the opinion of 12/28/39. That said paragraphs are more in the nature of a pleading or bill of complaint and are not, as a matter of practice, in proper language for findings, nor do the paragraphs contain proper matter for findings of fact and can therefore serve no useful purpose. On the contrary, the same are all harmful to the rights of the defendants when it is considered that Findings of Fact of a Trial Court are final truths.

9. Paragraph 22 should be stricken from the Findings of Fact of 1/25/40, for the reason that the plaintiffs do have an adequate remedy at law, as the facts and the evidence clearly show. The Act in question gives to the plaintiffs full and complete protection in the courts of the State of Nebraska in defense of any charge, civil or criminal, that may or might be instituted in the enforcement of the Act. No summary proceedings are permitted by the Act. Sections 9, 10, and 11 of the Act give full and adequate protection and due process of law, and equal protection to all (R. Vol. I, 74-87).

V.

The Conclusions of Law of the Court (R. Vol. I, 139), filed on 1/25/40, should be stricken because they are not properly drawn, nor are they compiled as defined in the decisions and rules; nor do they contain the supporting authorities and decisions to sustain them. In this regard, the defendants respectfully urge the Court to review the defendants' proposed Conclusions of Law, set forth on Pages 30 to 43, and submitted to the Court, and filed on 10/4/39. Said Conclusions of Law are respectfully referred to and made a part hereof, as if incorporated herein. (These conclusions proposed below are omitted from the printed record.)

The Decrees (R. Vol. I, 139) should be stricken and redrawn so as to provide that the Act is enforceable, unless the Court should continue its decision, after further facts on the actual operation of all public performance rights, that Section 2 (B) is nonenforceable because its provisions contravene the Copyright Act; then this Court should amend its Decree so that particular section is nonenforceable. The same might be true of other sections,

such as certain parts of Section 2 (A) or Section 2 (D), as well as Section 2 (B). However, the Court should hold that such provisions were not the inducing causes for the passage of the Act; that each one of such subsections as may be invalid may be entirely separated from the main and important features of the Act in reference to the monopolistic control in restraint of trade by ASCAP of the copyrighted musical compositions used in the State of Nebraska.

VII.

The defendants move the court to amend its findings of fact to include the following important and material matters clearly and unmistakably in the record:

1. That radio stations are charged 5% of their gross receipts exclusive of political speeches and advertising commissions paid, and must be paid irrespective of the kind and form of program and whether ASCAP music is used or not (R. Vol. I, 396, 428); that blanket licenses only are demanded by and acceptable to ASCAP (R. Vol. I, 402, 407); that ASCAP refuses radio users a per-piece or per-program charge based upon the ASCAP musical numbers used, excepting in the one instance of the newspaper contract found among the 391 contracts introduced in evidence pertaining to the newspaper owned radio station at Norfolk (R. Vol. I, 408) (R. Vol. II, 814); that such conduct is discriminatory and unfair to music users (R. Vol. I, 409); that repeated demands for per-piece or per-program rates have been demanded by radio stations especially, as the evidence clearly shows (J. J. Gillin Testimony) (R. Vol. I, 407, but ASCAP insists, and enforces through its monopolistic control (R. Vol. II, 794-6), the blanket license which it demands and which is

based upon percentage of gross business done plus a sustaining fee, irrespective of the program (Radio station contracts in evidence) (R. Vol. I, 408-10; Ex. F, R. Vol. I, 89).

2. That in the past ten (10) years one hundred (100) lawsuits for copyright infringement were instituted in Nebraska and terminated in dismissals by ASCAP, or the release of judgments by ASCAP, when the defendants signed the blanket license contracts demanded by it and paid the rates therein fixed and determined by ASCAP (R. Vol. II, 861-866).

3. That the radio stations in Nebraska are required to enter into contracts with the national networks, which compel the stations in Nebraska to enter into contracts with ASCAP to save them (networks) harmless from infringement. (See Columbia and National contracts in evidence.) (R. Vol. I, 791.)

4. That theaters pay ASCAP on the basis of seat capacity and not on whether ASCAP music is used or not used, or how much of it is used in the theater. (See theaater contracts in evidence.) (R. Vol. I, 94.)

5. That hotels pay on any sort of a basis that the agent of ASCAP in Nebraska can arrange; and the same is true with dance halls, taverns, amusement parks, and similar places, with each of the same at the complete mercy of ASCAP (Malec, Hedlin testimony and contracts in evidence) (R. Vol. I, 96; R. Vol. II, 852 A, B).

6. That the users of music have large investments in Nebraska and must have the music controlled by ASCAP to protect the same or go out of existence as music users at great inconvenience and loss (Malec, Gillin, Hedlin, and Searle testimony) (R. Vol. I, 367).

7. That the National Association of Broadcasters does not speak for the radio stations in Nebraska (Gillin) (R. Vol. I, 441-2), nor does the National Hotel Association speak for the hotels (Hedlin) (R. Vol. I, 448) in Nebraska. The negotiations for prices are actually accepted in Nebraska, and the contracts signed in Nebraska by the agent of ASCAP operating within the state (Blazer testimony) (R. Vol. I, 469).

8. That the composers of music have entered into contracts with their publishers and ASCAP, after which they have no further control in reference to public performance rights that are thus given to ASCAP by the composers and publisher (R. Vol. I, 36, 37, 42), and are placed in a classification in which the first group, of about 50 composers, receive as much as $17,500 per year (R. Vol. I, 203-212) and the publisher members in the first group $150,000 per year (Buck, Mills, Paine testimony; all depositions); that the classification is scaled down so that the vast majority of composers belonging to ASCAP receive virtually nothing (Irving Caesar Deposition) (R. Vol. II, 630-1); and through the scheme of the publisher members taking one-half of the profits and the selected classification [By-Laws (R. Vol. I, 64-5; 70) Complaint] of the upper groups, by the self-perpetuating board of directors, all the income for public performance rights is thus taken and controlled and distributed among a comparative few composers and publishers, and the officers named in the evidence in charge for years back.

9. That the officers receive $50,000 a year salary and bonuses of $5,000 to $8,000; that $30,000 a year rent is paid in New York for the headquarters (Buck) (R. Vol I, 208; 262); that ASCAP is a substantial business

organization doing business in the State of Nebraska through a local agent known as an attorney at law and in fact (Blazer) and whose name appears on all the contracts for ASCAP (R. Vol. I, 469; Vol. II, 815).

10. That the purpose of showing that there were 284,000 radio sets in Nebraska (Gillin) and 24 hotels (contracts) and 10 radio stations, and that a third of the population at some time during the year entertained itself in dancing; and that there are 350 dance halls and music rooms in the State of Nebraska (Malec), is to prove the matter of the public interest in the matter of copyrighted music within the State of Nebraska; and defendants are entitled to such finding because the evidence so shows (R. Vol. II, 797; Vol I, 367; Vol I, 362).

11. That it is clear from the evidence that there is no interference with commerce because the networks pay nothing to ASCAP [Contracts (R. Vol. II, 791); Mills] (R. Vol. 1, 263); that the public performances are all within the State of Nebraska; and that which comes over the wire, sent by the networks, has no usable value whatever until it is reformed by machinery and apparatus and equipment located and operated within the State of Nebraska (Gillin, Searle), and at which time, and only at such time, do the public performance rights attach within the State of Nebraska. Interstate commerce is in no way affected. A Finding of Fact should be made accordingly.

12. The foregoing suggestions in reference to commerce require additional Findings of Fact and which may be found in the proposed Findings of Fact set out on pages 13 to 29 inclusive of the defendants' findings sub-

mitted 10/4/39, and which are hereby referred to and made a part hereof the same and in all particulars as if copied at length herein (Omitted in printed record).

VIII.

As a Further Grounds for this Motion for New Trial, the Defendants Move the Reconsideration and Adoption by the Court of the Conclusions of Law and the Authorities in Support Set Forth on Pages 30 to 43 Inclusive of the Defendants' Proposed Conclusions Dated 10/4/39 (Omitted in printed record).

IX.

In Reference to the Interference of the Nebraska Act with the National Copyright Law, and Therefore Unconstitutional, the Defendants move for the correction and additions to the Findings of Fact, conclusions of law, and decree in the following manner and for the following reasons, either at this time or after some additional evidence asked for herein above on public performance rights has been furnished.

1. The National Copyright Act was passed in 1909. At that time, radio had not developed, and the use of music in the manner it is used today by hotels, in their rooms, by taverns, cafes, etc. had not been developed, nor even known. Consequently, the National Copyright Act does not cover many of the new phases of the business. Thus the Act does not prevent a state from passing reasonable regulations for the use of copyrighted material within the State of Nebraska so long as it does not interfere with the free use by the individual. Defendants contend that a monopolistic organization such as ASCAP

has no rights under the Copyright Act to combine unlawfully.

2. The deposition of Ella Herbert Bartlett shows that she and her publisher deal in reference to dramatico-musical rights by making special deals and special transactions with the moving picture houses, producers, theaters, and others. ASCAP is not interested therein, and those rights are separate and distinct and have no bearing upon or concern in this case; nor are such rights limited or curtailed in any way by the Nebraska Act. Ella Herbert Bartlett, for example (Refer to her deposition) (R. Vol. II, 698-705), received $50,000 for one of her father's rights for dramatico-musical purposes. That music for that purpose was sold and concluded. ASCAP admittedly has no interest directly or indirectly in that transaction. The Nebraska Act conforms to that right and does not interfere with such transactions.

3. The Copyright Act specifically provides that there shall be collected upon all mechanical reproductions 2c per each part (17 U. S. C. A., page 5), and which must be collected by the manufacturer when he sells the mechanical parts, rolls, discs, etc., including coin operated machines. The composer receives that sum direct from the manufacturer. ASCAP admittedly has no interest in such transactions. It is one of the separate rights that the composer and his publisher have, and which they handle independently of ASCAP and independently of all else, and all other publishers and composers. Consequently, there is no conflict with that provision of the National Act and the Nebraska Act, as the matter of price at 2c per roll must be collected and fixed by the composer by the National law (R. Vol II, 701).

4. With electrical transcriptions and other mechanical devices, ASCAP is not interested. The National Act provides that others who use the same must pay that price so fixed, and each must pay it. There is no interference by the Nebraska Act in reference to mechanical reproductions, including electrical or otherwise. That, too, is a matter for accounting between the composer and his publisher, and the manufacturer. The Nebraska Act in no way interferes with that right because the same agreement for price that might be made with a manufacturer in New York could likewise be made with with a manufacturer (if there were one) in the State of Nebraska, and the price for such manufacturing right to all mechanical devices is thus fixed and determined. Nothing in the Nebraska Act conflicts with this provision of the National Copyright Act.

5. As far as the sale of sheet music is concerned, that is admittedly an item upon which the evidence clearly shows that ASCAP is in no way interested. That is a matter purely between the composer and his publisher, and the evidence shows (See each deposition of composer and publisher on file) (R. Vol. II, 755-6) that they collect three cents per piece when the sheet music is sold at the music stores, and that three cents is remitted as a part of the purchase price, and the publisher gives one-half or all of it to the composer as his royalty on each piece of sheet music that is sold, as they might agree. In most instances, however, the evidence clearly shows that the publisher is the owner of the copyright and thus that three cents for each copy of sheet music is collected for the publisher (R. Vol. II, 643-4). That is immaterial to this case, ASCAP not being interested therein, and that

transaction is in no way interfered with by the Nebraska Act.

6. It then becomes only a question of what is known as the "small public performance rights." That is what ASCAP owns; that is what ASCAP completely controls and dominates free from interference by the composer or publisher under the terms of the contracts in evidence (R. Vol. I, 797-803; 36-37-42). Consequently the Court erred in its opinion of 12/28/39, and the same in its Findings of Fact of 1/25/40, when the Court erroneously found that Section 2 (B) or 2 (A) interfered with these respective rights. It does not. In fact, the enactment of Section 2 was evidently for the purpose of protecting the individual composer and his publisher in the State of Nebraska after ASCAP was dissolved by permitting or requiring the composers to handle their own small public performance rights in Nebraska by selling the same if they wished. The stamping on the music sold in Nebraska could read specifically to include or exclude any one or all of the rights above granted,—and so far as public performance rights are concerned, why is it not a reasonable regulation and a good one to require the composer to make known the price for his public performance rights and collected at the source? Wherein does the Copyright Act restrict state legislation on that score? That merely requires the composer to make his wants known. Repeated public performance,—is that the objection? How is it handled now? Outside the scope of the National Copyright Law is the method now used by ASCAP in collecting for public performance rights. The National Act gives no such right as ASCAP is exercising, in the State of Nebraska, in the matter of its monopolistic

practices in restraint of trade. Nor, does the National Copyright Act, by its terms, provide for any such means or methods of arriving at fees and licenses, and the distribution thereof, as ASCAP has invented (17 U. S. C. A. Sec. 1).

7. The Copyright Act does not define the means and the methods of the collection of what is known as the small public performance rights that have been given to ASCAP and which amount in the nation to some $6,000,000 per year, and in the State of Nebraska to $70,000 or more per year (R. Vol. II, 833; Vol. I, 27; 210-11).

8. The Nebraska Act, Section 2 (A), does not require those public performance rights to be given or granted when the sheet music is sold. The publisher may stamp thereon, if he desires to do so, all limitations of and the prices for public performance (R. Vol. I, 78).

9. ASCAP only being interested in the small public performance rights, the material feature is whether or not there is interference with the Copyright Act in requiring the composer and his publisher, when they sell music in the State of Nebraska, to sell the small public performance rights with it, if they wish—then and only then—to state the terms on the music, and what parts are granted and what parts withheld and what uses are granted by the sale. Defendants admit that interpretation of Section 2. For example, in the deposition of Ella Herbert Bartlett (R. Vol. II, 688-693; 699-705), she stated that in 1937, her publisher sold 300,000 copies of her father's copyrighted music; she received three cents a copy directly from her publisher for the ordinary sheet music royalty, which she and her publisher fixed and de-

termined ahead of time. The Nebraska Act would not stop that. She received $50,000 for one piece for the dramatico-musical rights, and she received large sums of money on the basis of 2c per roll for mechanical reproductions. The Nebraska Act would not stop that. This she collected at 2c per part from the manufacturer through her publisher acting as her agent or under contract with her. Therefore, on some of the sheet music that she sold, —and if she stamped public performance rights, defining its limitations, if she collected one dollar per copy for public performance rights copies so sold for that purpose, on 10,000 of the 300,000 sold, she would have received $10,000 directly from the music houses for small public performance rights. There is nothing in the Nebraska Act (Section 2 A) to prevent her from estimating what her public performance rights were worth for these small public performance rights for the music that was sold for public performance purposes within the State of Nebraska. She received from ASCAP in 1937 $7,500 for those rights. If she wished to charge $5.00, or $10.00, or $1.00 per copy for those sold in Nebraska for that purpose, she could do so; or, she could withhold that right completely and sell only the sheet music that would carry with it, as now, no public performance rights. This is not an interference with the Copyright Act, but is a legitimate exercise of the rights of the State to remedy a situation which Congress has not remedied in the Copyright Act, and which is not within the exclusive purview of the Copyright Act. It gives the right, but not how it shall be performed. If the right is in no way curtailed, the method of collection is not violative of the provision of the National Copyright Law.

10. The cases cited on Pages 36 and 37 of the defendants' proposed Conclusions of Law, filed on 10/4/39, are respectfully referred to because in some of those cases the Supreme Court of the United States has held, as shown in those cases, that it was not the intention of Congress to curtail states in a matter similar to Section 2 (A) (Omitted in printing).

X.

In Reference to Additional Testimony Under Rule 59 and 52, to Bring Out All Phases of the Various Public Performance Rights, Defendants Move the Court:

1. To grant a partial retrial by receiving additional evidence in the form of either affidavits, or depositions, or the answering of interrogatories by the plaintiffs to establish exactly in what manner the respective parts of public performance rights of the National Copyright Act are dealt in by composers and publishers, because the Court in its opinion of 12/28/39 (R. Vol. I, 125; 132) and in its finding of 1/25/40, erroneously defines those rights, and then finds an interference therewith as the dominating issue in the case, and thereby defeats the whole Act. One or two short depositions, or the answering of a short set of interrogatories, in addition to the evidence of record, should rectify the erroneous findings of the Court.

2. The reference to public performance rights in the last half of Page 6 and all of Pages 7 and 8 of the opinion of 12/28/39 (R. Vol. I, 128-132), and Paragraphs 16 and 19 on Pages 6 and 7 of the Findings of Fact of 1/25/40 (R. Vol. I. 137-8), are the objectionable findings and are erroneous, and should be stricken or clarified to speak the truth by some new evidence.

3. It was the duty of the plaintiffs to have given the Court complete and adequate evidence on all phases of public performance rights; they have not done so, and yet the Court has held, without adequate evidence to support its findings, upon the request of ASCAP a quite complete resume of public performance definitions and how applicable. These findings, defendants claim, are in error. In justice to the defendants, the same should be corrected, and amended findings, conclusions, and decree granted, upon new evidence, or the same entirely stricken from the consideration of the case. As it now stands, it is the controlling finding.

XI.

The attitude taken by the defendants is that Section 2 (B) and Section 2 (D) as well as Section 2 (A), might readily be blue-penciled from the Act and held non-enforceable without in any way curtailing or hampering the other main features of the Act in reference to monopoly (R. Vol. I, 78-9).

1. The defendants state that in connection with Section 2 (A), while they believe the same to be a proper exercise of the legislative function of Nebraska and believe in its constitutionality, and that it is not a violation of the National Copyright Act, still if the Court should hold, as to Section 2 (A) that it is unconstitutional, the whole Act should not fail. That is manifestly unjust to defendants. All of Section 2 is easily separable. The main monopolistic features of the Act will stand after the separation (R. Vol. I, 74).

XII.

Elimination of the finding that the Nebraska Act is drastic in its provisions.

In the Findings of Fact and Conclusions of Law of 1/25/40, it has been stated that the Act is too drastic in its penalties. We respectfully urge the Court to read the cases from Nebraska on Pages 33 and 34 of defendants' proposals of 10/4/39 (Omitted in printing), and the other penalties provided for monopolistic practices in other lines in the State of Nebraska, as well as the Sherman Act, and it will be readily seen that the penalties are not any more severe than in other similar acts held valid. A Finding of Fact on that matter should be entered, or the "drastic" reference in the Findings (Par. 21, Page 7, Findings of 1/25/40) should be stricken (R. Vol. I, 138).

XIII.

In reference to the separability of Section 2 from the balance of the Act.

1. A careful reading of the Nebraska cases cited in the opinion of 12/28/39, in reference to the inseparability of parts of an act, will convince the Court that those cases are in themselves adequate authority to sustain the defendants' contention herein that Sections 2 (A), 2 (B), and 2 (D) of L. B. 478 might readily be stricken and still the Act be enforceable and proper in all its other phases (R. Vol. I, 78-9).

2. The objectionable parts of the Nebraska Act, being Section 2, pertain to the individual composer and his publisher. Section 1 and all the balance of the Act, except

said Section 2, pertains to the unlawful combination. If Section 1 and its enforcing provisions are held constitutional, and Section 2 (A), 2 (B) and 2 (D) are held unconstitutional, we respectfully submit that the main and important feature of the Nebraska Act will be left entirely intact and enforceable. A reading of the Act, with Section 2 eliminated, should convince the Court (R. Vol. I, 74-88). Certainly there was no ulterior motive of the Nebraska Legislature in its attempt to give the individual composer and his publisher the right to collect themselves for public performance rights if they wished (R. Vol. I, 78-2A). If the Legislature in so doing overstepped its limitation in the Sections 2 (B) and 2 (D), those two might be stricken, and Section 2 (A) would be perhaps more clear. This is what defendants-appellants wish the Court to reconsider. But even if all of Section 2, including 2 (A), is classified as nonenforceable with 2 (B) and 2 (D), defendants submit that the Act, L. B. 478 (R. Vol. I, 78-80) shorn of all those parts, or some of them, must stand as a proper exercise of the state legislative power to prohibit unlawful combinations from carrying on their business in Nebraska.

Respectfully submitted,"

(Signed by attorneys for defendants below and appellants herein.)

Affidavit in Support of Defendants' Motion for New Trial

"STATE OF NEBRASKA,

County of Douglas, ss:

Amos Thomas, being first duly sworn upon oath, deposes and says that he was a member of the Nebraska Legislature on May 13, 1937, and was present and voted

for the final passage of L. B. 478 (R. Vol. I, 74-88); that the title to said bill shows that the main features of the same were an act relating to unlawful monopolies in copyrighted vocal or instrumental musical compositions and prohibiting combinations composed of copyright owners, their heirs, successors, or assigns; that said bill had been debated on the floor repeatedly previous to its passage and was reported out by the Judiciary Committee; that the Nebraska Legislature at said time was a Unicameral Legislature consisting of 43 members; that the roll call of record on final passage showed 32 votes for the bill, 7 against the bill, and 4 not voting.

Affiant further states that he is familiar with Section 2-B, relating to the rights given to users in the event the individual composer refused to fix upon the music the selling price for public performance and other uses; and also is familiar with Section 2-D, which required the filing of the copies of the musical composition with the Secretary of State at 25c per copy; and is also familiar with Section 2-A that required the individual composer to fix the selling price for public performance rights and stamp it upon the musical composition if the composer or publisher desired to grant or sell his public performance rights.

Affiant further states that none of said parts of Section 2 were the inducing causes for the passage of the bill, nor for the affirmative vote of this affiant; that there was incorporated in the said act the saving clause, known as Section 12, in reference to the enforcement of the balance of the act in the event any part was held nonenforceable; and furthermore, the act specifically provided that all benefits of the national copyright law would be grant-

ed to all authors and composers, and their heirs and assigns, within the State of Nebraska.

Affiant further states that the inducing cause, and the legislative intent, and this affiant's affirmative vote, in passing L. B. 478, were fundamentally and mainly to prohibit the operation of an unlawful combination of copyright owners acting in restraint of trade and in the fixing of prices within the State of Nebraska; and that Sections 2-B and 2-D, as well as Section 2-A, were not the main or the inducing reasons for the passage of the bill, nor for this affiant's affirmative vote, but said sections were merely incidental to the main issue in reference to monopoly, and separable therefrom.

AMOS THOMAS.

Subscribed in my presence and sworn to before me this 30th day of January, 1940.

HAROLD A. MOORE,
Notary Public."

(SEAL)

My commission expires January 28, 1943.

Certificate

"I, Grace A. Bowen, a notary public, do hereby certify that the following named persons, in the following named counties, and on the following named dates, and before the following named notaries public, signed and acknowledged affidavits in the exact wording of the affidavit of Amos Thomas attached hereto; and that all the said original affidavits, being 22 in number, were filed with the Clerk of the United States District Court at Lincoln, Nebraska, in said cause, Equity No. 562, and attached to

the Motion for New Trial; that said affidavits were drawn, and copies thereof made, by the undersigned.

(S.) GRACE A. BOWEN,
(SEAL) *Notary Public.*"

Dated: February 3, 1940.

Name	Date Signed and Acknowledged	County	Notary
Armstrong, Robert M. Exh. 1	1-30-40	Nemaha, Nebr.	Oscar A. Flau
Ashmore, Hugh B. Exh. 2	1-30-40	Hitchcock, Nebr.	J. E. Blum
Brady, Frank J. Exh. 3	1-29-40	Holt, Nebr.	J. B. Nickerson
Brodecky, Emil E. Exh. 4	1-31-40	Colfax, Nebr.	James A. Fiala
Cady, P. L. Exh. 5	1-31-40	Washington, Nebr.	Tom Dowell
Carlson, Swan Exh. 6	1-30-40	Phelps, Nebr.	J. M. Larson
Frost, Tracy T. Exh. 7	1-30-40	Howard, Nebr.	Pearl Dobry
Howard, R. M. Exh. 8	1-31-40	McPherson, Nebr.	Clay Wright
Knickrehm, John Exh. 9	1-30-40	Douglas, Nebr.	Grace A. Bowen
Murphy, L. B. Exh. 10	1-30-40	Scottsbluff, Nebr.	Maude Glover
Neubauer, E. M. Exh. 11	1-31-40	Orleans, Nebr.	Geo. S. Austin
Norton, J. N. Exh. 12	1-31-40	Washington, D. C.	Helen A. Bonorden
Peterson, Carl H. Exh. 13	1-29-40	Madison, Nebr.	Kathleen Kulp
Peterson, John B. Exh. 14	1-30-40	Saunders, Nebr.	C. N. Walton
Regan, R. C. Exh. 15	1-30-40	Platte, Nebr.	Carl N. Hoge
Reynolds, John D. Exh. 16	1-30-40	Knox, Nebr.	E. A. Houston
Schultz, Edwin Exh. 17	1-31-40	Antelope, Nebr.	Rosa Martin
Slepicka, Alois Exh. 18	2-1-40	Saline, Nebr.	J. J. Grimm
Thomas, Amos Exh. 19	1-30-40	Douglas, Nebr	Harold A. Moore
Tvrdik, Charles F. Exh. 20	1-31-40	Douglas, Nebr.	Otto Smolek
Von Seggern, E. M. Exh. 21	1-31-40	Douglas, Nebr.	Grace A. Bowen
Wells, Franklin S. Exh. 22	1-31-40	Jefferson, Nebr.	E. R. Bee

(Service duly acknowledged on February 5, 1940.)

The order overruling the motion for new trial is as follows:

"The Defendants' Motion for a New Trial, and for other relief, filed on February 5, 1940, in the above entitled case, which has heretofore been submitted to the Court, consisting of Archibald K. Gardner, Circuit Judge, Thomas C. Munger, District Judge, and J. A. Donohoe, District Judge, is hereby overruled.

(S.) ARCHIBALD K. GARDNER,
United States Circuit Judge;

THOMAS C. MUNGER,
United States District Judge;

J. A. DONOHOE,
United States District Judge."

The following assignments of error (R. Vol. I, 113-121) were filed below and docketed with the appeal papers on June 27, 1940, and are verbatim:

I.

"The Court erred in holding in its opinion of December 28, 1939 (R. Vol. I, 125), that Section 2 (B) of the Nebraska statute in question (Session Laws 1937, Chap. 138, page 488) was the inducing cause for its passage and inseparable from the balance of the Act, and therefore the entire Act was nonenforceable, because it affirmatively appeared from the Act itself (R. Vol. I, 79) that said subsection might be stricken and the balance of the Act would be full, complete, enforceable, and independent of said alleged objectionable clause or clauses in Section 2.

II.

The Court erred in refusing to correct its decree on rehearing when it then affirmatively appeared by the affidavits of a majority of all the legislators (R. Vol. I, 160-2), each of whom voted for the Act, that the said objectionable section [Section 2 (B)] together with Subsections 2 (A) and 2 (D) had no influence whatever upon them in their affirmative vote; and that neither of said subsections were the inducing cause for the affirmative vote of any one of said legislators.

III.

The Court erred in granting the permanent injunction *after it had found* in its opinion of December 28, 1939, that the *following facts* [(a) to (n)] *had been established* by competent evidence at the trial (R. Vol. I, 125-132):

(a) That the appellee ASCAP was made up of 1,000 music composer members and 123 music publisher members; that these music publisher members constituted substantially all of the music publishers in the United States.

(b) That ASCAP was likewise affiliated with 44,000 foreign composer members throughout the world whose music was exclusively controlled in the United States by ASCAP.

(c) That ASCAP actually did control from 85% to 90% of the popular copyrighted vocal and instrumental musical compositions and from 50% to 75% of the standard or older music used in Nebraska and elsewhere throughout the United States.

(d) That the users of music in the State of Nebraska, including radio stations, dance halls, hotels, theaters, and places of amusement must

necessarily, for the successful operation of their business, deal with ASCAP.

(e) That there was no place, or person, or agency to whom the users of music in Nebraska might go in order to deal for the public performance rights in any substantial amount sufficient to meet the ordinary needs of users in the state, except ASCAP.

(f) That the appellees, and all other members of ASCAP had assigned in writing to it the exclusive right to all their public performance rights.

(g) That the collections were made in the State of Nebraska by ASCAP of at least $70,000 annually; that the same was distributed, after the expense of operation, one-half thereof to the publisher members and one-half thereof to the composer members, classified by a self-perpetuating board of directors of ASCAP, as shown by their articles of association attached to their bill of complaint and in evidence.

(h) That the public was interested because there were in Nebraska 350 dance pavilions and ballrooms, independent of taverns, where dancing was carried on incidentally; that there were ten radio stations operating within the state, all dealing with ASCAP, and one of which stations was affiliated with the Columbia Broadcasting Network and the other with the National Broadcasting Network; that there were a large number of theaters as users of ASCAP music, and 284,000 radio receiving sets in private homes that listened to ASCAP music from the ten radio stations; that about one-third of the population of the state at one time or another during the year attended dances and balls where ASCAP music was played.

(i) That the theaters paid to ASCAP approximately $12,000 per year at ten to fifteen cents per seat per year; that the largest radio stations each

paid $22,000 or more per year to ASCAP; that there were 391 signed contracts in evidence with users in the state in which ASCAP, through its Nebraska representatives and agents, was the licensor and recipient of all the collections.

(j) That the exclusive right to make collections, to fix all prices, and to carry on all the public performance rights of all the copyrighted musical compositions of all its members was vested by each member in ASCAP under contracts in evidence.

(k) That throughout the nation some $6,000,000 was collected annually, of which approximately 20% was to pay the overhead expense of ASCAP; and that Nebraska users paid their proportionate part of that sum.

(l) That the protection by ASCAP of the legal rights by infringement suits for the members of their copyrighted musical compositions, which the individuals could not as readily carry on or detect themselves, would not authorize the monopolistic practices nor curtail the exercise of the police power of the State of Nebraska to prevent the unlawful monopoly of ASCAP.

(m) That the National Copyright Act (Title 17 U. S. C. A., Sec. I) gave no right to copyright owners to combine with other copyright holders to insure control of prices and the consequent power of monopoly of an entire field.

(n) That the necessity urged by the appellees as a justification or warrant for their organization was of no avail as a defense.

EXPLANATION: (All the foregoing facts were found by the Court in its opinion of December 28, 1939 (R. Vol. I, 125), and also in the findings of fact of January 25, 1940 (R. Vol. I, 132.))

IV.

The Court erred in finding in its opinion of December 28, 1939, that Section 2 (B) (R. Vol. I, 78) was the inducing cause for the passage of the entire Act and was inseparable from the balance thereof, when that issue was not pleaded and was not raised in any manner at the trial by either the appellees or the Court upon its own motion during the trial.

V.

The Court erred in granting a permanent injunction (R. Vol. I, 139) against the enforcement of Sections 1, (not 2), 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the Act in question (R. Vol. I, 74-88), when said sections merely declared the announced rules of law universally applied in Nebraska against all unlawful monopolistic combinations [Chapter 59, Comp. St. Neb., 1929, and Amendments, Monopolies and Unlawful Combinations; Art. 1, Trusts Generally; Art. 2, Grain Dealers; Art. 3, Fire Insurance Companies; Art. 4, Lumber and Coal Dealers; Art. 5, Local Discrimination; Art. 6, Pooling by Bridge Contractors; Art. 7, Rebate Vouchers; Art. 8, Unlawful Restraint of Trade; Art. 9, Regulation of Public Markets; Art. 10, Dairy Industry; 1937 Supp., Chap. 59, Art. 11, Protection of Trade-marks, Brands and names].

VI.

The Court erred in failing to apply the announced principle of law in Nebraska that:

> "Although a statute may be invalid or unconstitutional in part, the other parts will be sustained, where they can be separated from the part which is

void" (*Laverty v. Cochran,* 132 Neb. 118, 271 N. W. 354).

VII.

Furthermore, the Court erred in holding in its opinion that Section 2 and its subdivisions (B) and (A) (R. Vol. I, 378) were in themselves violative of the National Copyright Act (17 U. S. C. A., Sec. I) because the said sections and subsections were obviously enlargements to and permissive additions to the National Copright Act, rather than in derogation thereof, and were enacted as a proper and legal exercise of the police power of the Legislature of the State of Nebraska to protect its citizens against fraud and unlawful practices of ASCAP when dealing in the public performance rights for copyrighted musical compositions.

VIII.

The Court erred in granting the permanent injunction when the appellees had a plain, adequate, and speedy remedy at law, and especially so when the enforcement provisions of the Act, to wit, Sections 9, 10, 11 and 13 provide for full and complete hearings in the regularly constituted courts of the state and no summary action was permitted under the terms of the Act (R. Vol. I, 84-7).

IX.

The Court erred in granting the permanent injunction (R. Vol. I, 139) because in doing so it violated the well-established principle of law announced by the Supreme Court of the United States that the limited individual monopolies granted to patent or copyright owners

do not exempt them from the prohibitions of anti-trust legislation when it appears that the combining patent or copyright owners effectively dominate industry, because the power to fix royalties for licenses is tantamount to the power to fix prices in violation of the anti-trust legislation (R. Vol. I, 125, Par. 4-6).

EXPLANATION: (Only in the Court's opinion (R. Vol. I, 125) of December 28, 1939, was the entire Act held void because of the invalidity of Section 2 (B) as above set forth. In the findings of fact, conclusions of law, and decree (R. Vol. I, 132-9) of January 25, 1940, the entire Act was held invalid and non-enforceable although no part thereof was held repugnant to the Copyright Law, and no mention or reference was made to Section 2 (B), as the only invalid part, as was done in the opinion of December 28, 1939, and no determination of unconstitutionality made in said papers of 1/25/40 (R. Vol. I, 132-9).

Thus appellants now proceed with the following assignment of errors based upon omissions in the findings of fact, conclusions of law, and decree of January 25, 1940).

X.

The Court erred in failing to find in its findings of fact (R. Vol. I, 132) of January 25, 1940, the following additional, definitely proven, material matters appearing of record because the omission thereof affected the material rights of the appellants on the issue of monopolistic practices amounting to fraudulent practices indulged in by ASCAP:

(These facts are indexed to the printed transcript of record before this Court.)

(1) That, contrary to its claim of being a protective association for its members, ASCAP is a very

substantial business organization paying $30,000 a year rental for its New York office (R. Vol. I, 262).

(2) That it pays each of its officers Buck and Mills $50,000 annually together with large bonuses and other emoluments, and to its secretary Paine $25,000 per year (R. Vol. I, 208; 211).

(3) That no fee or license is charged the radio networks dealing in interstate commerce but only the local radio station for such public performance of ASCAP compositions as are reproduced or presented originally in the Nebraska studios (R. Vol. I, 263).

(4) That the entire operations of ASCAP are so carried on as to be within the state as intrastate transactions obviously and ostensibly to avoid, in the slightest degree, interference with interstate commerce (R. Vol. I, 263; 398-403; 455-8).

(5) That over 100 infringement suits were instituted by ASCAP in the past ten years in the Nebraska Federal Courts, all of which were dismissed when and if contracts were signed by the users with ASCAP on ASCAP'S terms (R. Vol. II, 861-866).

(6) That there has been a gradual enlargement in the fees charged year by year; and that the users of music are helpless and must pay the price dictated by ASCAP if they use music commercially in their business enterprises (R. Vol. I, 443; 367-8; 380-6; 396-8).

(7) That many thousands of dollars are invested by the users of music in the State of Nebraska in theaters, broadcasting stations, hotels, amusement parks, halls, and pavilions; and that these investments would be adversely affected without the use of music of the type and kind controlled almost exclusively by ASCAP (R. Vol. I, 365-7; 397-400; 410-12).

(8) That the classification committee of ASCAP (Its Art. of Assoc., (R. Vol. I, 64; 70)) divides one-half the net income to composer members, classifying them arbitrarily in groups so that approximately 100 to 150 of the composer members receive approximately all of the composer money (R. Vol. I, 203-9); that these funds are annually paid as if dividends or earnings, and not as royalties to each composer on his music (R. Vol. I, 201-206; 64; 70).

(9) That the radio broadcasting companies in Nebraska are compelled, in contracting with ASCAP, to pay it 5% of the station's entire gross receipts, no matter from what source received, together with a sustaining fee, irrespective of whether the radio station used ASCAP or any other music, or no music, on a particular program (R. Vol. I, 396; 428; 402; 407; 408; Vol. II, 814, 794-6).

(10) That ASCAP refused to furnish the list of its compositions, the public performance rights of which it claimed to control, so that the user might protect himself against an innocent infringement in his establishment (R. Vol. I, 447; 403).

(11) That the facts admitted by appellees in their petition (R. Vol. I, 1-36; 36-97) and by their exhibits attached and made a part thereof, when applied to the Act also set forth in the petition, were sufficient admissions of facts by appellees to legally ground an order of dismissal moved for by the appellants in August of 1937 (R. Vol. I, 98 to 102), but overruled on November 13, 1937, and to which exceptions were taken and filed on November 18, 1937 (R. Vol. I, 102).

XI.

The Court erred in its opinion of December 28, 1939, when commenting upon Section 2 (B), which applied

separately to the *individual* composer and his publisher, as specifically set forth, by holding (R. Vol. I, 131):

> "While the power reasonably to restrain unlawful monopolistic trade-restraining combinations from exercising any rights in the state may be conceded, an act which compels the owner of a copyright to offer it for sale in a certain way, and if he fails so to do to take it from him without compensation violates the due process and equal protection clauses of the Constitution, and it is also violative of the Federal Copyright Act,"

because Section 2 (A) (R. Vol. I, 78) of the Act provides that the said individual composer and his publisher *may, only if he or they wish,* grant public performance rights, and when they do shall fix the price therefor upon their music when sold, and collect for it in the same manner as they do for their royalties on all sheet music; and because Section 2 (C) (R. Vol. I, 79) protects the individual copyright owner by prohibiting others from publishing, copying, vending, or selling the composition containing the public performance rights to others when so purchased, with full protection of the National Copyright Law specifically provided in Section 2 (A) (R. Vol. I, 79).

XII.

The Court erred in holding in reference to said Section 2 (B) in its finding of fact of January 25, 1940, that:

> "The Statute can not possibly be complied with because, among other things, under their respective contracts with the authors and composers, the publisher-members of the Society (including publisher complainants) have the right to and do give away and distribute free of charge, professional copies of

the compositions copyrighted by said publisher-members within the State of Nebraska; this is a practice in the business and is done to create a desire for such compositions on the part of the public, make said compositions popular and give them commercial value" (R. Vol. I, 138),

because the statute in no way prohibits the giving away of copyrighted musical compositions with or without public performance rights; that such arrangement, if indulged in, would be a simple matter of contract between the composer and his publisher and is extraneous to the issues involved in this case, and in no manner violative of the Copyright Act or the Nebraska Act.

XIII.

The Court erred in granting the permanent injunction when it did not directly or indirectly in any part of its findings of fact, conclusions of law, or decree of January 25, 1940, state, find, conclude, or decree that the Nebraska Act in question was violative of any provisions of the Federal or State Constitution or of the National Copyright Act (R. Vol. I, 132-141).

XIV.

The Court erred in failing to correct its decree of January 25, 1940 (R. Vol. I, 139), for the additional reasons set forth in appellants' motion for rehearing (new trial) filed February 5, 1940 (R. Vol. I, 141-162), which reasons and grounds are made a part of this assignment of error as if copied verbatim herein.

Respectfully submitted,"

(Duly signed. Service acknowledged.)

POINT NO. I.

While copyrighted vocal and instrumental musical compositions may grant individual monopolies, they cannot be unitedly exercised to restrain competition and to fix prices; and a suit to enjoin such combination to restrain commerce and trade in copyrighted musical compositions is not one arising under the Copyright Laws of the United States.

Boston Stores v. American Graph Co., 246 U. S. 8, 38 S. Ct. 257.

Ethyl Gas Corp. v. U. S., 309 U. S. 436, 60 S. Ct. 618.

Fashion O. G. A. v. Fed. Trade Com., ... U. S. ....., 61 S. Ct. 703, affm'g 114 Fed. 2d 80.

Mines v. Scribner, 147 Fed. 927.

Murphy v. Christian, 38 App. Div. 426, 56 N. Y. S. 579.

Standard Oil Co. v. U. S., 283 U. S. 163, 51 S. Ct. 421.

Standard Sanitary Mfg. Co. v. U. S., 226 U. S. 20, 33 S. Ct. 9.

State of Washington v. ASCAP, 13 Fed. Supp. 141.

Straus v. American Publishers Ass'n, 231 U. S. 222, 34 S. Ct. 84.

Straus v. Victor Talking Mach. Co., 243 U. S. 490, 37 S. Ct. 412.

U. S. C. A., Title 17, Sec. 1 (Mar. 4, 1909, C. 320, Sec. 1, 64, 35 Stat. 1075, 1088.) Copyrights.

POINT NO. II.

There is nothing in the Constitution of the United States which precludes a state from adopting and enforcing statutes which secure competition and preclude combinations which tend to defeat it; and the state is the sole judge, within reasonable limitations, of what laws shall be enacted for the protection and welfare of

its people and as to when and how the police power of the state shall be exercised.

Central Lumber Co. v. South Dakota, 226 U. S. 157, 33 S. Ct. 66.

Great Atl. & Pac. Tea Co. v. Grosjean, 301 U. S. 412, 57 S. Ct. 772.

State v. Drayton, 82 Neb. 254, 117 N. W. 768.

National Cotton Oil Co. v. Texas, 197 U. S. 115, 25 S. Ct. 379.

Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505.

Paramount Famous Lasky v. U. S., 282 U. S. 30, 51 S. Ct. 42.

Selover v. Walsh, 226 U. S. 112, 33 S. Ct. 69.

Shallenberger v. First National Bank, 219 U. S. 114, 31 S. Ct. 189.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 S. Ct. 220.

POINT NO. III.

The state may pass such reasonable regulations in reference to the sale and use of copyrighted material by the individual owner and his publisher within the State of Nebraska as its legislature may deem proper, when the enactment is not prohibited by the Copyright Act nor in derogation of it.

Allen v. Riley, 203 U. S. 347, 27 S. Ct. 95.

Straus v. Am. Pub. Ass'n., 231 U. S. 222, 34 Sup. Ct. 84.

John Woods & Sons v. Frank Carl, 203 U. S. 358, 27 S. Ct. 99.

Paramount v. Langer, 23 Fed. Supp. 890 (Decision under Sec. 266 of the Judicial Code).

Patterson v. Kentucky, 97 U. S. 501, VII Otto 501.

POINT NO. IV.

A state statute prohibiting monopolies in copyrighted vocal and instrumental musical compositions does not

militate against the commerce clause of the Federal Constitution when the acts of the unlawfully combining conspirators are so carried on as to be intrastate transactions.

Arkansas-Louisiana Gas Co. v. Dept. of P. U., 304 U. S. 61, 58 S. Ct. 770.

Eichholz v. Public Service Com. of Mo., 306 U. S. 268, 59 S. Ct. 532.

Hartford v. Illinois, 298 U. S. 155, 56 S. Ct. 685.

Interstate Circuit v. Paramount Pictures, 306 U. S. 208, 59 S. Ct. 467.

Milk C. B. of Pa. v. Eisenberg, 306 U. S. 346, 59 S. Ct. 528.

Paramount v. Langer, 23 Fed. Supp. 890 (Decision under Sec. 266 of the Judicial Code).

POINT NO. V.

The penalties of an anti-monopoly statute may not be considered so drastic as to be nonenforceable and to deprive those affected by it of the due process and equal protection clauses of the State and Federal Constitutions, when the act itself gives full and complete protection in the courts, and when the penalties for violation are from $1.00 to $5,000, and when the criminal provisions provided are misdemeanors with penalties not to exceed one year in prison, and when such fine or imprisonment may be imposed only after a full and complete hearing on the merits in the courts of the state, and when jury trial is guaranteed by the act and the Constitution of the state. The Court may consider similar penalties in other anti-monopoly statutes in Nebraska and in the nation as an aid in sustaining the act.

Collins v. Johnston, 237 U. S. 502, 35 S. Ct. 649.

Marsh-Burke v. Yost, 98 Neb. 523, 153 N. W. 573.

Noble v. Carlton, 36 Fed. (2d) 967.

People v. Magoni, 73 Cal. App. 78, 238 Pac. 112.

People v. Cruz, 113 Cal. App. 513, 298 Pac. 556.

Tegtmeyer v. Tegtmeyer, 292 Ill. App. 434, 11 N. E. (2d) 657.

Penalty Provisions of: Chapter 59, Comp. St. Neb., 1929, and Amendments, Monopolies and Unlawful Combinations; (Art. 1, Trusts Generally; Art. 2, Grain Dealers; Art. 3, Fire Insurance Companies; Art. 4, Lumber and Coal Dealers; Art. 5, Local Discrimination; Art. 6, Pooling by Bridge Contractors; Art. 7, Rebate Vouchers; Art. 8, Unlawful Restraint of Trade; Art. 9, Regulation of Public Markets; Art. 10, Dairy Industry.)

Penalty Provisions of: Sherman Anti-Trust Act and Clayton Act, Title 15, Sec. 1-7 and Sec. 12-27, U. S. C. A.

POINT NO. VI.

Where there is a conflict in the considered opinion of the Court and the findings of fact, conclusions of law, and decree subsequently entered, the opinion will be considered supererogatory; and the findings of fact, conclusions of law, and decree only will be considered on appeal.

Basevi v. Edward O'Toole Co., 26 Fed. Supp. 41.

Interstate Circuit v. U. S., 304 U. S. 55, 58 S. Ct. 768.

Penmac Corp. v. Esterbrook Steel Pen Co., 27 Fed. Supp. 86.

POINT NO. VII.

If a three-judge federal court, sitting under the provisions of Section 266 of the Judicial Code, in its findings of fact, conclusions of law, and decree makes no finding, conclusion, or decree that a state statute permanently enjoined is violative of a Federal statute or the Federal or State Constitution, the Supreme Court of the United States in reviewing the case is justified in reversing the cause, dissolving the permanent injunction, and ordering

the case dismissed because the basis for the three-judge federal court's jurisdiction is the repugnancy to a Federal statute or some provision of the Constitution.

Buck v. Gallagher, 36 Fed. Supp. 405.

Buck v. Gibbs, 34 Fed. Supp. 510.

Buck v. Swanson, 33 Fed. Supp. 377.

Interstate Circuit v. U. S., 304 U. S. 55, 58 S. Ct. 768.

Rule 52 (a) of Rules of Civil Procedure.

Section 266, Judicial Code; Title 28, U. S. C. A., Section 380.

NOTE: [In the case at bar, there *were* findings of fact, conclusions of law, and decree of January 25, 1940 (R. Vol. I, 132-9); but nowhere therein was it stated that the Nebraska Legislative Act in question was repugnant to any part of the Federal Constitution, or the State Constitution, or the Copyright Act.

In a previous opinion dated December 28, 1939 (33 Fed. Supp. 377), there was a finding or conclusion that only one part or provision of the act was repugnant to the National Copyright Act, to wit: Section 2 (B) of the Act in question (R. Vol. I, 79).]

POINT NO. VIII.

If on appeal to the United States Supreme Court, in an action brought under Section 266 of the Judicial Code, wherein the lower court granted a permanent injunction, the appellate court should consider an opinion rendered by the lower court previous to the findings of fact, conclusions of law and decree, holding that one subsection of the Act in question was inseparable from the balance of the Act, and was the inducing cause for its

passage, and for that reason declared the entire Act non-enforceable, then the appellate court should re-examine such question and sustain the enforceability of all the balbalance of the Act, when it is clear that after striking out the unconstitutional part of the statute, the residue is intelligible, complete, and capable of execution. Especially is this true when the state court has never passed upon the question.

Carter v. Carter Coal, 298 U. S. 238, 56 S. Ct. 855.

Dorchy v. Kansas 264 U. S. 286, 44 S. Ct. 323.

In re Lew Agnew, 89 Neb. 306, 131 N. W. 817.

John Reddell v. Moores, 63 Neb. 219 at 225, 88 N. W. 243.

Logan Co. v. Carnahan, 66 Neb. 685 at 694 and 708, 92 N. W. 984.

Merrill v. State, 65 Neb. 509 at 517 and 518, 91 N. W. 418.

Peterson v. Beale, 121 Neb. 348 at 353, 237 N. W. 146.

Scott v. Flowers, 61 Neb. 620, 85 N. W. 857.

State v. Price, 129 Neb. 433, 261 N. W. 894.

State v. Ure, 91 Neb. 31 at 43, 135 N. W. 224.

State v. Stuht, 52 Neb. 209, 71 N. W. 941.

Sunderland v. Mo. P. Ry. Co., 101 Neb. 119, 162 N. W. 494.

Union v. Sprague, 69 Neb. 48, 95 N. W. 46.

Williams v. Standard Oil Co., 278 U. S. 235, 49 S. Ct. 115.

POINT NO. IX.

The issue of whether or not a particular subsection of an act was the inducing cause for its passage is a matter of legislative intent which must be pleaded in order to raise the issue; and if not so raised, the trial court errs in any findings or ruling on the subject. It is proper for the parties adversely affected by such er-

roneous ruling to call the trial court's attention thereto in a motion for rehearing and a showing by affidavits of a majority of all the legislators who voted for the act that said subsection was not the inducing cause for its passage nor for their affirmative votes.

Bresee v. Preston, 91 Neb. 174, 135 N. W. 544.

Glenn v. Field Packing Co., 290 U. S. 177, 54 S. Ct. 138.

Lee v. Bickell, 292 U. S. 415, 54 S. Ct. 727.

Wald T. & S. Co. v. Smith, 290 U. S. 602, 54 S. Ct. 227 (on rehearing).

York v. Chicago, B. & Q., 56 Neb. 572, 76 N. W. 1065.

59 C. J., Section 740, Page 1200 (Note 22a).

ARGUMENT

Argument to Sustain Law Point No. I.

The appellee society, ASCAP, and its individual members, some of whom are appellees, are all a part of the unlawful combination. The fact that these appellees are dealing in an incorporeal right, or a franchise, *may* have been in the past a defense against anti-monopoly statutes that defined commodities, products, or material as its subject matter, but the State of Nebraska under its police power has *now* enacted the statute in question. Section 1 thereof (pages 135-150 hereof) is directed specifically against a combination organized for the purpose of fixing fees and licenses in public performance rights for profit of copyrights on music within the State of Nebraska; the combination has for one of its purposes the prevention of free competition among others, or with different and competing copyright owners.

ASCAP admittedly deals only in "small" public performance rights. That means there is eliminated from consideration in this case, because not covered by the act, the dramatico-musical rights or what are known as the "grand rights," the moving picture rights, the recording rights, and all other similar rights. There has been assigned to ASCAP, by these individual appellees and others, only the sole right to fix prices and collect fees each and every time a piece of music is rendered publicly for profit in a hotel, radio studio, or similar place. It makes no difference whether there is an admission charged at the door or whether there is any direct profit or not. ASCAP collects for these rights wherever and whenever music is played and sung, even though that music

has been orchestrated and purchased obviously for the sole purpose of playing it publicly for profit.

These public performance rights are fixed and collected by ASCAP and distributed as dividends among its members.

These and other facts in connection with the operations of ASCAP have been found by the lower Court and clearly set forth (pages 58-60 hereof). Other similar facts appear undisputed (pages 63-65 hereof).

The subject matter of the state act is coupled with a public interest as shown in the opinion of the Court (page 9 hereof). It is apparent that without the right to use some of this vast amount of music controlled by ASCAP the financial investments of persons, firms, or corporations that must have music played and sung upon their premises in Nebraska, are seriously jeopardized (page 10 hereof). These facts have all been established by the opinions, findings, and decree of the Court and stand unappealed and final for the purpose of this case.

From a legal standpoint, this question arises: Does the National Copyright Act, under which these public performance rights arise, prevent the State of Nebraska from exercising its police power in reference to monopoly in public rendition rights of music, granted to the individual with the power of assignment?

The following cases clearly hold that the police power of a state is not obliterated by the National Copyright Act and especially in the matters covered by Section I of the State Statute, and all the enforcement pro-

visions thereof which are Sections 7 A, B, Sec. 8, 9 A, B, C, D, 10 A, B, 11 A, B, as well as Sections 12 and 13 (pages 135-150 hereof).

In the case of *Boston Store of Chicago v. American Graphophone Co.*, 246 U. S. 8, 38 S. Ct. 257 Syllabi Nos. 2 and 3 the court states:

> 2. "Contracts between a manufacturer of graphophones, etc., as assignee of patents, or its agents, and all dealers permitted to sell them throughout the country, which fixed the prices at which the articles might be resold, and covenanting that underselling is an infringement of the patents, though speaking of the contract as a license, is not justified under the guise of the monopoly granted by the patent law."
>
> 3. "Such contract is invalid under the law."

In *Ethyl Gasoline Corporation v. United States*, 309 U. S. 436, 60 S. Ct. 618, at page 461 in 309 U. S., the Court stated:

> "Since the unlawful control over the jobbers was established and maintained by resort to the licensing device, the decree rightly suppressed it even though it had or might continue to be used for some lawful purposes. The court was bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival. * * * Since the court rightly concluded that these reasons were without substantial weight, it properly suppressed the means by which the unlawful restraint was achieved."

In *Fashion Originators' Guild of America, Inc., et al. v. Federal Trade Commission*, ... U. S. ....., 61 S. Ct. 703, affirming 114 Fed. 2nd 80, the Court held:

> "But petitioners further argue that their boycott and restraint of interstate trade is not within the

ban of the policies of the Sherman and Clayton Acts because 'the practices of FOGA were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs and had in fact benefited all four.

"Nor can the unlawful combination be justified upon the argument that systematic copying of dress designs is itself tortious, or should now be declared so by us. In the first place, whether or not given conduct is tortious is a question of state law, under our decision in Erie Railroad Co. v. Tompkins, 304 U. S. 64. In the second place, even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law."

In *Mines v. Scribner,* 147 Fed. 927 (the defense was the Copyright Act) it is stated:

"The copyright law cannot help the defendants, because, in the first place, the restraint is not confined to copyrighted books, and, if it were, it cannot be so that the right given a single publisher to do as he pleases with his copyrighted book can be extended, so that he can combine with other owners of copyrights and permit his book to be subject to the rules laid down by the united owners."

Syllabus No. 2 of this case states:

"Defendants became members of an association of book publishers controlling 90 per cent of the book business of the country, which association adopted a rule that they would not sell to anyone who cut prices on copyrighted books, nor to anyone who should be known to have sold to others at cut prices. A blacklist was kept containing the names of such persons, and no one on the blacklist could buy any books of anybody in the scheme. *Held,* that

such scheme constituted a conspiracy in restraint of interstate trade or commerce."

In *Murphy v. Christian P. & P. Co.*, 38 App. Div. 426, 56 N. Y. S. 597 (the defense was the Copyright Act), the Court in the opinion stated:

> "We suppose that the author of a new geometry may fix the price at which he will sell his work at any sum, or arrange with others for its publication and sale at the stipulated price. But if all the publishers of books on geometry were to combine and agree not to sell any publication on that subject except for a stipulated price, the contract would be in restraint of trade and void. The difference of principle between the two cases is just this: Monopolies are not favored, and agreements to create the same, except where authorized by law, are void. No law authorizes a monopoly of all publications on the subject of geometry; the law does, however, authorize and grant to the author a monopoly in any particular work which he may publish on that subject."

In *Standard Oil Co. v. United States*, 283 U. S. 163, 51 S. Ct. 521, Syllabi 4 and 9 the Court states:

> 4. "Limited monopolies granted to patent owners do not exempt them from prohibitions of anti-trust legislation (Sherman Anti-Trust Act Secs. 1, 2 [15 U. S. C. A. Secs. 1, 2]."
>
> 9. "If combining patent owners effectively dominate industry, power to fix royalties for licenses is tantamount to power to fix prices (Sherman Anti-Trust Act Secs. 1, 2 [15, U. S. C. A. Secs. 1, 2]."

In *Standard Sanitary Manufacturing Co. v. United States*, 226 U. S. 20, 33 S. Ct. 9, Syllabus 1 states:

> "Agreements embracing 85 per cent of the manufacturers of, and 90 per cent of the jobbers in, enameled ironware * * * cannot escape condemnation under the Sheriman anti-trust act of July 2, 1890 (26

Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3,200), because the agreements take the form of licenses from the owner of a patent for a device used in the enameling process."

In *State of Washington v. A. S. C. A. P.*, 13 Fed. Supp. 141 (the defense was the Copyright Act), it is stated:

> "While the compositions owned and controlled by the defendant society may be copyrighted, a suit to enjoin a conspiracy to restrain commerce and trade in such compositions is not one arising under the copyright laws of the United States."

In the case of *Straus v. American Publishers' Association*, 231 U. S. 222, 34 S. Ct. 84 (the defense was the Copyright Act), it is stated at page 88:

> "We conclude, therefore, that the court of appeals erred in holding that the agreement was justified by the copyright act, and was not within the denunciation of the Sherman act, and in denying, for that reason alone, the right of the plaintiffs in error to recover under the state act as to copyrighted books."

Syllabus 2 of this case states:

> "The copyright monopoly conferred by the Federal laws does not protect, as against condemnation under the Sherman anti-trust act of July 2, 1890, agreements between associations embracing probably 75 per cent of the book publishers and a majority of the booksellers in the United States, which operate to restrict the sale of copyrighted books to those only who will maintain the fixed net retail price, and result in almost completely destroying competition in such books at retail."

In *Straus v. Victor Talking Machine Co.*, 243 U. S. 490, 37 S. Ct. 412, the opinion states:

"Convinced, as we are, that the purpose and effect of this 'License Notice' of plaintiff, considered as a part of its scheme for marketing its product, is not to secure to the plaintiff any use of its machines, and as is contemplated by the patent statutes, but that its real and poorly concealed purpose is to restrict the prices of them, after the plaintiff had been paid for them and after they have passed into the possession of dealers and of the public, we conclude that it falls within the principles of Adams v. Burke, 17 Wall. 453, 456, 21 L. Ed. 700, 703; and of Bauer v. O'Donnell, 229 U. S. 1, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150; that it is, therefore, invalid, and that the district court properly held that the bill must fail for want of equity.

In the last case, note that Mr. Justice Clark in announcing the opinion of the Court stated:

" * * * the scheme was regarded by the plaintiff itself and by its agents simply as one for maintaining prices by holding a patent infringement suit in terrorem over the ignorant and the timid."

Thousands of infringement suits throughout the United States have been instituted by ASCAP to whip music users into line and to sign their contracts. In Nebraska, there were about 100 such suits in recent years (page 64 hereof). In Nebraska, there are 391 licenses, and in the United States some 33,000 licenses for these public performance rights upon which the society collects some $6,000,000 per year. About $70,000 is collected from Nebraska annually (page 10 this brief).

Appellants contend that in the light of the facts established below, and admitted by the record, when applied to the decisions above quoted the Court is confronted squarely with the proposition that all the sections of the act in question which deal with the unlawful combination are a proper exercise of the police power. These sections of the act are Section 1 concerning monopoly, Section 2 (C) which is a reiteration of the restrictions against reselling the same as in the National Copyright Act, Section 3 declared nonenforceable these licenses made, not with the individual copyright owners, but with the unlawful, monopolistic combination. Sections 4 (A) and (B), 5 (A) and (B), and 6 in no way are against the operations of any person, firm, or corporation owning public performance rights excepting the unlawful combination as defined in Section 1 of the act.

These last mentioned sections were obviously enacted to protect such users as radio stations, theaters, and other persons, firms, and corporations within the State of Nebraska from being victimized by the unlawful combination should it attempt to reach into the State of Nebraska through agencies, and try in that way to escape control by the State of Nebraska. Yet, Section 6 (page 143 hereof) specifically holds and recognizes that in the event of infringement of copyright by local radio stations, theatres, and other users of music in Nebraska, they could not be exempted from the provisions of the National Copyright Act in reference to infringement but would be required to rely upon the theory of subrogation to recover damages that such users may have suffered by virtue of infringement brought about by the unlawful combination in dealing with affiliates of the Nebraska users.

Sections 7 (A) and (B) prevent the unlawful combination from dealing through persons, firms, and corporations acting as agents for it within the state. Section 8 has to do with penalties. Later we will comment upon the reasonableness of the penalties and the enforcement features of the act.

For the purpose of further explanation of point No. 1 and the application of the decisions hereinabove set forth to sustain the point, a careful reading of said Sections 1, 2 (C), 3, 4 (A) and (B), 5 (A) and (B), 6, and 7 (A) and (B), (pp. 135-150 hereof) will be found helpful to the court because it is very apparent that those section deal with "unlawful monopoly," and "unlawful" combinations. Those sections, together with the enforcement provisions hereinafter set forth, constitute an act within itself and within the law. Sections 2 (A), 2 (B) and 2 (D) deal with individuals in reference to their public performance rights. The act stands firm either with or without the parts of Section 2 that deal with the individual.

Argument to Sustain Law Point No. II.

The state, within certain well-defined, reasonable limitations, may enact statutes which secure competition and preclude combination which tends to defeat it.

If, as in Point I determined, the State may enact legislation against the intangible franchise of public performance rights in vocal and instrumental musical compositions that are copyrighted, then great weight should be given to the general proposition of law that the Nebraska act above cited is not an illegal effort to extend the police power over a subject which cannot be brought within the rightful exercise of that power.

The following cases show the lengths to which the high courts of the nation and state have gone to announce unequivocally the right of a state legislature to be the deciding factor in the propriety of its legislative programs. Appellants do not overlook the National Copyright Act in any of its features when applying the law set forth in the following cases:

In the case of *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 33 S. Ct. 66, Justice Holmes in the opinion stated:

> "If the legislature shares the now prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. * * * If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their state, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts."

In *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 57 S. Ct. 772, Paragraph 8 of the Syllabus states:

> "In exercise of its police power, state may forbid as inimical to public welfare the prosecution of a particular type of business, or regulate a business in such manner as to abate evils deemed to arise from its pursuit."

The State of Nebraska has very distinctly defined what its Legislature may do under the police power in

reference to monopoly—and which applies to existing and cumulative laws in addition to the act in question. *State v. Drayton*, 82 Neb. 254, 117 N. W. 768, holds as follows:

> "Then unless the act under consideration is open to attack as in violation of the written provisions of the fundamental law, or an illegal effort to extend the police power over a subject which cannot be brought within the rightful exercise of that power, the law must be sustained. It must also be remembered that with reference to the latter subject the legislative department of the state, within well-known and well-defined limitations, is the sole judge as to when and how that power is to be exercised. From a careful reading and study of the act in question, we are driven to the conclusions that it is not subject to attack upon either of the grounds named. It does not seek to prevent any person or corporation from engaging in any lawful business, nor does it prevent legitimate competition, nor seek to interfere in any way with the due management of anyone's business, nor prevent the sale of any commodity at any price which the owner may fix or demand."

In *National Cotton Oil Company v. Texas*, 197 U. S. 115, 25 S. Ct. 379 Syllabus 1 states:

> 1. "The property of a foreign corporation engaged in manufacturing products of cotton seed is not taken without due process of law by the Texas anti-trust laws, under which its license to do business in that state is forfeited for violating those laws by entering into an agreement to regulate or fix the price of cotton seed."

In *Nebbia v. People of State of New York*, 291 U. S. 502, 54 S. Ct. 505, Syllabi 9 and 11 state:

> 9. "On proper occasion and by appropriate measures, state may regulate a business in any of its aspects, including selling prices of products or commodities."

11. "Courts are unauthorized to deal with wisdom of legislative policy, or adequacy or practicability of enactments, and law seeking to curb unrestrained and harmful competition may not be annulled unless arbitrary or discriminatory."

The Court in the opinion at Page 537 of 291 U. S. states:

"And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

In *Paramount Famous Lasky Corp. v. United States,* 282 U. S. 30, 51 S. Ct. 42, it is stated at Page 43 of 282 U. S.:

"It may be that arbitration is well adapted to the needs of the motion picture industry; but, when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition, their action becomes illegal.

"In order to establish violation of the Sherman Anti-Trust Act, it is not necessary to show that the challenged arrangement suppresses all competition between the parties or that the parties themselves are discontented with the arrangement. The interest of the public in the preservation of competition is the primary consideration. The prohibitions of the stat-

ute cannot 'be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties and be of some good results.' "

In *Selover v. Walsh,* 226 U. S. 112, 33 S. Ct. 69, the Court in the opinion stated:

"The dilemma was not presented to the supreme court of the state for resolution, as plaintiff in error had made no attempt to comply with the statute in any way. As that court held the statute applicable to contracts such as that under review, it will, no doubt, in a proper case, so construe the statute as to make it effective. We are not called upon to anticipate its ruling * * * and we may say further, it is well settled that a corporation cannot claim the protection of the clause of the 14th Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a state."

In *Shallenberger v. First National Bank,* 219 U. S. 114, 31 S. Ct. 189, Justice Holmes adapted his opinion in *Noble State Bank v. Haskel,* 219 U. S. 104, 31 S. Ct. 186, wherein the Court held:

"If, then, the legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it."

Syllabus 3 stated:

3. "The police power of a state extends to the regulation of the banking business, and even to its prohibition except on such conditions as the state may prescribe."

In *Waters-Pierce Oil Company v. Texas,* 212 U. S. 86, 29 S. Ct. 220, Syllabus 4 states:

> "State legislatures, in the exercise of their power to deal with monopolies and combinations in restraint of trade, may provide their own methods of procedure and determine the methods and means by which their legislation may be made effective, subject only to the qualifications that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution."

When the appellees in this case restrained and enjoined the appellants from enforcing the state law, the lower Court most certainly erred when it failed to recognize the right of the state to prohibit the activities indulged in by the appellees in handling public performance rights within the State of Nebraska. Law Point No. II therefore goes to the basic fact of whether or not these activities, coercions, method of collection, combination, infringement suits, basis for collection of the so-called royalties, the basis for its distribution, and all other of these facts clearly brought out in the opinion, as well as in the findings of fact and conclusions of law, do not in themselves constitute violations of law, whether the appellees were dealing in public performance rights that originated under the Copyright Act or not. Appellants claim that the state legislature is within its rights in curtailing the activities of the appellees within the fair and reasonable limitations set forth in all those parts of the statute in question which relate to the unlawful combination, i. e., the entire act excepting Sections 2 (A), 2 (B), and 2 (D). We eliminate that section and its subsection from consideration at this point because they deal especially with the individual copyright owner while the balance of the act, which are its main and principal portions, deal with

an unlawful combination and prohibitions against its activity.

The activities of the ASCAP organization and the appellees, while a part of that unlawful conspiracy, show practices within the State of Nebraska that are within the power of the legislature of the State of Nebraska to prohibit even though originating with or growing out of the individual copyrights.

Argument to Sustain Point of Law No. III.

Law Point No. III sets forth, as a proposition of law, that the state may pass reasonable regulation in reference to the sale and the use of public performance rights by the individual owner and his publisher within the State of Nebraska so long as the provision is not prohibited by the Copyright Act nor in derogation of it. This brings up directly the question of the purport of Sections 2 (A), 2 (B), and 2 (D) of the act in question (pages 138-140 hereof). Those sections deal with the individual copyright owner, while the entire balance of the act, as repeatedly stated, deals with an unlawful combination in its activities and the prohibitions of its price-fixing, monopolistic practices within the state.

This Law Point No. III in reference to the state's right to legislate concerning the individual's right under the National Copyright Act, might readily be answered by stating that the state has no such right, if it were not for the fact the federal courts hold that the state, within certain limitations, may prescribe reasonable and fair regulations for carrying on rights within a state granted under either the patent or copyright laws of the United States Government. The following cases deal

with state legislation affecting both patents and copyrights.

There is an erroneous statement in the opinion of the court of December 28, 1939 (page 25 hereof), which is as follows:

> "The rights of public performance in connection with the composition includes separate and distinct rights, among them being: (1) the right of publication; (2) the motion picture rights; (3) the stage rights; (4) the recording rights; and (5) the radio reproduction rights. The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing."

In what manner and where does the statute interfere with a copyright owner so doing? Admittedly the right of public performance for profit covered by Section 1 of the National Copyright Act (17 U. S. C. A. Sec. 1) in no way directly or indirectly curtails, hampers, or regulates motion picture rights, stage rights, recording rights, or radio reproduction rights. There is nothing in the state act which prevents any copyright owner from doing what he pleases in connection with any or all of those rights. Admittedly, he may sell them separately or together or not sell them at all. The appellee Buck in his testimony (R. Vol. I, 184), after stating that ASCAP had no interest whatever in the publication of musical compositions or sheet music, and that it owned no copyrights, and never did in its history, further stated as follows:

"Q. In what is the Society interested?

A. The author, composer and publisher vests in the Society the so-called 'small performing right' —the right to publicly perform for profit.

Q. Is that the only right in which the Society is interested?

A. That is the only right they have."

The deposition of Mrs. Ella Herbert Bartlett, Victor Herbert's daughter, clearly and unmistakably corroborates the repeatedly established facts in the case that there are no rights except the "small" public performance rights involved herein for the reason that ASCAP deals only in the said "small" public performance rights on vocal and instrumental musical compositions that are played or sung in public, such as in the hotels and in the studios of the radio stations, and at the parks, dance halls, pavilions, and other places of amusement. The state act positively has no concern with stage rights, moving picture rights, or the many other rights that are given by the Copyright Act—only the small public performances for profit.

So, the lower Court herein, in setting forth these various other rights and attempting to apply the statute to these rights, as a basis for its conflict with the National Copyright Act was clearly in error.

However, it is proper to inquire as to whether or not the requirement of Section 2 (A) is an interference with the individual's rights under the National Copyright Act in connection with the small public performance rights. All the rights of the appellee ASCAP and the individual appellees, as a part of the combination, flow from one clause in Section 1 of the National Copyright Act [Title 17, U. S. C. A., Sec. 1 (e)]:

> "Any person entitled thereto upon complying with the provisions of this title shall have the exclusive right * * * (a) * * * (b) * * * (c) * * * (d) * * * (e) to perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit."

That is the sum total of the language of the National Copyright Act in connection with all the public performance rights involved in this action. Nowhere in the act is it written that the copyright owner may have the right to collect public performance rights, after he has sold and parted with his music and was paid for orchestrations thereof obviously for public performance purposes. However, the Copyright Act gives to the individual copyright owner and his heirs and assigns the right to collect public performance rights. The National Act does not grant to the individual or his heirs or assigns the right to collect money each and every time that a piece of music is played in public for profit. This right has been built up by consent decrees and by case law that has been creeping into the decisions of our courts during the past twenty-five years of ASCAP's growing monopoly. Now it is able to cite lists of dozens of cases in infringement suits against music users. Thus ASCAP has been able to establish the right to collect for public performance rights against most anyone at most any time and any place and under any conditions and under all circumstances if a score of music is played publicly and some indirect benefit might be inferred to flow to the establishment where it was played or sung.

Even though that music has been bought and paid for and the orchestrations paid for additionally, still,

each time that the music is played by the musicians, ASCAP continues to collect on and on and on. Naturally, under these conditions, confusion has arisen; and in the State of Nebraska, Section 2 (A) was passed, not as an inducing cause for the main anti-monopoly features provided in Section 1 of the act, but as a safeguard for the individual composer. Section 2 (A) in no way sought to curtail or limit the amount of the charge for the public performance rights, but the act does say that each author, composer, and publisher shall act independently of substantial numbers of other authors, composers and publishers and independently of the combination declared unlawful by Section 1—

> "in determining and fixing the price to be charged for the use or rendition of his copyrighted musical compositions within this state, and the author, composer or publisher, or his, her, or its heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical compositions, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition within this state, the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes."

Nowhere in the case law built up by ASCAP and under no federal statute, copyright or otherwise, is there an utterance to be found that the plan as outlined in Section 2 (A) is in derogation of the rights of a copyright owner granted him under the National Copyright Act or the many decisions construing the same.

How would clause [2 (A)] operate from a practical standpoint?

In the deposition of Mrs. Ella Herbert Bartlett (R. Vol. II, 697-705), she testified that in 1938 she received $6,000 at 3c per copy for sheet music sold during the year. ASCAP had nothing to do with that. That meant 200,000 copies of sheet music sold. She testified that she received about $10,000 from ASCAP each year (R. Vol. II, 688-691) for the small public performance rights, and $50,000 each for several stage and moving picture rights arranged between herself, her publisher and the purchaser-user. If in the sale of 200,000 copies of music one-fourth thereof, or 50,000 copies were orchestrated or otherwise arranged for public performance, and if at the time that music were sold across the counter in the music store for that purpose, and if the small sum of fifty cents per copy for those pieces that were sold for public performance had been charged and collected when and as the three-cent royalty for the sheet music was collected, she would have received $25,000 for the public performance rights for each year instead of $10,000 received from ASCAP. This then would be equitable to the composer because the users who wished to buy public performance rights could go to the music stores or the catalogues of the various publishing houses and select in open competition what was desired, and bargain for it exactly as one pays the royalty on sheet music, or the royalty on moving picture rights, or on phonograph records, or stage rights, and on all the other rights granted under the National Copyright Law. None of these other rights are under monopolistic control. Each publishing house with its composers is in competition with others in reference

to all these rights excepting the "small" public performance rights. In reference to those, 85% to 90% of all the public performance rights on usable popular music is under the control and domination of the appellee Society. Thus, it would seem that Section 2 (A) may not work an injustice but would be a benefit to all but ASCAP's high-salaried officers. Opportunity should be given the State of Nebraska to exercise its police power in this manner. It is apparent that the provisions of Section 2 (A) of the act in question is not in derogation of the National Copyright Act. Congress has not legislated in that field.

In reference to Section 2 (B): that is a penalty clause and merely provides that if the composer refuses to comply with Section 2 (A) and charge and collect additionally for his public performance rights if he wishes to sell such rights when the music is sold; then naturally, if Section 2 (A) is to have any force and effect, Section 2 (B) would necessarily follow as a penalty proviso. Otherwise there would be no object in the passage of Section 2 (A).

Section 2 (D) is a requirement for recording copyrights in the state. It may be burdensome and it may not be; it would all depend upon the conditions that arose at the time. It has not been tested in the state Court under practical operation any more than any other parts of the act. Appellants anticipate no serious consequences to appellees if the cause is reversed and dismissed. The music publishing houses that "are" virtually ASCAP will no doubt comply with the law readily.

However, the fact remains that Sections 2 (A), 2 (B) and 2 (D) all deal with the individual. Those three

sections are entirely independent and separable from the balance of the act and may stand or fall exactly as if they were written into an entirely different, separate, and distinct bill. That is apparent from the act itself (pages 135-150 hereof).

However, appellants maintain that Section 2 (A) is a legitimate and fair and reasonable exercise of the police power of the state; that it does not deprive the individual copyright owner of any privilege that is given him under the National Copyright Act.

We quote from the following cases that illustrate the holdings of the court in reference to state laws passed in reference to patents and copyrights and which have been construed in support of appellants' contention on this Law Point No. III.

In *Allen v. Riley,* 203 U. S. 347, 27 S. Ct. 95 (1906), at page 96 it is stated:

> "It is asserted by the plaintiffs in error that the subject of the sale or assignment of the whole or any part of an interest in a patent is derived from the laws of Congress passed with reference to the constitutional provisions quoted above, and that any regulations whatever, by any state authority, in regard to such assignment or sale, and making provision in respect to them, are illegal."

In the opinion the Court stated:

> "The mere provision in the Federal statute for an assignment and its record as against subsequent purchasers, etc., is not such legislation as takes away the rights of the states to legislate on the subject themselves in a manner neither inconsistent with, nor opposed to, the Federal statute. We think the judgment is right, and it is affirmed. * * *.

"We think the state has the power (certainly until Congress legislates upon the subject) with regard to the provision which shall accompany the sale or assignment of rights arising under a patent, to make reasonable regulations concerning the subject, calculated to protect its citizens from fraud. And we think Congress has not so legislated by the provisions regarding an assignment contained in the act referred to."

In *Straus v. American Publishers' Association,* 231 U. S. 222, 34 S. Ct. 84, the Court in the opinion stated:

"We conclude, therefore, that the court of appeals erred in holding that the agreement was justified by the copyright act, and was not within the denunciation of the Sherman act, and in denying, for that reason alone, the right of the plaintiffs in error to recover under the state act as to copyrighted books."

In *John Woods & Sons v. Frank Carl,* 203 U. S. 358, 27 S. Ct. 99, Syllabus No. 1 states:

"The requirement that a negotiable instrument taken on a sale of rights under a patent shall show on its face for what it was given, or be void, which is made by Kirby's (Ark.) Dig. Sec. 513, does not violate U. S. Const. art 1, Sec. 8, granting to Congress the right to secure to inventors the exclusive right to their discovery, nor U. S. Rev. Stat. Sec. 4898, U. S. Comp. Stat. 1901, p. 3387, authorizing written assignments of patents or interests therein, which shall be void as against subsequent purchasers unless recorded in the Patent Office."

In *Paramount Pictures v. Langer,* 23 Fed. Supp. 890 (8th Cir.). (the defense was the Copyright Act), the Court in the opinion while referring to copyright as a defense to state anti-monopoly laws said:

"The legislature is primarily the judge of the necessity of the law. Every possible presumption is in favor of its validity, and, though the Court may regard it as unwise, it may not be annulled unless palpably in excess of legislative power."

In *Patterson v. Kentucky,* 97 U. S. 501, at Page 506 (Otto VII), it is stated:

"If the State should pass a law for the purpose of destroying a right created by the Constitution, this court will do its duty; but an attempt by the legislature, in good faith, to regulate the conduct of a portion of its citizens, in a matter strictly pertaining to its internal economy, we cannot but regard as a legitimate exercise of power, although such law may sometimes indirectly affect the enjoyment of rights flowing from the Federal government."

Further in the opinion, at Page 509, it is stated:

"Without further elaboration, we deem it only necessary to say that the Kentucky statute does not, in our judgment, contravene the provisions of the Federal Constitution, or of any statute passed in pursuance thereof. Its enforcement causes no necessary conflict with national authority, and interferes with no right secured by Federal legislation, to the patentee or his assigns."

Furthermore, there should be taken into consideration at this point the fact that none of the appellees in this action are before this Court excepting as a part of an unlawful conspiracy and each is acting in violation of the Nebraska statute in furtherance of that conspiracy. It would seem, therefore, that appellees have no standing in court to make complaint in connection with Section 2 (A), 2 (B) and 2 (D) because none of the individual appellees will act independently of the combination. They are then not affected by these provisions.

However, the act in question will stand with Sections 2 (A), 2 (B) and 2 (D) stricken. The balance is fully enforceable. The entire main features of the act are completely independent of Sections 2 (A), 2 (B) and 2 (D). These facts become readily apparent by analyzing the act in question (pages 135 to 150 hereof) with the views herein expressed in mind.

Argument to Sustain Point of Law No. IV.

There is no reference in the lower Court's opinion of December 28, 1939, nor in its later findings of fact or conclusions of law which directly states that the act in question is in violation of the commerce clause of the Federal Constitution. The bill of complaint of the appellees raised the point. The findings of fact, conclusions of law, and decree of January 25, 1940 (pages 12-21 hereof) declare the whole act void and nonenforceable, but not for any violation of the commerce clause nor as a matter of fact any other announced reason.

So careful were the appellees in their dealings in public performance rights to avoid violation of the commerce clause that they made no charge whatever for the use of public performance rights against the chains for music which emanated from outside the state of Nebraska for the purpose of rebroadcasting within Nebraska. Nor did ASCAP make any charge against the moving picture producers who used music in a sound producing moving picture [R. Vol. I, 263; 94; Vol. II, 873 (2)]. Instead the record is clear that ASCAP in Nebraska has made and is making its charges for public performance rights against the places in Nebraska from which the music is

played, such as a hotel, a movie theatre, a ballroom or a local radio station (R. Vol. I, 212; 89; 94; 96).

Appellants refer briefly to six cases which they believe to be in point on the question of interstate commerce. *Paramount Pictures v. Langer,* following, seems most directly in point because it deals with copyrighted films used in moving pictures that moved from California into the Eighth Circuit at North Dakota and became the subject of anti-monopoly legislation.

No evidence is necessary to show how music is rendered publicly for profit. The hotel, the radio station, the amusement park, the ballroom employ musicians. The users know little or nothing specifically about the style or kind of music, nor the particular pieces that are to be played. Nor do the music users know whether the pieces of music are copyrighted or not or who owns the copyright. Nevertheless, under the infringement division of the Copyright Law, the owner of the premises or the business operator or both is liable for infringement under many ASCAP decisions. However, the orchestras or singers go upon the premises to play or sing; they open up their music rolls and perform—purely an intrastate transaction. The musical instrument is inert by itself; the musical composition is inert by itself. It takes a human mind, functioning solely within the state to create by action, in a purely intrastate transaction, musical sounds which he produces in two ways, either through an instrument or through the human voice, or both. In either event, the rendition is an intrastate transaction; it in noway affects or influences or impedes in the slightest

degree, directly or indirectly, commerce between the states, nor anything that flows in commerce between the states.

Music played in the studio of a radio broadcasting station might be heard over state lines; but such would not be an interference with commerce. There is no money transaction involved in that part of the performance that goes over the lines through the ether. In the testimony of Gillin (R. Vol. I, 399-406), he explains as a competent radio station manager that even the broadcasts that emanate from New York come into Omaha by wire. What comes over that wire is just as inert as a musical instrument on the shelf. Until the broadcasting apparatus and machinery and equipment within the local broadcasting station within the State of Nebraska are put into operation, those sounds over the wire are not available to the people of the State of Nebraska in the radios in their homes and places of business throughout the state.

There are 284,000 radio receiving sets in the State of Nebraska and 10 stations, 3 of which only have partial network affiliations (page 10 hereof).

It is apparent from a reading of the act in question that there is no part of it, directly or indirectly, which could logically be construed as affecting the commerce clause of the Federal Constitution (pages 135-150 hereof).

We cite the following cases which should aid the Court materially in the solution urged by the appellants on Law Point No. IV:

In support of Law Point No. IV the case of *Arkansas-Louisiana Gas Co. v. Dept. of P. U.*, 304 U. S. 61, 58 S. Ct. 770, Paragraph One of the Syllabus states:

> "An order of the Arkansas Department of Public Utilities, proceeding under a state statute, requiring public utilities to file schedules of rates and charges, was not an infringement of any right or privilege guaranteed by the Federal Constitution to a corporation purchasing and producing natural gas in neighboring states and thereafter transporting and delivering it through pipe lines to selected industries and public utility distributing corporations within the state, and to its own distributing department through which it acted as a public utility, irrespective of whether certain of its activities within the state were parts of interstate commerce."

In *Eichholz v. Public Service Com. of Mo.*, 306 U. S. 268, 59 S. Ct. 532, the Court in the opinion stated:

> "That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid. See Lone Star Gas Company v. Texas, 304 U. S. 224, 236, 58 S. Ct. 883, 82 L. Ed. 1304. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected."

In *Hartford Accident Indemnity Company v. Illinois*, 298 U. S. 155, 56 S. Ct. 685, the Court in the opinion stated at Page 157 of 298 U. S.:

> "The sole question presented is the constitutional validity of the act as it affects the appellant's liability under its bonds. The statute is a police regulation. The business regulated is local, having its situs within

the state and being conducted therein. The fact that the commission merchant contracts to sell, and sells, farm produce forwarded to him from points without, as well as points within, the state is not enough to condemn the regulation of a business carried on within her borders. Such effect as the regulation has upon interstate commerce is indirect and incidental and does not trespass upon the power conferred on Congress by article 1, Sec. 8, of the Federal Constitution. In these circumstances, until Congress, under the commerce power, adopts inconsistent legislation, that of the state remains effective."

In *Interstate Circuit v. Paramount Pictures,* 306 U. S. 208, 59 S. Ct. 467 (the defense was the Copyright Act) it is stated at Page 230 of 306 U. S.:

"A Contract between a copyright owner and one who has no copyright, restraining the competitive distribution of the copyrighted articles in the open market in order to protect the latter from the competition, can no more be valid than a like agreement between two copyright owners or patentees. Straus v. American Publishers' Association, supra; Paramount Famous Lasky Corp. v. United States, supra; see Standard Oil Co. v. United States, 283 U. S. 163, 174, 51 S. Ct. 421, 425, 75 L. Ed. 926. In either case if the contract is effective, as it was here, competition is suppressed and the possibility of its resumption precluded by force of the contract. An agreement illegal because it suppresses competition is not any less so because the competitive article is copyrighted. The fact that the restraint is made easier or more effective by making the copyright subservient to the contract does not relieve it of illegality. Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 33 S. Ct. 9, 57 L. Ed. 107."

It is stated at Page 232:

"We think the conclusion is unavoidable that the conspiracy and each contract between Interstate and

the distributors by which those consequences were effected are violations of the Sherman Act and that the District Court rightly enjoined enforcement and renewal of these agreements, as well as of the conspiracy among the distributors."

Milk C. B. of Pa. v. Eisenberg, 306 U. S. 346, 59 S. Ct. 528, Syllabus 5 states:

"A state police statute does not run counter to the commerce clause merely because it incidentally or indirectly involves or burdens interstate commerce, even though such statute might be restricted in operation or rendered unenforceable if Congress should exercise its paramount power."

In the opinion the Court stated:

"But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority. One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the state law might thereby be restricted in operation or rendered unenforceable. These principles have guided judicial decision for more than a century."

In *Paramount Pictures v. Langer,* 23 Fed. Supp. 890 (8th Cir) (the defense was the Copyright Act), Syllabus 1 states:

"The North Dakota statute prohibiting operation of motion picture theaters owned, controlled, man-

aged, or operated by producers or distributors of motion picture films did not improperly invade field exclusively reserved to Congress, on ground that it related to distribution of films in interstate commerce or rights of producers or distributors under the Copyright Law."

In the opinion the Court stated at page 895:

"It seems clear to us that any remote effect that the Act might have upon the distribution of films in interstate commerce or upon the rights of producers or distributors under the Copyright Law could not sustain a conclusion that the Legislature of North Dakota had invaded a field exclusively reserved to the Congress of the United States."

Note the very lucid and clear reasoning in *Paramount Pictures v. Langer,* supra. That case never reached the Supreme Court of the United States because the situation in North Dakota undoubtedly was remedied when that forceful opinion was rendered. The necessity for the act disappeared and it was repealed before the case reached final decision in the Supreme Court of the United States. Nevertheless, the reasoning of the opinion stands as an expression of the Western judicial mind in problems of the sort here under consideration.

Argument to Sustain Point of Law No. V.

This point has to do with the penalty provisions of the act in question. The point is brought out specifically because in the findings of the Court of January 25, 1940 [page 18, (p. 21) hereof], the severity of these penalties was given as the principal or only grounds for holding the act invalid.

Appellants have set forth under Law Point No. V references to the penalty provisions of many other Ne-

braska anti-monopoly statutes and the penalty provisions of the Sherman Anti-Trust Act and the supplements thereto. Without further comment or quotations therefrom, appellants advise that all the penalty provisions and the enforcement provisions of the act in question are identical with all the other anti-monopoly statutes, both state and federal, that have repeatedly been held to be proper by the various courts. Section 21 of the findings of fact of the Court below (R. Vol. I, 138; or page 18 hereof) specifically states:

> "Said Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great, that complainants have no adequate means of testing the validity of the Statute by violating the same and defending against a criminal or civil prosecution in the courts of the State of Nebraska; if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in the 93 counties of the State of Nebraska where their works are being publicly performed for profit, they will be subjected to a multiplicity of suits and prosecutions; unless defendants are restrained, complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions within the State of Nebraska."

Obviously, the final permanent injunctive decree was based upon such finding. No other finding could sustain the decree. Therefore, it is the duty of the appellants to explain the law covered by Law Point No. V to prove that the enforcement and penalty provisions are proper and lawful.

Sections 8, 9, 10, and 11 of the act in question should here be read (pages 146-149 hereof).

Noble v. Carlton, 36 Fed. (2) 967, Syllabus 5 holds:

"Laws Fla. 1929, fixing penalty at fine of not more than $5,000 or imprisonment in county jail for not more than twelve months for violation of regulations as to sale of milk and cream in such state, held not unconstitutional as imposing excessive penalty; it being within court's discretion to impose a fine as small as $1."

The Court in its opinion at page 969 states:

"No such provision is contained in the Florida statute under consideration. The penalties therein provided make it within the discretion of the trial court to impose a fine as small as $1. This certainly could not be considered excessive."

Penalty Provisions of Chapter 59, Comp. St, Neb., 1929, and Amendments, Monopolies and Unlawful Combinations; (Art. 1, Trusts, Generally; Art. 2, Grain Dealers; Art. 3, Fire Insurance Companies; Art. 4, Lumber and Coal Dealers; Art. 5, Local Discrimination; Art. 6, Pooling by Bridge Contractors; Art. 7, Rebate Vouchers; Art. 8, Unlawful Restraint of Trade; Art. 9, Regulation of Public Markets; Art. 10, Dairy Industry).

Penalty Provisions of Sherman Anti-Trust Act (T. 15, U. S. C. A., Secs. 1, 3, 8).

People v. Magoni, 73 Cal. App. 78, 238 Pac. 112, at page 113 of 238 Pac.:

"In order to justify the court in interfering and setting aside a judgment for a fine authorized by statute, the fine imposed must be so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. A statute

does not violate the constitutional provision prohibiting the excessive fines or the imposition of cruel and unusual punishments, because it authorized a fine to be imposed for each sale of liquor without a license, for each act of extortion in charging excessive freight rates, for each animal one unlawfully may have in his possesion, or for each day the statute is violated, or because it makes the deposit of each letter in a scheme to defraud a separate offense, even though the fine in the aggregate amounts to a large sum, since the punishment thus imposed is not the fault of the law but of the one who violates it. 16 C. J. 1358."

Collins v. Johnston, 237 U. S. 502, 35 S. Ct. 649 at page 653 of 35 S. Ct. states:

"The 8th Amendment is also invoked, with its prohibition of cruel and unusual punishments; but, as has been often pointed out, this is a limitation upon the Federal government, not upon the states. (Citing cases.)

Tegtmeyer v. Tegtmeyer, 292 Ill. App. 434, 11 N. E. (2d) 657, at page 660 of 11 N. E. (2d) states:

(2) "Defendant contends that the court erred in not quashing the 'contempt mittimus' because the punishment inflicted upon her is cruel and unusual, contrary to the Eighth Amendment of the United States Constitution, and to sections 11 and 12 of article 2 of the Constitution of this state, and that she has been deprived of her liberty without due process of law, contrary to the Fifth and Fourteenth Amendments to the United States Constitution. It has been repeatedly held that the first ten amendments to the Federal Constitution apply only to the national government and do not apply to the state government. (Citing cases.)

People v. Cruz, 113 Cal. App. 513, 298 Pac. 556, at page 557 of 298 Pac.:

"Appellant urges further that the Firearms Act violates the provisions of the Eighth Amendment to the federal Constitution and the provisions of section 6 of article 1 of the state Constitution because it authorized the infliction of a cruel and unusual punishment upon a person convicted of violating its terms. The Supreme Court of the United States has held that the Eighth Amendment to the federal Constitution is not a limitation on the powers of the states."

From the foregoing cases and all the Nebraska anti-monopoly statutes, the enforcement and penalty provisions of the act in question appear to be a proper exercise of the police power of the state.

When this Section 21 of the findings of fact of the lower Court is eliminated as a legal factor to sustain the decree, really nothing remains in the findings of fact to substantiate the conclusions of law and the final decree (pages 18-21 hereof).

The case should therefore be reversed—not sent back for new findings because there are findings—but reversed and dismissed because the findings fail to sustain the decree.

Argument to Sustain Points of Law Nos. VI and VII.

These law points deal with the reversible error resulting from the obvious difference in the *opinion* (pages 9 to 12 and 22-27 hereof) of December 28, 1939, the *findings of fact and conclusions of law* dated January 25, 1940 (pages 12-19 hereof).

On pages 28 to 56 of this brief, setting forth the entire motion for new trial, all the facts that were found in both the opinion and the findings of fact, were listed.

These facts are sufficient in themselves to establish the conclusion that the appellee ASCAP and the individual members thereof are each a part of the unlawful conspiracy operating in violation of the law. Therefore, all the appellees, as such conspirators, fall within the unlawful conspiracy provisions of the act in question. They have no standing in this Court as such conspirators (290 U. S. 240).

On pages 40 to 44 hereof, in the motion for new trial, the appellants have set forth some additional facts indexed to the printed record, which were undisputed and unchallenged or admitted. So much for the *facts*. The law applicable has been discussed under Points I, II and III.

However, the *opinion* of December 28, 1939, distinctly holds (pages 25-26 hereof) that Section 2 (B) of the act in question was in conflict with the National Copyright Law and was the inducing cause for the passage of the entire act and was inseparable from the balance, and for *that reason* the entire act was obliterated by the Court.

The Court in that opinion held:

> "But where the connection between the invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative. The provision of the statute which we are here considering is such an essential part of the statute as not to be separable.
>
> "In view of our conclusion on this phase of the case, it is unnecessary to consider the other contentions that have been ably argued and elaborately briefed by counsel for the respective parties.

"We conclude that permanent injunction restraining the enforcement of this statute must be granted. Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion."

Later, and on January 25, 1940, when the *findings of fact and conclusions of law* were so prepared, obviously by the attorneys for the appellees, but nevertheless signed by the three-judge federal court, and thus adopted as the Court's own, the "inducing cause" and "inseparability" features in reference to 2 (B) of the act in question were not even mentioned (pages 12-21 hereof).

Therefore, if the *opinion* is treated as supererogatory and as having no part in the case before this Court on appeal, as has been held in the cases hereinafter cited, then there remains only the points in the *findings of fact and conclusions of law* to sustain the permanent injunction. A careful reading of the findings of fact, conclusions of law, and decree on pages 12 to 21 hereof should convince the Court that the decree should have been for appellants and the injunction denied.

Thus, the presumption at once arises that the three-judge court knew its own mind—and purposely eliminated all the *legal conclusions* of the *opinion* and adopted new ones in its final *conclusions of law*. The facts as found in the opinion were reiterated in the findings of fact—but the law was changed by the Court itself. The change could not have been made inadvertently because that Court's attention was directed to it in the motion for new trial (pages 28 to 52 hereof) and by twenty-two affidavits of legislators that were filed to show the Court its

error from a factual standpoint on the question of *"inducing cause"* for the passage of the act (pages 53-56 hereof).

Furthermore, the Court was asked directly by appellants to change or amend its findings of fact (page 28, par. 3 hereof) in the said motion for new trial. The Court failed to do so, but instead finally adopted the findings of fact, conclusions of law, and decree of January 25, 1940 (pages 12 to 21 hereof), which appellants contend are now alone before this Court for consideration on the sufficiency thereof to sustain the decree.

Appellants cite the following cases to sustain Points Nos. VI and VII:

In *Basevi v. Edward O'Toole Co.*, 26 Fed. Supp. 41, the Court at page 43 states:

> "In view of the decision of the United States Supreme Court on April 25, 1938, in Interstate Circuit, Inc., et al. v. United States, 304 U. S. 55, 56, 57, 58 S. Ct. 768, 82 L. Ed. 1146, it is now a work of supererogation to write a considered opinion on the facts in an equity cause, for its place will be taken by formal findings of fact and conclusions of law, separately stated, under Rules of Civil Procedure, 28 U. S. C. A. following section 723, Rule 52 (a), formerly Equity Rule 70½, Title 28 United States Code, Section 723."

In *Interstate Circuit v. United States,* 304 U. S. 55, 58 S. Ct. 768, the Court at page 56 of 304 U. S. states:

> "The opinion of the court was not a substitute for the required findings. A discussion of portions of the evidence and the court's reasoning in its opinion do not constitute the special and formal findings by which it is the duty of the court appropriately and specifically to determine all the issues which the case presents. This is an essential aid to the appel-

late court in reviewing an equity case. Railroad Commission v. Maxcy, 281 U. S. 82, S. Ct. 228, 74 L. Ed. 717, and cases."

In *Penmac Corporation v. Esterbrook Steel Pen Mfg. Co.*, 27 Fed. Supp. 86, the Court at page 87 states:

> II. "In view of the decision of the United States Supreme Court rendered April 25, 1938, on Equity Rule 70½, 28 U. S. C. A. following section 723, in Interstate Circuit, Inc. v. United States, 304 U. S. 55, 56, 57, 58 S. Ct. 768, 82 L. Ed. 1146, and under Rule 52 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, it is now a work of supererogation to write a considered and detailed opinion on the facts in what used to be an equity cause and is now called a non-jury cause, for the place of the opinion must now be taken by formal findings of fact and conclusions of law, separately stated and numbered. Title 28 United States Code, Section 723, 28 U. S. C. A. 723."

Also the opinions should here be read in the following cases set forth at the outset in this brief:

Buck v. Gallagher, 36 Fed. Supp. 405.
Gibbs v. Buck, 307 U. S. 66, 59 S. Ct. 725.
Buck v. Swanson, 33 Fed. Supp. 377.
Rule 52 (a) of Rules of Civil Procedure.
Buck v. Gibbs, 34 Fed. Supp. 510.
Interstate Circuit v. U. S., 304 U. S. 55, 58 S. Ct. 768.

Therefore, if the view is adopted by this Court that the "inseparability" and the "inducing cause" features of the case, substantially form the final basis for the opinion of the Court of December 28, 1939; and if that opinion is supererogatory; and has been entirely supplanted by the findings of fact and conclusions of law, then there remain only those findings of fact and conclusions of law

of January 25, 1940—a careful reading of which discloses that there exist no grounds whatever for the granting of the permanent injunction (pages 12 to 21 hereof).

The appellants, as stated at the outset, are justified in urging this Court to conclude that the "inducing cause" and the "inseparability" features raised in the opinion were advisedly and purposely eliminated by the Court when it adopted the findings of fact and conclusions of law of January 25, 1940—especially after attention was called to this identical point to the Court below by timely motion that was entertained by the Court (page 28 hereof).

This cause should be reversed and dismissed because the said facts and law of said findings, conclusion and decree, so warrant.

Argument to Sustain Point of Law No. VIII.

Appellants cannot anticipate whether the Supreme Court will or will not *consider* the "inducing cause" and "inseparability" features, that appellants contend were nullified in the final decision papers as brought forth under Law Points VI and VII. Therefore, for the purpose of argument, appellants will assume that Sections 2 (B) with Sections 2 (A) and 2 (D), deal with the individual copyright owner in his individual rights as distinct from the corporation, association, or combination dealt with by Section 1. If these sections, applicable to the individual copyright owner, are in conflict with the National Copyright Act, then the question remains, whether or not the lower Court committed reversible error when it stated that Section 2 (B) and indirectly 2 (A) were inseparable from the balance of the act and were the inducing cause for its passage.

Assume that the question of "inducing cause" and "inseparability" are legal questions for the Court to decide from the "four corners" of the act in question and not from any extrinsic facts.

With this assumption, the appellants do not agree; but for the purpose of argument appellants will so proceed in reference to Law Point No. VIII.

To appreciate the necessity for the enactment of the bill in question, the Court's attention is called to the following facts of record:

The principal owners of the public rendition rights on musical compositions are 123 music publishing houses, all of which are located in the City of New York, with the exception of one or two (R. Vol. I, 126). These music publishing houses actually own substantially all public rendition rights of the copyrights. The publishers came to own them by assignment over many years from the original copyright owners of the million pieces or more that go to make up the 85% to 90% of the commercially usable music controlled by ASCAP (R. Vol. I, 127). No composer of music is able to place his music upon the market and obtain any financial returns without a publisher any more than the writer of a textbook or a novel could market his book without a publisher. So, when the composer copyrights his music by the payment of $2.00 and then wishes to have the music published, he goes to one of the publisher members of ASCAP and makes a deal for all the rights in reference to that song as he and the publisher might agree (See contracts, Volume I, 36-45; Volume II, 797-804). Then comes the question of the small public performance rights. If public performance

rights are the subject matter of contract between the composer and the publisher, it is apparent that they are turned over by the publisher and the composer to ASCAP for exploitation (R. Vol. II, 697-705). The result has been that over a period of twenty-five years these rights have been built up by ASCAP, working in conjunction with substantially all the important publishing houses of America (R. Vol. I, 209; Vol. II, 791). The composer may gradually advance into a classification where in time he may receive some remuneration for public performance rights depending on the classification which he may be given from time to time by ASCAP's board of directors. The net funds are divided equally, one-half to the composer members and one-half to the publisher members (R. Vol. I, 70). Under this law point, these facts are material because of the "inducing cause" feature advanced in the case by the lower Court in its opinion.

It is quite obvious, therefore, that those composers who are "in" ASCAP are financially affected each and every time there is an inclusion of another composer member or an enlargement of his classification. That is a mathematical certainty. From the record (Vols. I, 202-7; Vol. II, 924-968) it has been worked out fairly accurately that only approximately 235 composer members receive any substantial sum whatever from ASCAP; 800 members of the 1,100 receive practically nothing (R. Vol. II, 626; 633; 630). Furthermore, it will be noted by the evidence (R. Vol. I, 184; 223-4) and by the contract that ASCAP makes with the composer that he surrenders substantially his future to ASCAP.

Thus, it is apparent that the ASCAP organization is not a benevolent, protective order engaged in the ad-

vancement of any creative art. It has nothing whatever to do with the advancement of music, nor is it an inspiration for any composer. The fact of the matter is and the records of ASCAP show from their lists of members that they have taken in substantially no new composer member for years—perhaps an isolated case or two. The reason is obvious; it is financial. The fewer members the larger the dividends (R. Vol. I, 207-11; 70).

The same is true with the publisher members. The higher classifications receive $100,000 to $150,000 per year from ASCAP for public performance rights. There are 20 of the 123 publishers who receive the substantial part of the money (R. Vol. I, 559; 598; 788).

Bear in mind that the sole and exclusive right to fix prices and determine terms and conditions for public performance rights is vested in ASCAP; that it was and is that organization alone which deals in public performance rights in Nebraska; it is quite apparent therefore that the "inducing cause" for the passage of Legislative Bill No. 478 in question was the monopoly. So strong did the ASCAP organization become in Nebraska and elsewhere throughout the United States, that it had the entire radio industry of the nation at its mercy. These facts were brought out by the testimony in this case and are in the printed record (R. Vol. I, 430-2; 439-40). ASCAP demanded 5% of the gross receipts of every radio station in the State of Nebraska (R. Vol. I, 91). This might equal 50% of the net proceeds. In any event, it forced the radio industry to incorporate its own music publishing house, known as Broadcast Music Incorporated, at an expense at the outset of over $1,000,000. But, with only a small percentage of scattered pieces of commercially

usable music available to BMI, and music that might be used from the public domain, it is apparent that BMI would only have a very small, insignificant, fractional part of the necessary music. ASCAP still controls the vast and substantial amount of the commercially usable music in the United States so far as public performance rights are concerned. The Court so held in its findings of fact (R. Vol. I, 136; 430-1).

> "The Society has control of from 85 to 90% of the popular music necessary for the successful operation of radio stations, dance halls, hotels and theaters, and has control of from 50 to 75% of the standard or older music that is played occasionally at such places."

Note that the Court said "necessary for the successful operation," and that ASCAP controls those public performance rights.

How can it then be said from the facts in this record that Section 2 (B) of the act in question was the "inducing cause" for the passage of the bill? Is it not more logical to assume that Section 1 of the act, which seeks to dissolve this unlawful combination, was paramount to Section 2 (B)?

Appellants conclude from the record that there existed in the State of Nebraska an unlawful combination dealing in incorporeal rights known as public performance rights; that the unlawful combination was fixing prices in restraint of trade; that such situation was coupled with a public interest; that it was within the police power of the State of Nebraska to remedy the same; that the legislature enacted Sections 1, 3, 4, 5, 6, 7, 8, 9, 10, 11,

12, 13 and 14 of the act in question as the necessary remedy for an existing evil (pages 135-150 hereof).

Appellants know without question of a doubt, as the representatives of the people of the State of Nebraska, that the act was passed in order that the unlawful monopoly might be appropriately dealt with should there be any violations of law by it after the act in question became operative.

The protection of the people of the State of Nebraska from the exactions of a price-fixing, monopolistic combination controlling the rendition rights of most all music was the *inducing* cause for the passage of the act.

Regarding the separability of Sections 2 (A), 2 (B) and 2 (D) from the balance of the act, appellants suggest reading the applicable law announced by the United States Courts and the Courts of the State of Nebraska, both of which have repeatedly dealt with the situation.

Furthermore, there is a presumption that the saving clause enacted as part of the law in question was meant to aid in the judicial interpretation that parts of the act might be separated from the balance thereof without destroying the main parts of the act.

The appellants, as the law enforcement officials of the State of Nebraska and the spokesmen for its people, assert before this Court that Sections 2 (A), 2 (B) and 2 (D) (grouped together because they all deal with the individual copyright owner) might either one or all be entirely stricken and separated without the slightest interference, directly or indirectly, with the enforcement or the interpretation or the application of the many remaining provisions of the act.

Appellants cite the following cases to sustain Law Point No. VIII:

In *Carter v. Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855, the Court at Page 312 of 298 U. S. states:

> "In the absence of such a provision, the presumption is that the Legislature intends an act to be effective as an entirety—that is to say, the rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it. The effect of the statute is to reverse this presumption in favor of inseparability, and create the opposite one of separability. Under the nonstatutory rule, the burden is upon the supporter of the legislation to show the separability of the provisions involved. Under the statutory rule, the burden is shifted to the assailant to show their inseparability. But under either rule, the determination, in the end, is reached by applying the same test—namely, What was the intent of the lawmakers?"

In *Dorchy v. State of Kansas*, 264 U. S. 286, 44 S. Ct. 323, the Court at Page 289 of 264 U. S. states:

> "A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad. Berea College v. Kentucky, 211 U. S. 45, 54-56, 29 Sup. Ct. 33, 53 L. Ed. 81; Carey v. South Dakota, 250 U. S. 118, 121, 39 Sup. Ct. 403, 63 L. Ed. 886. But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall."

In re Lew Agnew, 89 Neb. 306, 131 N. W. 817, the Court at Page 312 of 89 Neb. states:

> "If some provision should be found which is violative of the constitution, that fact would not necessarily render the whole act void. In 36 Cyc. 983, it

is said in the text: 'The weight of authority is to the effect that, where a state statute is primarily intended to regulate domestic commerce, it will be sustained so far as it relates to such commerce, although it contains clauses invalid as attempting to regulate interstate commerce'—citing a number of authorities in the note. See, also Standard Oil Co. v. State, 117 Tenn. 618; Austin v. State, 101 Tenn. 563; State v. Lancaster County, 6 Neb. 474; State v. Lancaster County, 17 Neb. 85; 3 Neb. Syn. Digest, p. 2964."

In *Redell v. Moores,* 63 Neb. 219, 88 N. W. 243, the Court at Page 225 of 63 Neb. states:

> "That a part of an act, or even a part of the same section of an act, may, under some circumstances, be held unconstitutional, without invalidating the remainder, is elementary. This court has said that 'Where a statute contains provisions which are invalid or unconstitutional, if the valid and invalid portions are not so connected as to be incapable of separation, and the valid part is a complete act and not dependent upon the part that is void, the latter alone will be disregarded and the remainder upheld, * * * except in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder.'"

In *Logan County v. Carnahan,* 66 Neb. 685, 92 N. W. 984, the Court at Page 694, Syllabus No. 8 in the opinion filed on rehearing states:

> 8. "Inducement. Where a provision of an act is declared invalid because contravening some provision of the constitution, the statute will yield only to the extent of its repugnancy to the constitution; and if the remainder is found complete and capable of enforcement, notwithstanding the invalid portion, it will be held valid unless the unconstitutional part was manifestly an inducement to the legislature for the passage of the remainder."

In *Merrill v. State,* 65 Neb. 509, 91 N. W. 418, the Court at Pages 517 and 518 of 65 Neb. states:

> "It is also urged that because a part of the act has been declared invalid, the whole must fall, on the proposition that the invalid part was an inducement to the passage of the remainder. We are not impressed with the force of this argument. The act is complete, symmetrical and perfect in all its parts, without an appropriation for the salary of the deputy food commissioner. Nor can we believe that the attempted appropriation of the salary was an inducement to the passage of the act."

In *Petersen v. Beal,* 121 Neb. 348, 237 N. W. 146, the Court at Page 353 of 121 Neb. states:

> "The general rule upon the subject is that, where there is a conflict between an act of the legislature and the Constitution of the state, the statute must yield to the extent of the repugnancy, but no further. (Citing cases.) If, after striking out the unconstitutional parts of a statute, the residue is intelligible, complete, and capable of execution, it will be upheld and enforced, except, of course, in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder. In other words, the legislative will is, within constitutional limits, the law of the land, and when expressed in accordance with established procedure, must be ascertained by courts and made effective."

In *Scott v. Flowers,* 61 Neb. 620, 85 N. W. 857, the Court at page 620 of 61 Neb. in Syllabus No. 2 states:

> 2. "If, after striking out the unconstitutional part of a statute, the residue is intelligible, complete and capable of execution, it will be upheld and enforced, except in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder."

In *State v. Price,* 129 Neb. 433, 261 N. W. 894, the Court at page 434 of 129 Neb. in Syllabus 3 states:

> 3. "If a portion of a legislative act is unconstitutional and it can be separated from other portions of the act and the latter enforced independent of the former, and it further appears that the unconstitutional part did not constitute such an inducement to the passage of the other parts of the law that they would not have been passed without it, the former may be rejected and the latter upheld."

In *State v. Ure,* 91 Neb. 31, 135 N. W. 224, the Court at page 32 of 91 Neb. in Syllabus No. 7 states:

> "Where a portion of a statute is in violation of the constitution, if the objectionable part was not an inducement to its passage and may be eliminated without interfering with the general purpose of the act, and the remainder of the act is valid and capable of being enforced, the act will be upheld."

In *State v. Stuht,* 52 Neb. 209, 71 N. W. 941, the Court at page 217 of 52 Neb. states:

> "Another test to be applied here is, may the constitutional and unconstitutional portions of the law in question be separated, and is the former so complete within itself and independent of the latter that the former will be operative and can be enforced without the latter? If so, the former will be upheld and the latter disregarded or rejected. The foregoing is the rule announced and enforced by this Court."

In *Sunderland Bros. Co. v. Missouri P. R. Co.,* 101 Neb. 119, 162 N. W. 494, the Court at page 122 of 101 Neb. states:

> "If the provisions of the act relating to interstate commerce can be disregarded and still leave a valid workable law, we see no reason why the act cannot be upheld so far as it applied to commerce

within the state. It is true that some courts have held in somewhat similar circumstances that such a law will not permit a separation or division and the whole act must fall, but other courts take the view that, though a statute of this nature may be void and inoperative as a regulation of interstate commerce, it may be valid and enforceable with reference to transportation within the state."

In *Union Pacific Railroad Co. v. Sprague,* 69 Neb. 48, 95 N. W. 46, the Court in Syllabus 8 states:

8. "If the valid and invalid parts of a statute are severable and it is apparent that the latter was not an inducement to the adoption of the former, the law will be upheld and enforced to the extent that it is in harmony with the constitution."

In *Williams v. Standard Oil Co.,* 278 U. S. 235, 49 S. Ct. 115, the Court at page 241 of 278 U. S. states:

"But the general rule is that the unobjectionable part of a statute cannot be held separable unless it appears that, 'standing alone, legal effect can be given to it and that the Legislature intended the provision to stand, in case others included in the act and held bad should fall.' The question is one of interpretation and of legislative intent, and the legislative declaration 'provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command."

The appellees were ready, when the act was passed, with the long complaint to restrain and enjoin the enforcement of the act (R. Vol. I, 1-97). The act was signed and became a law on May 17, 1937; and on June 7, 1937, the action to restrain and enjoin the appellant state officials was instituted by the appellees in the Federal Court. So drastic are the provisions of the final, permanent injunctive decree against the appellants that

an opinion could not be written by the Attorney General of the State of Nebraska interpreting the act for any county attorney or state official preparatory to action without violating the terms of that final decree (pages 19-21 hereof).

From the foregoing Nebraska cases on the question of "inducement" and "inseparability" of Sections 2 (A), 2 (B) and 2 (D), from the balance of the act, it is clear that the state court would most certainly have followed these numerous decisions on the subject that have been above quoted, if it had an opportunity to do so.

Therefore, in reference to Law Point No. VIII, if the Court considers that the "inducing cause" and "inseparability" features are before the Court for decision, then under the decisions, the Court should inquire into the facts de novo and rule that Section 2 (B) was not the inducing cause for the passage of the act; and that Sections 2 (A), 2 (B) and 2 (D), because dealing with individual copyright owners as distinguished from an unlawful combination, are separable from the balance of the act.

Argument to Sustain Point of Law No. IX.

Under Law Point No. IX, the appellants have cited three federal cases and two Nebraska cases that decide the following very important points: The questions of "inducing cause" and "inseparability" are special defenses which must be pleaded and which were not. Furthermore, they were never raised in the course of the trial at any time by either side in the case until the Court itself announced both those features in its opinion of December 28, 1939 (pages 9-12 and 22 to 27 hereof).

Within proper time, the appellants filed a motion for rehearing because these features were, as appellants believed, erroneously injected into the case in the said opinion. Affidavits of the majority of the legislators were obtained. These men each stated that Sections 2 (A) and 2 (B) were each not the inducing cause for his affirmative vote, but it was the anti-monopoly feature and the enforcement provisions of the act against the monopoly that caused each one to vote as he did affirmatively, and thus placed the law into force and effect as a part of the police power of the State of Nebraska, to prevent further violations of law (pages 53-6 hereof).

The Court had made its findings of fact, conclusions of law, and decree on January 25, 1940 (pages 12 to 21 hereof), prior to this motion for rehearing and the filing of these affidavits. Then the Court's attention was challenged in the motion for new trial (page 28 hereof) to the fact that the findings of fact, conclusions of law, and decree failed to mention the "inducing cause" and "inseparability" features in the opinion. The Court overruled the motion for new trial; and, in so doing, it adopted finally and conclusively the findings of fact and conclusions of law without those provisions (p. 57 hereof).

Had the Court by *error* or *mistake* omitted those features from its findings of fact, it had the opportunity to make the correction at the hearing on the motion. But the Court did not choose to do so. Therefore, the appellate court need not do so, it would seem. However, the appellate court might wish to permit such modification or changes in the decree of the lower Court as would upon such grounds alone allow the courts of the State of Nebraska to pass their judgment upon the effect of those features, on the validity of the whole act.

The appellants again call the Court's attention to the fact that they believe the lower Court has eliminated the feature of "inducing cause" and "inseparability" from further consideration in the case. However, if the Supreme Court of the United States is inclined, in reviewing this matter, to itself inquire into the matter of "inducing cause" and "inseparability," then it is appellants' contention that under Point No. VIII hereinabove, there is ample authority, both of fact and law, to justify the Court in holding that Sections 2 (A), 2 (B) and 2 (D) were separable from the balance of the act and were not the inducing cause for its passage.

But, should the Court feel that the cause should be reversed and remanded on the "inducing cause" and "inseparability" features, then appellants contend the Court should at least modify the injunctive decree to permit the state court to pass upon those features in order to give validity to the balance of the act.

Appellants cite the following cases to sustain these views:

In *Bresee v. Preston,* 91 Neb. 174, 135 N. W. 544, the Court at page 176 of 91 Neb. states:

> "Of course, under section 136 of the code it is unnecessary to plead the validity of a statute, because it is a presumption of law. But, when it is claimed that facts exist which rebut the presumption of law, the facts which are claimed to exist should be pleaded so as to inform the court of what is the real issue. Some act of omission or commission by the legislature in conflict with the provisions of the constitution with reference to the manner of passing bills must be relied upon to support this allegation. This is a matter to be proved, and while under our

former decisions the court will take judicial notice of the legislative journals, this notice cannot supply the want of a specific plea of the fact upon which the pleader relies. The Supreme Court of the United States holds: 'Judicial notice of facts which the plaintiff has not chosen to rely upon in his pleading cannot make these facts a part of the complaint for the purpose of giving jurisdiction to a federal court, as the averments, if not sufficient in themselves to give jurisdiction, present no controversy in respect of which resort may be had to judicial knowledge.'" (Citing cases.)

In *Glenn v. Field Packing Co.*, 290 U. S. 177, 54 S. Ct. 138, the Court at pages 178 and 179 of 290 U. S. states:

"Upon the facts found, the decision appears to be supported by principles laid down by the Court of Appeals of Kentucky, but, so far as the application of the state Constitution is concerned, the ultimate determination of the validity of the statute necessarily rests with that court. Further a change in circumstances may create a situation different from that to which the opinion below was addressed.

"In order to prevent the possibility that the decree may operate injuriously in the future, the decree will be modified by providing that the members of the state tax commission, or that commission, may apply at any time to the court below, by bill or otherwise, as they may be advised, for a further order or decree, in case it shall appear that the statute has been sustained by the state court as valid under the state Constitution, or that by reason of a change in circumstances the statute may be regarded as imposing a valid tax."

In *Lee v. Bickell*, 292 U. S. 415, 54 S. Ct. 727, the Court at pages 425 and 426 of 292 U. S. states:

"The taxation of the documents being without warrant in the statute, there is no duty to determine

whether the constitution would be infringed if the meaning were something else. As to that we do not indicate an opinion, even by indirection. It will be soon enough to set a value upon the arguments of counsel when a statute is before us that requires us to choose between them. At the same time the parties to the controversy should have adequate protection in the possible contingency of a decision by the state Supreme Court at variance with ours in respect of the meanings of the statute, a meaning that will then be declared with ultimate authority. Hartford Accident & Indemnity Co. v. Nelson Mfg. Co., February 5, 1934, 291 U. S. 352, 54 S. Ct. 392, 78 L. Ed. 840. There should be an appropriate opportunity in such circumstances to terminate or modify the restraints of the decree. There should also be an opportunity to renew the litigation in respect of the issue of constitutional validity, now held to be irrelevant. The reservations proper to that end will follow the practice indicated in Glenn v. Field Packing Co., 290 U. S. 177, 54 S. Ct. 138, 78 L. Ed. 252, and Wald Transfer & Storage Co. v. Smith, 290 U. S. 602, 54 S. Ct. 227, 78 L. Ed.

"In conformity with those decisions, the decree will be modified by striking therefrom any conclusion of law or other adjudication as to the validity of the Documentary Stamp Tax Act of Florida under the Constitution of the United States, and by adding a provision, that the parties to the suit or any of them may apply at any time to the court below, by bill or otherwise, as they may be advised, for a further order or decree, in case it shall appear that the statute has been then construed by the highest court of Florida as applicable to the transactions in controversy here."

In *Wald Transfer & Storage Company v. Smith*, 290 U. S. 602, 54 S. Ct. 227 (on rehearing), the Court stated:

"Upon consideration of the petition for rehearing, the decree entered herein by this Court on No-

vember 13, 1933, is amended so as to provide that the decree entered in this cause by the District Court, as especially constituted, be modified by providing that the appellant may apply at any time to the District Court, by bill or otherwise, as it may be advised, for a further order or decree, in case it shall appear that the state court shall have construed the applicable state statute as not authorizing the state commission to enter the order challenged in this proceeding."

In *City of York v. Chicago, B. & Q. R. Co.*, 56 Neb. 572, 76 N. W. 1065, the Court at page 578 of 56 Neb. states:

"When an act is legal or illegal because of the existence or non-existence of certain facts, those facts must be pleaded. The mere assertion of illegality is not enough. It tenders no issue. Moreover, from certain special findings it is clear that the court did not act on this averment, so that we are relegated to an investigation of the legality of the ordinance, assuming that it was regularly passed."

59 C. J., Section 740, Page 1200:

"Where it is claimed that an act is void because, in its substance, it is violative of the fundamental law, or ulta vires the government, it is sufficient to allege generally that it is invalid; but where the objection to the validity of the law is that it was not regularly and constitutionally passed and adopted, the defect in the proceedings must be specifically pleaded."

"Where the objection to the validity of a law springs out of the failure of the legislature to comply with the provisions of the constitution, which is not apparent upon the act itself, it should be distinctly set forth in the pleadings, or in this case in the return. The adverse party should have an oppor-

tunity to controvert the allegation, and to prove a due conformity on the part of the legislature with the requirement of the constitution."

It is upon the authority of these cases that the appellants stated at the outset under this Law Point No. IX that these objectionable features found in the opinion for the first time, should have been raised in the pleadings, and not having been made an issue in the case below, they should now be ignored on appeal. Also the lower Court virtually struck them from further consideration when it entered its findings of fact and conclusions of law and ultimate decree after its attention was called to all the facts and the law and supporting affidavits of the legislators were furnished the Court.

Thus appellants contend under Point No. IX that the cause should be reversed and dismissed, unless the Court wishes to save the one point to the state court in reference to "inducing cause" and "inseparability," in which event the foregoing cited cases are ample authority for this Court to so act.

CONCLUSION

Appellants, as the state law enforcement officers, prefer the cause be reversed and dismissed. If so, the result would be that all features would be tried out when and if they arose. Each would be met and decided upon the facts and circumstances and experiences gained from a practical operation of the act.

So far there were before the lower Court, and now before the Supreme Court, no individual appellees that have any standing or right to question Section 2 (A), (B)

or (D), because all appellees were and are a part of the unlawful conspiracy. They each have testified they wish to so remain and will not conform to the act.

Under such circumstances, and the others which appellants have brought to the Court's attention in this brief and record, the cause should be reversed and dismissed.

The appellants believe the very finest results for all parties concerned will be accomplished by so doing.

Appellants, as law enforcement officers, sincerely hope that no action under this law will be required. None was threatened before nor since the suit was started. Appellees sought no advice, suggestions nor ruling of the appellants before they started their suit. The trial showed no irreparable loss nor damages resulting from the passage of the act. The act clearly provides for most complete protection of all rights in any action that might be instituted under the act against anyone.

There is no actual interference with the Copyright Act before this Court for decision. If Sections 2 (A), (B) or (D) are interferences it will be proper for a defendant who comes properly under those provisions to raise that question in a proper proceedings as a defense. That time may never come. Legitimate copyright owners may wish to comply with all the terms of the act. Owners of rendition rights may find it beneficial and profitable to do so—if the monopoly is dissolved and the rights revested in the composers and the various music publishing houses as owners, where they legally belong.

The hypothetically anticipated action by the state, feared by appellees in this case, should not be made the

basis for judicially destroying a very worthwhile state legislative bill covering a subject that the record proves required just such legislative action.

Respectfully submitted,

WALTER R. JOHNSON,
Attorney General of Nebraska.

JOHN RIDDELL,
Asstistant to Attorney General.

WILLIAM J. HOTZ of Omaha, Nebr.,
Special Assistant to Attorney General.

GORDON DIESING and

WILLIAM F. DALTON, both of Omaha, Neb., *assisting Wm. J. Hotz on Brief.*

Attorneys for Appellants.

William J. Hotz

1530-5 City National Bank Bldg.,
Omaha, Nebr.
Special Assistant to Attorney
General of Nebraska,
Attorney for Appellants.
Dated Omaha, Nebr., April 7, 1941.

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Nebraska Legislative Bill No. 478

AN ACT relating to monopolies; declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which fixes and determines the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit within this state copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composition copyright owners or their heirs, successors or assigns; to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of each other and of any combination as herein declared unlawful in determining license fees and other rights within this state; to require the author, composer, printer and publisher to specify upon the musical composition the selling price thereof for all uses that may be made thereof including public performance for profit within this state; to declare that any purchaser thereof, who pays such price therefor, shall have the right to render such music privately or publicly for profit within this state; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit within this state with any combination of persons, firms or corporations herein declared unlawful to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit within this state without interference by such unlawful combination; to provide for the appointment of a receiver and injunctive relief and the dissolution of such combination as herein declared unlawful; to determine in such action the legal owner of such copyrighted musical compositions; to adjust and fix in such action the license fee to be paid, if any, and the terms for the use of such musical compositions in this state; to provide for the protection of theatres, moving pic-

ture houses, hotels, places for education and public performance or amusement, radio broadcasting, radio receiving and radio rebroadcasting stations affiliated with other persons, firms or corporations outside the State of Nebraska against the collection of license fees or other exactions by such out-of-the-state affiliates for or on account of any combination declared unlawful under Section 1 hereof; to provide that the responsibility and all liability for any infringement of copyrighted musical compositions conveyed by radio broadcast, air, wire, electrical transcription, or sound production apparatus, or by personal performance coming from outside this state, and used herein, to rest entirely with the out-of-the-state person, firm or corporation originally emanating or sending the same into this state for use herein; to provide penalties for the violation hereof; to empower the County Attorneys and the Attorney General, upon complaint of any party aggrieved by any violation hereof to proceed to enforce the penalties hereof against such combination and any of its representatives, members or agents, and against the property of such unlawful combination within this state; to define the method of service of process upon such combination as herein declared illegal; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions hereof; to provide for the recovery of costs, expenses and attorney's fees; to provide for the filing of each said composition in the office of the Secretary of State before selling or disposing of the same, together with the amount of filing fee therefor; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof; and to declare an emergency.

Be it Enacted by the People of the State of Nebraska:

Section 1. It shall be unlawful for authors, composers, proprietors, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, as-

sociation, club, firm, partnership, corporation, or other group or entity, called herein a combination, either within this state or outside thereof, when the members, stockholders, or interested parties therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when at least one of the objects of any such combination is the determination and the fixation of license fees or other exactions required by such combination for itself or its members, stockholders or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit within this state for the purpose of preventing free competition among or with different and competing copyright owners or among or with persons, firms, corporations or associations in this state using or rendering such copyrighted matter by public performance for profit; or for the purpose of dividing among them the proceeds of the earnings of such copyright owners; or for the purpose of fixing the exactions and fees for the rendition or use of copyrighted matter which any copyright owner must charge; and the collection or attempted collection within this state of such license fee or other exaction so fixed and determined, by any member, agent or representative of any such combination herein declared unlawful, from any person, firm, corporation or association within this state, including theatres, radio receiving, radio broadcasting and radio rebroadcasting stations, moving picture houses, athletic associations, hotels, cafes, restaurants, clubs, dance halls, recreation rooms, amusement parks, pavilions, churches, colleges, schools, universities, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered, or permit to be rendered, such copyrighted vocal or instrumental musical compositions privately or publicly for profit within this state through personal performance, or through radio, or any instrumentality or sound pro-

ducing apparatus, shall be and the same is hereby declared unlawful and illegal; and such license fees or other exactions shall not be collected in any court within the boundaries of this state; and each collection or attempted collection of such license fee or other exaction by such combination or its agents, representatives, members, stockholders or interested parties shall be a separate offense hereunder; and any such combination of authors, composers, publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this state; and such fixing of prices for use or rendition of copyrighted musical compositions within this state by such unlawful combination and the collecting or attempting to collect such license fees or other exactions by it or for its stockholders, members or other interested parties within this state is hereby declared illegal and in restraint of trade, and such collection or attempted collection thereof is declared to be an illegal intrastate transaction within this state and shall be subject to the terms and penalties of this Act. In any action, civil or criminal, instituted under the provisions of this Act, it shall be prima facie evidence against any party to such action of the existence of such unlawful combination for the purposes in this Act enumerated, if a substantial number of all authors, composers, proprietors, publishers, owners or their heirs, successors or assigns of copyrighted vocal or instrumental musical compositions in the United States, are shown to be members of any society, association, club, firm, partnership, corporation, group or entity.

Sec. 2 (A). All authors and composers, and their heirs and assigns, shall have within this state all the benefits conferred by the Copyright Laws of the United States, being the act of March 4, 1909, c. 320 Section 1 (e). 35 Stat. 1073, Title 17 U. S. C. A. Each author, composer and publisher shall act independently of any and all substantial number or numbers of other authors, composers and

publishers, and also independently of any such combination as in Section 1 hereof declared unlawful, in determining and fixing the price to be charged for the use or rendition of his copyrighted musical compositions within this state, and the author, composer, or publisher, or his, her, or its heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition within this state, the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this state and pays the selling price so specified thereon to the seller or publisher of said copyrighted musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered within this state, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radios, loud speakers, radio receiving, radio broadcasting and radio rebroadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise within this state, and the same may be so rendered either privately or publicly for profit when so purchased and paid for without further license fees or other exactions; and such copyright owner or proprietor, in the event of such payment, shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private purposes or for public performance for profit by such purchaser within this state.

(B). In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm

or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private or public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state.

(C). Nothing in this section, or this Act, shall be construed to give to any purchaser of copyrighted music compositions, as herein provided, the right to resell, copy, print, publish, or vend the same.

(D). Any composer, author or publisher of vocal or instrumental copyrighted musical compositions, or any person, firm or corporation controlling the sale or distribution of said compositions, whether or not within the purview of the combination described in Section 1 of this Act, shall, before selling or disposing of any such composition in this state, file in the office of the Secretary of State a copy of each said composition upon which shall be written, printed or typed over his or its signature a statement to the effect that he or it controls the sale or disposition of such composition; and provided further, said person, firm or corporation who shall make such filing shall accompany the same with a fee of Twenty-five Cents (25c) with each copy of said composition so filed to reimburse the Secretary of State for keeping in current and convenient form, easily accessible to the public, the titles of said compositions and the names of the persons, firm or corporations who shall file said copies from time to time; and provided further, said Secretary of State shall deposit all the fees received hereunder weekly with the State Treasurer who shall credit said fees to the general fund of the state.

Sec. 3. All existing contracts, agreements, licenses or arrangements now existing within this state made by

any person, firm or corporation with any combination, declared unlawful under Section 1 hereof, are hereby declared void and nonenforceable in any court within the boundaries of this state, and are hereby declared to have been entered into as intrastate transactions with such unlawful combination and in restraint of trade; and further, all such contracts, agreements, licenses, arrangements and the attempted enforcement thereof within this state, may be enjoined by any person, firm or corporation sought to be bound thereby; and any member, representative or agent of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, license or arrangement within this state shall be guilty of a violation of the terms of this Act, and for each such collection or attempted collection shall be subject to the penalties hereinafter provided.

Sec. 4. (A). Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio rebroadcasting station within this state, shall be and is hereby authorized to receive, broadcast and rebroadcast copyrighted vocal or instrumental musical compositions within this state, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and noncollectible by the terms hereof.

(B). When such radio receiving, radio broadcasting or radio rebroadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or rebroadcast within this state, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this state, shall be and is hereby prohibited

from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio rebroadcasting station within this state, any herein declared noncollectible license fee or other exaction, for the purpose of paying or repaying the same outside this state to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exacting herein declared unlawful and noncollectible within this state, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Sec. 5. (A). Any person, firm or corporation who owns, leases, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this state, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered within this state, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or reproduction apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever within this state, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawfully by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and noncollectible by the terms of this Act.

(B). When such theatre or theatres, moving picture houses or houses, or other places for amusement or performance within this state is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this state, or supply such persons, firms, or corporations in this state with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this state shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect within this state, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this state, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section I hereof for the use, rendition or performance of such copyrighted musical compositions within this state; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this state against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and noncollectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Sec. 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio

receiving, radio broadcasting or radio rebroadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions within this state, and which radio stations and theaters, and other persons, firms or corporations, aforementioned, are affiliated with persons, firms or corporations outside this state from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this state, then any responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this state and thus rendered in this state shall rest with and be upon such affiliated person, firm or corporation from outside this state who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this state; and, if the owner of any copyrighted musical composition commences any action within this state on account of any use or rendition thereof in this state through such affiliate or affiliates, then any defendant in such action may interplead such affiliate or affiliates in such action; and any judgment which may be rendered in favor of the copyright owner shall be paid and satisfied by such affiliate or affiliates; and, if paid or satisfied by the defendant user in this state, such defendant shall be subrogated in said action or otherwise to all rights of the plaintiff in said judgment as against said affiliate or affiliates, whether the latter is or are a party or parties in said action or not; and in any event such affiliate or affiliates shall be liable to such user to the full extent of his liability to such copyright owner, in the absence of any agreement to the contrary; and any combination declared unlawful by Section 1 of this Act which is the owner or proprietor of or controls the copyrighted vocal or instru-

mental musical compositions, its agents or representatives shall be and are hereby prohibited from suing for infringement, loss or damage within the boundaries of this state, for the use or rendition of such copyrighted vocal or instrumental musical compositions so originating or emanating because such persons, firms or corporations used, rendered or performed the same within this state; the use or rendition by radio broadcast, radio rebroadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this state, or otherwise, of such copyrighted musical compositions within this state in the manner set forth in this section, shall be considered, for the purpose of this Act, as intrastate business of this state and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this state.

Sec. 7. (A). Any person, firm or corporation within this state who shall act as the representative of any combination herein declared unlawful as defined in Section 1, hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this state, and service of any process against such combination may be had upon such representative or the agent of any such representative as herein defined within this state; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this state.

(B). Furthermore, any person or persons who negotiates for, or collects within this state, or attempts to collect license fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall,

for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Sec. 8. Any combination as in Section 1 hereof declared unlawful and any other person, firm or corporation, acting or attempting to act, within this state in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination, as defined in Section 1 hereof, in the violation of any of the terms of this Act in any manner whatsoever within this state, shall be deemed guilty of a misdemeanor and shall be fined in any sum not more than $5,000.00 or imprisoned for not more than one (1) year, or both, such fine and imprisonment for each and every violation of the terms hereof.

Sec. 9. (A). The County Attorney in each county in this state wherein a violation of any of the terms of this Act takes place, in whole or in part, is hereby authorized upon the complaint of any party aggrieved to institute a civil or criminal action, or both, under the terms hereof against any combination declared unlawful as defined in Section 1 hereof, and against any of its members, stockholders or other interested parties, and its agents or representatives as herein defined, and to enforce any of the rights herein conferred, and to impose any of the penalties herein provided.

(B). The Attorney General of the State of Nebraska is hereby empowered to proceed upon the request of any County Attorney to aid and assist, or to take charge of, any prosecution or suit for any violations of any of the terms hereof.

(C). Or, the Attorney General, on the complaint of any party aggrieved, because of the violation of any of the terms of this Act anywhere within this state, shall proceed in the District Court in any county in which all or any part of the offense or violation was committed, to institute action against any

combination defined as unlawful by Section 1 hereof, and against the representatives or agents of any such combination, either in a criminal action to enforce the penalties hereof, or in a civil action to enforce all rights hereunder, or to dissolve any such combination as declared unlawful by Section 1 hereof, or he may proceed by both civil and criminal actions; in such action or actions, the plaintiff shall be the State of Nebraska; and any interested party may, upon application, be granted leave to intervene in such a civil action.

(D). The District Court shall, in such dissolution or other civil suit, upon the application and intervention in said action of any member, stockholder or other interested party of said unlawful combination, adjudicate the ownership of any copyrighted vocal or instrumental musical composition theretofore owned or controlled by said unlawful combination; and furthermore, such District Court shall have and is hereby granted the power and authority to appoint a receiver and to issue injunctive and mandatory temporary and permanent orders in reference to any of the issues involved in such action; and any person, firm or corporation within this state who is a user in any manner of any copyrighted vocal or instrumental musical compositions theretofore owned or controlled by such unlawful combination may, upon application, intervene in such action and therein have adjusted, determined and adjudicated all rights for or against the person, firm or corporation whom the Court shall finally determine to be the owner or proprietor of such copyrighted vocal or instrumental musical compositions; and said parties shall be permitted no other remedy in any other court within the boundaries of this State, whether the same be for damages, infringement or otherwise, until final decree has been had in said action determining the ownership and terms for use of such copyrighted musical compositions.

Sec. 10. (A). Any person, firm or corporation within this state aggrieved by any violation of the

terms hereof by any unlawful combination, as defined in Section 1 hereof, or any of its representatives or agents, may proceed in his or its own name and right in the District Court in the county in which the violation, or a part thereof, took place, to recover any right, loss or damage that may have resulted from any violation of the terms hereof; the plaintiff in such action shall be entitled to recover his or its costs and expenses and a reasonable attorney's fee to be fixed by the court in such action.

(B). In the event of the failure or refusal of a County Attorney, or the Attorney General, to promptly act, as herein provided, when requested so to do by any aggrieved party, then such party may institute in his own behalf, or upon behalf of the plaintiff and all others similarly situated, the same civil action as such County Attorney or Attorney General might have instituted under the terms of this Act, and with like procedure, powers, authority, rights, privileges, effect and final decree as the said County Attorney or Attorney General might have done under the terms of this Act.

Sec. 11. (A). In any action, either civil or criminal that may be had or instituted under the provisions hereof for any violation of the terms hereof, the plaintiff in any form of action brought hereunder, and in which action any combination declared unlawful, as defined in Section 1 hereof, or the members, stockholders, or other interested parties, or their agents or representatives of such unlawful combination, are defendants, any attorney of record for the plaintiff may file a request in writing with the Clerk of the District Court in which said action is pending, demanding that the defendant or defendants furnish plaintiff, or file with the Clerk of the Court, in which the action is pending, exact copies of all documentary evidence, facts and figures, records or data in the possession or under the control of the defendant or defendants pertaining to the issues as alleged by the plaintiff to establish or refute any issues in the

case; and the District Court, upon the presentation to it of such written demand by the plaintiff, shall thereupon determine that part or all of such evidence which shall be produced, and shall enter an order fixing a time for the defendant or defendants to furnish and file such information as ordered. A copy of said order shall be mailed to each defendant at his or its last known address, which shall be deemed sufficient notice and service upon said defendant or defendants; or the same may be served by mail in the same manner upon each attorney of record for the defendant or defendants, and when so served, the same shall be deemed notice and service upon the defendant or defendants for whom said attorneys appear of record.

(B). If said defendant or defendants shall fail to furnish plaintiff or his or its attorney, or file with the Clerk of the Court in which the action is pending, said copy or copies of said documentary evidence, facts, figures, records, books and data as set forth in said order within the time specified in said order, the Court shall adjudge said defendant or defendants guilty of contempt of court, and the Court shall assess a fine of $100.00 against such of the defendants for each and every day that such defendant or defendants fails to comply with said order; and judgment shall from time to time be rendered therefor, and the plaintiff may collect the same against the defendant or defendants with 6% interest thereon and the costs, including expenses and attorney's fees to be fixed by the Court, in the same manner as other judgments are collected in this state. The Court shall find and determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs, expenses and any attorney's fees that may be allowed.

Sec. 12. If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or nonenforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act.

Sec. 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Nebraska.

Sec. 14. Whereas an emergency exists, this Act shall be in full force and take effect, from and after its passage and approval, according to law.

Approved, May 17, 1937.

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF STATE OF NEBRASKA, ET AL.,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

REPLY BRIEF OF APPELLANTS AND APPENDIX

WALTER R. JOHNSON,
Attorney General of Nebraska.

JOHN RIDDELL,
Assistant to Attorney General.

WILLIAM J. HOTZ of Omaha, Neb.,
Special Assistant to Attorney General.

GORDON DIESING and

WILLIAM F. DALTON, both of Omaha, Neb., *assisting Wm. J. Hotz on Brief.*

Attorneys for Appellants.

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF STATE OF NEBRASKA, ET AL.,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

REPLY BRIEF OF APPELLANTS AND APPENDIX

APPELLANTS BELIEVE A REPLY BRIEF NECESSARY AND ACCORDINGLY SUBMIT THE FOLLOWING:

Appellees on pages 3 to 33 of their brief set forth under headings II to IX, inclusive, statements in the nature of "Confession and Avoidance." Each of these eight statements seeks to justify ASCAP based upon convenience and necessity.

The general effect of the appellees' brief is: That the income to be derived for the "public performance rights" granted by the National Copyright Law, as interpreted by ASCAP in their brief, cannot be collected except by operating a price-fixing monopolistic combination.

It requests this High Court to permit ASCAP, by judicial decree, to carry on its practices, which are in violation of the anti-monopoly laws, because it must do so in order to give effect to a "right" given to an individual, with the power of assignment, under the National Copyright Law.

The appellees in their brief generally, have failed to properly answer the "Points Relied Upon for Reversal," set forth in appellants' brief, pages 68-74. For example, they have failed to answer appellants' Law Point Number I, which cites established law that the individual monopolies granted the copyright owner *"cannot be unitedly exercised to restrain competition and fix prices"*; they have failed to answer Law Point Number II, *"as to when and how the police power of the State shall be exercised"*; they have overlooked the Tenth Amendment to the Constitution of the United States in their excuses and explanations for their existence; they have failed to admit the established law that a state has the right to pass reasonable regulations in reference to the *use* that may be made of copyrights within the state; they have failed to recognize the rule that Congress under the National Copyright Law has limited itself to defining what *may be copyrighted* and the *exclusive monopoly* therein given to the individual and the *length of time* that exclusive right may be exercised; they have confused those National rights with the State's right to correct abuses in the unlawful uses that have been made of them within the State; they have failed to answer Law Point No. IV and the arguments in reference thereto, wherein the appellants have challenged them to answer that the playing and singing of music by musicians within the State is

a performance or use that is *intrastate* by its very nature; that ASCAP has been carrying on an *intrastate business* by levying its licenses—not against musicians, nor instruments, nor individuals, but against the *establishment within the State* where its music is *performed*—not bought or sold.

These problems they have failed to answer, but conclude that their business is *now interstate* and affects *interstate commerce* and they should therefore be exempted from the Nebraska law.

They have failed to answer Law Point V, that the penalties of from $1.00 to $5,000.00, with violations deemed misdemeanors only, have been construed as *proper penalties,* and they have further failed to answer the fact that the limitations of the Eighth Amendment is a limitation upon the Federal Government, *not upon the states;* they have failed to answer Law Points VI, VII, VIII and IX, which deal with the "inseparability" and the "inducing cause" features, by failing to answer the effect of the motion for a new trial in the court below and the abandonment by the lower court of those features, when it adopted its findings of fact and conclusions of law (drawn under the order of the court by the appellees themselves) which became the court's final papers; they have avoided answering the point that the findings of fact and the conclusions of law fail to support the permanent injunctive decree thereby establishing reversible error; and they seek to confuse the point that the appellants are the State of Nebraska and not personal users quarreling over prices with ASCAP.

In balancing the equities these appellant State officials are entitled to have the state court of Nebraska pass upon the "inseparable" and "inducing cause" features should this High Court consider them still an issue on appeal.

The first 33 pages of the appellees' brief, appellants contend, contain no justification for the existence of ASCAP.

Nor have appellees answered the fact that the individual appellees are a part of the unlawful organization and have no standing in court to urge their individual problems, as long as they elect to remain a part of that organization.

The statement of appellees' position, presents social problems and emphasizes its members' *plight* in connection with public performance right if the unlawful monopoly is dissolved.

They have failed to cite legal authority, *except consent decrees,* legally permitting ASCAP to collect for public performance rights in a manner which the appellees admit are impossible of attainment except by a combination found to be monopolistic.

They have failed to show that the statement of law announced by the Supreme Court of the United States, 243 U. S. 490, set forth on page 81 of appellants' brief, is not applicable to the facts in the case at bar:

> "* * * the scheme was regarded by the plaintiff itself and by its agents simply as one for maintaining prices by holding a patent infringement in terrorem over the ignorant and the timid."

Appellees have failed to answer the proposition that, of all monopolies that should be prohibited, is a combination of individuals who have been granted personal copyrights, which if violated gives them further rights granted by their Government, to compel either nonuse or the exaction of pay in such amount as such individuals might wish. The assignment to the combination by such individuals carries with it the *compulsory features* of enforcement by infringement, in addition to the exclusive right of use. While appellees have not answered this last mentioned general proposition, the appellants claim that Justice Brandeis did so, when he announced the decision of this Court by stating (283 U. S. 163):

> "If combining patent owners effectively dominate industry, power to fix royalties for licenses is tantamount to power to fix prices" (Appellants' Brief, p. 70).

In this regard, there is no distinction between patent rights and copyrights.

Furthermore, **appellees have failed to meet the issue that the Nebraska statute does permit** the functioning of its organization within the State of Nebraska, for the purpose of collective action to protect its members against infringement; to gather facts for its members upon which to base their public performance licenses; to encourage the use of music and more music; to develop the creative art of musical composition; to protect its members from unwise and unwarranted interference with their legitimate rights under the National Copyright Law; to bargain for its members with music users; to carry on its social problems; and to provide funds for

their unfortunate members. But the Nebraska statute *does* rightfully *prohibit the unlawful practices of combinations* of *substantial numbers* of the holders of public performance rights of copyrighted vocal and instrumental musical compositions, who thus combine for the purpose of fixing fees and forcing the users to deal in restraint of trade, upon its terms—or be sued under another assigned right (infringement) really for not doing so.

When a combination has been proven in a proper case to be so constituted and endowed, the Court should "do its duty" and dissolve a permanent injunction under which judicial sanction alone the trust lives and thrives.

On pages 19 and 20 of appellees' brief they claim there has been "an organized effort to destroy the appellee Society," and they cite a long list of bills introduced in Congress to amend the National Copyright Law, as proof thereof.

The appellees introduced an exhibit (R. Vol. II, p. 791, Ex. 31), *showing not only Congressional bills but state laws.* Furthermore, in this action they filed an "Appendix to Appellees' Brief," setting forth numerous state statutes that have been passed. It therefore seems there is and has been a popular demand to curb the activities of associations that deal in public performing rights of music.

The Chairman of the United States Senate's "Committee on Patents and Copyrights," so thinks. On May 5, 1937, when United States Senator Duffy, who then held that position, made an address on the subject of ASCAP before the section of "International and Com-

parative Law" of the American Bar Association in session in Washington, D. C., he stated as follows:

"There is no limit to the amount they will charge. 'All the traffic will bear' is the only limitation. I have a letter which the American Society of Composers, Authors and Publishers wrote to Mr. Alex N. Schmalz, Route No. 1, Nemaha, Wisconsin, under date of March 13, 1934. Among other things, the letter said, 'This isn't a matter of what you feel like paying. You fill out the application and send it to us and we will tell you what you should pay.'

"They can actually determine whether a small dance hall can run. I have in mind the instance of a summer resort hotel in northern Wisconsin called the Alpine Resort at Egg Harbor; Mr. Paul Bertschinger is the manager. They do have an orchestra which plays for the guests, but no extra charge is made if they care to dance. ASCAP started them off with a $25 license fee; then a year or two ago they raised this fee arbitrarily to $150. When Mr. Bertschinger sent in $36, it was scornfully returned, and he was sued in the Federal Court for the Eastern District of Wisconsin.

"That an organization which gives a dance may be of a non-profit nature does not make any difference. I have a letter from the American Society of Composers, Authors and Publishers dated December 10, 1934, addressed to the Bowler Fire Department. Bowler is a small town in Wisconsin. The Society says in their letter, 'The fact that the dance and entertainment is for local benefit, and that yours is a non-profit organization, of course, does not exempt you from the necessity of obtaining a license from this society. * * * Under all the circumstances the license will be $60.'

"I have a letter from the Waupaca War Memorial Armory, at Waupaca, Wisconsin. This armory operates a National Guard Armory to defray operating expenses and to establish a mess fund for the

enlisted men of the Howitzer Company, 127th Infantry. They hold a few dances each year, barely realizing enough to make a little profit. This Society claimed they owed them $75, saying that they owed it for the three years, 1933, 1934, and 1935. There was no money in the treasury, so the soldier boys had to 'dig down.'

"This monopoly represented by ASCAP feels that the consuming public has no rights which should be considered. I have here a letter on the stationery of the American Society of Composers, Authors and Publishers dated July 1935. It is addressed to Mr. J. Dodmead of Osseo, Wisconsin. I quote parts of the letter:

' "I have your letter from which I note you only run old time dances. In response, let me say that the copyright on a sheet of music runs for 28 years. It is hardly likely that your musicians would play music older than that, even if they did know how to play it. I am sure that people want to hear music which is popular, music which is heard over the radio, and certainly not the schottisches and square dances of their grandmother's youth.' Then he ends up the letter by adding, 'It will be far cheaper for you to obtain a license than to take a chance of infringing, since the law provides for damages ranging from $250 up to $5,000 for each violation.' And the word 'each' is underlined in blood-like red—I suppose to intimidate and frighten this good citizen of my State.

"I have again introduced a bill in this Session of Congress, known as S. 7. It contains almost the same provisions as S. 3047, which passed the Senate. That bill seeks to eliminate the liability of the receiving set owner, unless the broadcast received constitutes the whole or a portion of that for which the customers directly pay. The dance hall would continue to be liable, for music is of the essence of the services for which its charges are made; but the barber shop, the boarding house, the taxi cab driver,

and others using it in a merely incidental way would no longer be deemed to be engaged in a public performance for profit."

Senator Duffy stated ASCAP's opposition to any amendment of the National Copyright Act, in the following language:

"But the big opposition came from ASCAP and its very efficient lobby * * * the very best in Washington."

The foregoing statement is cited by appellants because appellees have cited in their brief references to articles and pamphlets favoring ASCAP.

In the lower court, in opposition to the application for a temporary injunction, and in support of their motion to dismiss, the appellants filed a printed "Counter-Showing," made up of many affidavits signed by numerous small, as well as the large, users of music within the State of Nebraska similar to Senator Duffy's statement. That printed "Counter-Showing" of 164 pages consisting of affidavits and letters shows the methods used by ASCAP in enforcing its alleged rights against the dozens of small users of music in Nebraska that are dependent upon "public performance" for their own profits after they have bought and paid for the music, ostensibly, and by the very makeup and composition of the music, to be used for public performance for profit. A printed copy of that "Counter-Showing" will be left with the Clerk of this Court.

In the trial of the case on the merits, the respective counter-showings in support of the application for the temporary injunction, and in resistance thereto, were offered, but not received, in evidence. No error is predi-

cated on that score. But, in view of the fact that the appellees have disregarded the ruling and have inserted the affidavit of Anna Paul Nevin, in R. Vol. II, at page 1047, which affidavit was not placed in the record at the hearing on the merits, nor in any "designation" of the record, appellants feel justified in tendering likewise their counter-showing. It need not be referred to by the court.

On page 24 of appellees' brief, they assert that the Society controls only a "small part" of the available music. In reply to this assertion appellants state that if such fact is proven in any action brought under Section 1 of the Nebraska Statute, then ASCAP at such time may prove it is not a combination composed of substantial numbers of the owners of copyrighted vocal and instrumental musical compositions who are strong enough to fix prices, defy competition and restrain trade in licenses for public performance rights, within the State of Nebraska. However, the record on that point in the case at bar, is (R. Vol. I, p. 127; 136, par. 11):

> "The Society has control of from 85 to 90% of the popular music necessary for the successful operation of radio stations, dance halls, hotels and theaters, and has control of from 50 to 75% of the standard or older music that is played occasionally at such places."

There is no cross-appeal from that finding, and there is no error prosecuted on the rejection or admission of any evidence or exhibits in the case.

Furthermore, there appears no evidence in the record to refute these findings of the court.

On pages 25 to 33 of appellees' brief, they recite their own false interpretation of the Nebraska statute. The appellants believe that throughout the "Brief of Appellants," filed herein, proper explanations of the various terms of the statute in question have been made and therefore no detailed reply to the appellees' analysis is necessary. As it will be necessary for the Court to carefully read each provision of the Act, and especially after reviewing the authorities cited by both parties in their respective briefs, appellants respectfully refer the Court to the Act in question set forth in full in the Appendix to the "Brief of Appellants," pages 135-150.

However, *again* we direct attention to the obvious fact that the Act has two independent parts. Sections 2 (A), 2 (B) and 2 (D) are the parts that relate to the *individual,* while the balance of the Act relates to the *unlawful combination.* There are no penalties attached for violations of Section 2 (A), excepting the same penalty that is provided by the National Copyright Act, and that is, that if an author or a composer fails to mark upon his copyright material the reservations which he wishes to make in reference to its use, fully and completely *or* collect for it when sold, then he loses the rights (Sec. 2 B) which he might otherwise have obtained by compliance with the Act.

The Appellants' Criticism of the Appellees' Six Points Set Forth Under the Heading of "Argument" on Pages 33 to 76 of the Appellees' Brief.

Under the first topic, pages 33 to 53, the appellees assert that the State Statute violates the copyright clause of the Federal Constitution; that Congress has fully covered the field; that the State Statute confiscates appel-

lees' rights of public performance for profit; that it discriminates against owners of copyrighted works by failing to include common law copyrights; that the penalties for violation are more severe than those imposed under Nebraska Laws against other combinations monopolizing or restraining trade; that the State Statute discriminates against the copyright owners by denying them the right to show the reasonableness of their Association, and the further fact is claimed by appellees that they do not actually monopolize or restrain trade.

The appellees call the Court's attention to the cases of *Herbert vs. Shanley,* 242 U. S. 591, and *Buck vs. Jewell-La Salle Realty Co.,* 283 U. S. 191, as justification for their above enumerated positions in connection with public performance rights for profit and as authority for their right to collect each and every time the music, that has been sold and paid for, and obviously for public performance for the user's profit, is used.

In reply, the appellants deny that the Shanley case is authority for any such claimed right, for Justice Holmes confined his opinion to the one point, that admission need not be charged at the door of an establishment in order to constitute the playing of music therein a public performance for profit, under the circumstances in that case.

From a careful reading of the case, originally in the District Court, *222 Fed. 344,* it will be seen that the then District Judge Learned Hand, held in reference to parting with music meant for public performance, as follows:

> "This result no doubt involves the abandonment of some rights, secured by the dramatico-musical

copyright, but that is because the plaintiffs wished a double protction. There can be no justice in preserving their dramatic rights at the expense of the public's rights arising from taking out a musical copyright. Had they wished to retain a complete dramatic monopoly, they had it in their power to do so. As it is, that monopoly remains to their complete protection, except so far as its limitation is necessary to give full scope to the musical copyright. For instance, if the performance here had been anything beyond the least essentials to a musical reproduction of the copyrighted song, it would be protected; but it was not. The plaintiffs are really trying to eat their cake and have it; they would get the full benefit of a musical copyright, while they prevent the public from enjoying the corresponding rights."

On appeal this holding was not reviewed nor commented upon by the Supreme Court.

In the case of Buck vs. Jewell-La Salle Realty Co., the only question decided was that a radio entertainment for the guests of a hotel received through their own radio was a public performance. Justice Brandeis in that case refused to hold that it was a public performance *for profit.* The case is not authority for the proposition urged by ASCAP, that it has the right to collect public performance rights each and every time a copyrighted musical composition is played or sung in public for profit by that purchaser, *unless* there is a special reservation of that right. Appellants do not contend that the purchaser of any music may copy, publish, or vend the same without permission, but do contend he may *use* it for the purpose purchased with implied or express knowledge of that purpose. Appellees in their brief cite no authority for their assumed right to collect from the purchaser of

musical compositions each and every time played, unless specifically restricted.

Appellants believe this proposition is closely related to the provisions of Section 2 (A) of the Nebraska Statute (Appellants' Brief, 138-139).

It has been considered in all of the testimony in the case and by all of the witnesses for the appellees, and with no evidence to the contrary, that ASCAP, as well as the individual appellees in this case, *are not concerned with the sale of sheet music* wherein a royalty of three cents a copy is collected at the time it is sold, by arrangement between the composer and the publisher; nor is it any concern of appellees about the *dramatico-musical* composition or the *grand rights;* nor is it any concern of the manufacturer of phonograph records, because the recording rights are definitely covered by the copyright statute, which requires the manufacturer to pay and the copyright owner to accept *two cents per musical composition* when and as the disc or record is manufactured for sale to the public.

If the appellees' claim is correct that it is a public performance for profit entitling it to collect further when that record so paid for is played in public in any hotel or other public place similar to Shanley's restaurant, then the copyright owner or his assignee should mark upon the disc his restrictions and prices for that purpose as provided by the Nebraska Act and collect for it when the record is sold, just as the recording rights are paid when the disc is manufactured.

In the case of *R. C. A. Mfg. Co. vs. Whiteman, et al,* 114 Fed. (2) 86 (certiorari denied 61 Sup. Ct. 393), the

court dealt directly with the problem of a restriction of the common law right upon a phonograph record, and held that when the record was sold for public performance rights, in spite of the restriction, the purchaser had the right to complete use and repeated use as often as desired for public performance rights for profit.

The decision was based upon a well recognized legal principle that:

> "restrictions upon the uses of chattels once absolutely sold are at least prima facie invalid; they must be justified for some exceptional reason, normally they 'are repugnant' to the transfer of title."

However, in *Waring vs. WDAS,* 194 At. 631, the Pennsylvania State Court sustained the restriction upon the phonograph record.

Therefore, appellants' reply to these questions raised by the appellees, that Section 2 (A) of the Nebraska Law, if tested in actual operation, would be welcomed by the many composers not here represented by ASCAP who might wish to adopt its terms. The method provided [Sec. 2 (A) (B)] for collecting their public performance rights by an additional charge, which they themselves determine by arrangement with their publishers, and collected when the music was sold for such purpose by the music stores throughout the land, or from the catalog of the publishers (exactly by the same procedure as the sheet music royalties are now collected for composers and publishers) should not be denied them in a case where ASCAP and the other appellees interested therein, are *obviously* prejudiced because such plan required by the Nebraska Act would eliminate the necessity of

a price-fixing, unlawful combination of owners, such as ASCAP.

On page 36 of appellee's brief, they cite *Napier vs. Atlantic Coast Line R. Co.,* 272 U. S. 605, as authority for the *preemption theory.* That case merely holds because the Interstate Commerce Commission has been clothed by Congress with the power to adopt rules and regulations that have the effect of law, in reference to safety devices for locomotives engaged in interstate commerce, it was not within the purview of the state legislature to pass an act in reference to safety devices on locomotives used in interstate commerce. That case is not in point any more than *Jennings vs. U. S. F. & G.,* 294 U. S. 216, is in point, to sustain the appellees' *preemption theory* in the case at bar. The *Jennings* case is really in favor of the appellants because it holds that the Indiana Bank Collection Code *is applicable to national banks,* so far as consistent with the express or implied policy or provisions of the National Banking Act, or of other Federal acts of paramount authority. Only one section of the Indiana State Banking Act was held to be in conflict with the plain provisions of the Federal Law in question, relating to a system of equal distribution specifically provided by the Federal Law. While that section was unenforceable, the Act generally was sustained as a proper exercise of the police power of the State of Indiana.

On the other hand, and in reply to these and similar cases cited by the appellees to sustain its preemption theory, the appellants cite *Mohawk Mfg. Co. vs. Cavicchi,* 308 U. S. 522, 60 Sup Co. 294, wherein the appeal was

dismissed "for want of a substantial Federal question" (citing many cases). That case came up from the Court of Appeals of New York, wherein it was held:

> "that Article 84 of the Civil Practice Act (as applied here to a cause of action arising under the patent laws) is not repugnant to Article 1, Section 8 of the Constitution and does not offend Section 256 of the Judicial Code."

The appellees on pages 47, and 58, and 59 of their brief, assert that the state statute *discriminates* against the holders of copyrighted musical works, because it does not mention those protected under the *common law.*

Appellants answer the alleged discrimination, by stating that there could not possibly be such discrimination, for the very good reason that the moment a piece of music is composed the author is endowed with a common law copyright. He then has two elections: one is to file his composition with the Register of Copyrights for the purpose of publication; and upon doing so he immediately by operation of the copyright statute, accepts the provisions thereof in lieu of his former common law right. If, on the other hand, the common law copyright owner does not desire, or fails to avail himself of the copyright act, and still wishes to deal in public performance rights, he could not possibly do so without releasing his copyright by dedication to the public when he granted and parted with his public performance rights for profit. *R. C. A. vs. Whiteman,* 114 Fed (2d) 86.

Therefore, in dealing with public performance rights there could be no discrimination between the two. This statement is clearly explained in the opinion Justice Day

delivered for the Court in *Caliga vs. Inter Ocean Newspaper Co.*, 215 U. S. 182, 30 Sup. Ct. 38.

Appellants answer the proposition set forth in appellee's brief, at page 59 thereof, concerning discrimination in the statute, because it applies to composers residing within the United States, and has no application to foreign composers who might come into the State of Nebraska and take over the field. Appellants' reply to that situation is that the legislature of Nebraska will meet that proposition when and if it arises. Let us hope not.

On page 54 of appellees' brief, they cite *McFarland vs. American Sugar Refining Co.*, 241 U. S. 79, as their authority that appellees' property rights are being taken in violation of the Fourteenth Amendment, and that the statute is a bill of attainder.

The *McFarland* case as viewed by the appellants refers to a complicated series of factual matters in reference to the sale and the production of sugar in Louisiana, that seem to have no relation to the provisions of the State Statute, nor to the facts in the case at bar. The lower court found that the practices in the sugar case were not monopolistic in character. Therefore, the *McFarland* case is not in tune with the record before this Court because the appellees' activities herein as a price-fixing monopolistic combination dealing in public performance rights have been proven to be definitely within the prohibitions of Section 1 of the Nebraska Statute. There is a definite close relationship established.

In reply to the question of "presumptions of guilt" the Nebraska statute is far different from that in

Louisiana on that subject, because the Nebraska Act states (Appellant's Brief, p. 138):

> "it shall be prima facie evidence against any party to such action of the existence of such unlawful combination for the purposes in this Act enumerated, if a substantial number of all authors, composers, proprietors, publishers, owners or their heirs, successors or assigns of copyrighted vocal or instrumental musical compositions in the United States, are shown to be members of any society, association, club, firm, partnership, corporation, group or entity."

The statute is not unreasonable. It announces only the elementary rules of evidence that would be applicable to any anti-trust suit, i. e., that if the facts stated in the statute were proven at trial, a prima facie case would have been established in any event by evidence. It does not mean conviction. Any prima facie case may be rebutted.

In the case of Morrison vs. California, 291 U. S. 82, *cited by the appellant on page 57 of their brief,* the term "presumption of guilt" is used, as in the *McFarland* case.

The Nebraska Act defines what shall be necessary to make out a "prima facie case," which is far different than the presumption of guilt. The facts in connection with the *Morrison* case are not in point, because there an alien was *presumed* to be guilty of a violation of the Immigration Laws, if he could not show and prove where he was born.

On pages 61 to 68 of appellees' brief, they set forth cases and argument that the State Statute cannot be justified under the police power. However, they cite no

cases that require reply. Appellants believe they have analyzed that subject fully under Points II, III and IV on pages 68, 69 and 70, of appellants' brief.

On page 68 of appellees' brief, they assert the state statute impairs obligations under existing contracts, in violation of Article 1, Section 10, of the Federal Constitution. Appellants reply to that position by first suggesting what contracts are impaired. If they mean the contract existing between the unlawful monopoly and the members in reference to public performance rights, then there is ample authority that such contracts are not within the purview of the Federal Constitution, for obvious reasons—assuming, of course, that all the appellees are a part of a combination that is found in a proper case to be illegal under Section 1 of the Act.

The Supreme Court of the State of Nebraska in *State vs. Adams Lumber Company,* 81 Neb. 412, quoting from 166, U. S. 290, holds:

> "'* * * When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by congress.' This language is pertinent to the act under consideration so far as trade or commerce within the state is concerned, since the Nebraska law is almost a literal copy of the Sherman Act, changing only its field of operation. In Northern Securities Co. v. United States, 193 U. S. 197, 331, the Sherman law was held to embrace and declare to be illegal every contract, or combination or conspiracy of whatever form, of

whatever nature, and whoever may be parties to it, which directly or necessarily operated in restraint of trade or commerce. This is the proper construction to be placed upon our statute, * * *."

In a suit brought by a trust or a monopoly to collect for goods, wares or merchandise sold, a defense of anti-monopoly of the plaintiff may not thus be collaterally set up to defeat collections. But in the case at bar we are confronted with no such proposition of law. Furthermore, if the combination is declared unlawful under the terms of the Nebraska Act, it is elementary that its further right to contract would necessarily terminate. The Nebraska Statute itself, however, does provide in Section 9 (D) (Appellants' Brief 147) for the adjustment of all property rights between all of the parties and those that might have an interest and intervene therein, so that no one may be denied their day in court under existing contracts.

Appellants cite the case of *Carl Laemmle vs. Stern,* 219 Fed. 534, as authority for the fact that a state court has the right to adjudicate all matters in connection with contracts, property rights, ownership, and all other matters *save infringement,* in reference to any copyright.

Thus, Section 9 (D) of the Nebraska Statute is in aid of, and not in derogation of, the National Copyright Act.

On page 69 of the brief of appellees the claim is made that the Fourteenth Amendment is violated, because it interferes with the use of the interstate business of the appellees; the Act requires the fixing of prices upon sheet music and phonograph records coming from

outside the boundaries of the state into the state. Appellants' reply to the sheet music phase, by stating that the appellees have no concern with sheet music. They admittedly have no interest therein, nor contracts with their members in reference thereto. Furthermore, sheet music is sold now by direct arrangement between the composers and the various publishing houses, one in open competition with the other, and the royalty of three cents is collected in the purchase price when the sheet music is sold over the counter.

The Nebraska Act does not provide in Section 2 (A) that the individual composer shall fix the price for private performance rights when sold. But the evidence is clear that such plan is now being followed by all of the individual appellees and all of the music publishing houses that go to make up ASCAP, and is not an issue on this appeal for any purpose.

As far as phonograph records are concerned, ASCAP is in no way concerned with them. The composer and his publisher make an arrangement with the manufacturer of the records, and the Copyright Law provides that the composer or publisher shall receive two cents for each record so manufactured. This is all by private contract, except the price. Each publishing house and its composers competes with the other publishing houses and with the various manufacturers of phonograph records for the recording business (R. Vol. II, 722). ASCAP is not concerned therein—excepting that the record shows

that ASCAP *claims* that a phonograph record that has thus been bought and paid for may *not* be played in a hotel or public place, directly or indirectly, for the indirect profit of the establishment where played. Appellants do not concede that right. If the public performance rights on records are to be reserved and must be paid for each time played in addition to the original sale price, then the Nebraska Act requires that those public performance charges of the composer be made known by a label upon the record, so that the purchaser if he wishes the public performance right for profit, might purchase it, at the time that the ownership of the chattel is alienated by purchase. If he does not do so appellants contend the right is lost under the copyright law and that the state statute (Sec. B) is really a reiteration in that regard to the national law.

Therefore, appellants reply there is no violation of the Fourteenth Amendment because sheet music is not in question, and phonograph records are not in question, excepting when publicly performed within the state after the disc or record or sheet music has come to rest and has become personal property within the State of Nebraska, and its use within reasonable limitations is within the police power of the state, under the Tenth Amendment.

The last proposition of appellees is set forth on page 75 of their brief, wherein they state that the whole statute must fail because the various sections cannot be

separated. In reply, appellants call the Court's attention to the words used by the appellees, "various sections." Certainly, "various sections" cannot be separated one from the other, but Sections 2 (A) and 2 (B) and 2 (D) (Appellants' Brief, 138, 139 and 140) may be separated from the balance of the Act, because they deal with the individuals, and the balance of the act deals with the unlawful combination and all of the enforcement provisions in reference thereto.

The appellants on pages 114 to 131 of their own brief, in the argument to sustain Law Points VIII and IX, cited ample authorities in reply to the appellees' final point on page 75 of appellees' brief. Appellees have clearly failed to answer wherein the cases cited under Point VIII on page 73, and under Point IX on page 74 of the appellants' brief, lack soundness in principle. Those cases apply directly to the "inseparability" and "inducing cause" features that were injected into the case at bar for the first time in the opinion of the Court on December 28, 1940, and were never raised as an issue by appellees, and were abandoned when the findings of fact, and conclusions of law, and decree were finally entered (R. Vol. I, 133-9).

In the brief of the appellants under the heading of "Conclusion," on page 131, the position of appellants in regard to appellees' final proposition is made clear and need not be further amplified in this reply brief.

———o———

CONCLUSION

The appellants respectfully request this Court to comply with the conclusion set forth in the "Brief of Appellants," at page 131 thereof.

Respectfully submitted,

WALTER R. JOHNSON,
Attorney General of Nebraska.

JOHN RIDDELL,
Assistant to Attorney General.

WILLIAM J. HOTZ of Omaha, Neb.,
Special Assistant to Attorney General.

GORDON DIESING and

WILLIAM F. DALTON, both of Omaha, Neb., assisting Wm. J. Hotz on Brief.
Attorneys for Appellants.

Wm. J. Hotz

1530-5 City National Bank Bldg.,
Omaha, Nebr.

Special Assistant to Attorney
General of Nebraska,
Attorney for Appellants.
Dated Omaha, Nebr., April 26, 1941.

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APPENDIX

APPELLANTS' OPENING STATEMENT PREPARED FOR ORAL PRESENTATION TO THE SUPREME COURT OF THE UNITED STATES ON APRIL 28th, 1941.

1. This case comes before the Supreme Court by direct appeal from a United States District Court in Nebraska. That tribunal was a three-judge Federal Court sitting by virtue of the authority of Section 266, and the appeal to this Court is under the authority of Section 238 (3) of the Judicial Code. The lower court consisted of United States Circuit Judge Gardner from the Eighth Circuit, United States District Judges Munger from the Lincoln, Nebraska, Division, and Donohoe from the Omaha, Nebraska, Division.

2. The case was in equity and tried without a jury. The complainants were the American Society of Composers, Authors and Publishers, which appellants have in the proceedings called "ASCAP," a New York corporation doing business in Nebraska, together with a number of the members of the Association, in their individual capacities, as music publishers and composers. They sought to restrain the enforcement of a Nebraska legislative bill that declared unlawful the operations of any association or combination of composers and publishers of copyrighted vocal and instrumental musical compositions that fixed prices for public rendition rights for profit in restraint of trade. A temporary injunction was granted and no appeal taken from that interlocutory order. A full hearing on the merits was held in 1939, and a permanent injunction was granted against the defendants below, who are the law enforcing officials of the State of Nebraska, consisting of the Governor, the Attorney General, the Secretary of State, the State Treasurer, the State Auditor, and most of the County Attorneys of the State. The enforcement of the bill which the final injunction permanently enjoined became a law on May 17, 1937.

3. The complainants' suit to restrain was filed on June 8, 1937. Thus no decision was had on any of the questions involved, by any Nebraska State Court.

4. The defendants below will be referred to as "Nebraska." These appellants have perfected their appeal before this Court, which has noted probable jurisdiction. The lower court passed in favor of its jurisdiction on the amount involved, and no error is before this Court on any question of jurisdiction. The complainants below are the appellees before this Court.

5. The complaint below sought to restrain the enforcement of the Nebraska legislative bill upon many constitutional grounds, *primarily:* that all of the provisions of the State legislative bill were in violation of the National Copyright Law; and the constitutional provisions in reference to copyrights; the equal protection; the due process; the commerce; the contract; and the severe penalty provisions of the Federal Constitution; and also the equal protection, the contract clauses and the protection against severe penalty provisions of the Nebraska Constitution.

6. I represent as Special Assistant to the Attorney General of the State of Nebraska, all of the appellants before this Court. The Attorney General, Mr. Walter R. Johnson, and his assistant, Mr. Riddell, appeared in the court below at the hearing on the merits and in the various steps leading up to this appeal, and are here as representatives of the State of Nebraska on this appeal.

7. There are no private parties who have intervened or are represented by the appellants in this case on appeal.

In the court below, the defendants denied violation of any of the constitutional provisions, and asserted the State's right to pass anti-monopoly legislation directed against the incorporeal right or franchise known as the "public performance right for profit," of copyrighted vocal and instrumental musical compositions.

9. To raise an issue directly against the particular complainant, ASCAP, the defendants below for their further answer alleged that

"The complainant American Society of Composers, Authors and publishers is an unlawful combination of a substantial number of the owners of copyrighted vocal and instrumental musical compositions within the United States; that said unlawful combination operates within the State of Nebraska by unlawfully and wrongfully fixing prices within the State of Nebraska in restraint of trade and contrary to all the provisions of the act; and that it does unlawfully and wrongfully exact fees and licenses within this state in violation of the terms of said act; that said Society does control substantially all the public performance rights of all the copyrighted vocal and instrumental musical compositions used within the State of Nebraska, in violation of the terms of said act, and that it does through its publisher members actually own and control substantially all the copyrighted musical compositions for use within this state, and in violation of the terms of said act, and actually does fix and control prices for its use for all purposes within (fol. 114) Nebraska, contrary to the provisions of the act.'

10. Thus there was presented to the court below at the hearing on the merits the legal questions of whether or not the act itself, based upon the issues presented, violated the Federal Constitution or the National Copyright Law, or both, and the further question of whether or not this particular plaintiff, ASCAP, was such unlawful monopoly as defined in the Act so as to bring it squarely within the provisions of the anti-monopoly statute in question.

11. A digest of cases will show that for the first time in its existence of 25 years, ASCAP's method of doing business and its corporate affairs were made a matter of court record. The two volumes of printed record of over 1,000 pages and many exhibits is before this Court. From it we find the explanation of many problems in reference to public performance rights for profit.

12. ASCAP in recent years in Nebraska filed against our citizens over 100 infringement suits; and if propor-

tionate throughout the nation possibly a total of 6,000 infringement suits have been prosecuted by it during the same period in the nation.

13. In none of this vast number of cases were the issues now before this Court presented for decision.

14. On December 28, 1939, the lower court rendered its opinion, and found the following facts (App. Br. 9-12). There is no cross-appeal in this case:

a. That ASCAP is made up of approximately 123 music publishing houses, which constitute the principal music publishers of the country.

b. Each of these has assigned to the Society the exclusive right of public performance for profit.

c. There are 44,000 composer members of foreign countries, authorizing ASCAP to deal exclusively for them. ASCAP issues blanket licenses for public performance rights for profit.

d. In Nebraska there are 350 dance pavilions.

e. There are ten radio stations operated within the state, of which one is affiliated with the Columbia and one with the National Broadcasting Networks. The other stations initiate their own vocal and instrumental musical programs within their studios in Nebraska.

f. A large number of theatres in Nebraska are users of music.

g. There are 284,000 radio receiving sets in private homes in Nebraska.

h. One-third of the population of the State at some time during the year attends dances or balls where music is played.

i. ASCAP has 391 signed contracts with music users within the State of Nebraska.

j. In 1938 these users in Nebraska paid approximately $70,000 to ASCAP.

k. The largest radio station in Nebraska pays about $26,000.00 annually to ASCAP.

l. There are many small users of music in Nebraska.

m. ASCAP is given by its members the exclusive right to make collections, fix prices, and otherwise carry on the business of public performance rights on all the musical compositions it controls.

n. Of the popular music necessary for the successful operation of radio stations, dance halls, hotels, and theatres, ASCAP has control of about 85% or 90%, and also controls from 50% to 75% of the standard or older music that is occasionally played.

o. ASCAP's income from public performance rights in the United States in 1938 was approximately $6,000,000.00.

p. All of the large and more influential publishers of music in the United States are members of ASCAP.

q. The users of music in Nebraska cannot successfully carry on their business except they deal with the plaintiff society, because there is no place where any person or agency to whom users of music in Nebraska may go in order to deal for public performance rights and negotiate for music in any substantial amount sufficient to meet the ordinary needs in the state, except the society.

r. The income of ASCAP is divided, fifty per cent to the composer members, and fifty per cent to the publisher members. These groups are classified by the Board of Directors of ASCAP by a Classification Committee of its own.

s. The court further found that whether or not, under the common law of Nebraska, the contracts between ASCAP and its members and the users were valid or not, need not be considered, and that the only issue before the court was the constitutional validity of the challenged statute.

t. The court further found that prior to the organization of the plaintiff society in 1914, the composer had no practical means of enforcing the exclusive right given him by the Copyright Act.

u. That users of music were unable to ascertain who the copyright owner was and to whom to go.

v. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement that the Society was organized.

15. In the opinion of December 28, 1939, the lower court also held as follows (App. Br. 22-27):

1. "The control or prohibition of combinations in restraint of trade and the prohibition of monopolistic practices is recognized as a proper exercise of the public power of the state."

2. "The Act of March 4, 1909, Chap. 320, Sec. 1 (E), 35 Stat. 1073, Title 17 U. S. C. A. Secs. 1-63, enacted pursuant to the grant of power in Article 1, Section 8 of the Constitution, was intended to grant valuable enforcible rights to authors and publishers without burdensome requirements, in order to afford greater encouragement to the production of literary works of lasting benefit to the world. *Washingtonian Pub. Co. v. Pearson*, 306 U. S. 30. The policy and purpose of the statute is to grant to the individual the right to control the use of the production covered by the copyright. Of course, the Act gives him no right to combine with others to insure control of prices and the consequent power of monopoly of an entire field by combination. Plaintiffs urge necessity as a justification or warrant for their organization. It is urged that without some such means of protection, the individual copyright owner is helpless to protect his rights, but if the statute violates no rights guaranteed to the plaintiffs by the Constitution or laws of the United States, the motive for the organization or acts of ASCAP, however, impelling, is not material."

3. "Section 2 (a) of the state statute requires the author, composer or publisher to specify legibly upon the musical composition, in whatever form it may be published, 'the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes.'"

4. "Section 2 (B) of the statute provides that,

"'In the event any author, composer or publisher, or any of his heirs, successors, or assigns, fails or refuses to affix on the musical composition

the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private and public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation, so using or rendering the same shall be free from any and all liability in any ininfringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state.'

"The state statute contains a separability provision (Section 12), which provides that,

"'If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or nonenforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act.'"

The court then held in reference to Section 2 (B) as follows (App. Br. 26):

"This provision, we think, clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act. As observed, his rights of ownership entitled him to sell or offer to sell, or to withhold from sale, as he may choose."

The court further held (App. Br. 27):

"The rule is that, although a statute may be invalid or unconstitutional in part, the other parts will be sustained where they can be separated from the part which is void.

"But where the connection between the invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative. The provision of this statute which we are here considering is such an essential part of the statute as not to be separable.

"In view of our conclusion on this phase of the case, it is unnecessary to consider the other contentions that have been ably argued and elaborately briefed by counsel for the respective parties.

"We conclude that permanent injunction restraining the enforcement of this statute must be granted. Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion."

16. In addition to the facts found and set forth in the opinion, the record stands undisputed that the following facts were established and there is no cross-appeal by ASCAP (App. Br. 63-65):

(1) That, contrary to its claim of being a protective association for its members, ASCAP is a very substantial business organization paying $30,000 a year rental for its New York office (R. Vol. I, 262).

(2) That it pays each of its officers, Buck and Mills, $50,000 annually together with large bonuses and other emoluments, and to its secretary Paine $25,000 per year (R. Vol. I, 208; 211).

(3) That no fee or license is charged the radio networks dealing in interstate commerce but only the local radio station for such public performance of ASCAP compositions as are reproduced or presented originally in the Nebraska studios (R. Vol. I, 263).

(4) That the entire operations of ASCAP are so carried on as to be within the state as intrastate transactions obviously and ostensibly to avoid, in the slightest degree, interference with interstate commerce (R. Vol. I, 263; 398-400; 455-8).

(5) That over 100 infringement suits were instituted by ASCAP in the past ten years in the Nebraska Federal Courts, all of which were dismissed when and if contracts were signed by the users with ASCAP on ASCAP's terms (R. Vol. II, 861-866).

(6) That there has been a gradual enlargement in the fees charged year by year; and that the users of music are helpless and must pay the price dictated by ASCAP if they use music commercially in their business enterprises (R. Vol. I, 433; 367-8; 380-6, 396-8).

(7) That many thousands of dollars are invested by the users of music in the State of Nebraska in theaters, broadcasting stations, hotels, amusement parks, halls, and pavilions; and that these investments would be adversely affected without the use of music of the type and kind controlled almost exclusively by ASCAP (R. Vol. I, 365-7; 397-400; 410-12).

(8) That the classification committee of ASCAP (Its Art. of Assoc.) (R. Vol. I, 64; 70) divides one-half the net income to composer members, classifying them arbitrarily in groups so that approximately 100 to 150 of the composer members receive approximately all of the composer money (R. Vol. I, 203-9); that these funds are annually paid as if dividends or earnings, and not as royalties to each composer on his music (R. Vol. I, 201-206; 64; 70).

(9) That the radio broadcasting companies in Nebraska are compelled, in contracting with ASCAP, to pay it 5% of the station's entire gross receipts, no matter from what source received, together with a sustaining fee, irrespective of whether the radio station used ASCAP or any other music, or no music, on a particular program (R. Vol. I, 396; 428; 402; 407; 408; Vol. II, 814, 794-6).

(10) That ASCAP refused to furnish the list of its compositions, the public performance rights of which it claimed to control, so that the user might portect himself against an innocent infringement in his establishment (R. Vol. I, 447; 403).

17. On January 25, 1940, the lower court entered its formal findings of fact, conclusions of law and decree (App. Br. 12-21).

18. The findings of fact as to the activities and control and operations of ASCAP were substantially as in the previous opinion set forth, but nowhere in the final papers was any reference made to the unconstitutionality of Section 2 (B), the unconstitutionality of any of the other sections of the Act, nor was the separability and the inducing cause features contained in the findings of fact, the conclusions of law or decree. In fact, in no place in the final papers was it found as a matter of fact, or concluded as a matter of law, or decreed, that the legislative Act in question was in violation of the National Copyright Act, nor any provision of the Federal Constitution or the State Constitution.

19. After stating substantially the foregoing facts the court's "Conclusions of Law" were as follows (App. Br. 18):

> "I. On the Findings of Fact, the court concludes as a matter of law that complainants are entitled to a decree permanently enjoining the defendants, their deputies, their successors in office, and all persons acting for or on behalf of them, or either of them, and each of them, from bringing or permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said statute against complainants and others similarly situated, their representatives, employees, agents, or any of them, and from prosecuting originally any members of the said American Society of Composers, Authors and Publishers, including complainants, their representatives or agents, or any of them, for violating any provision of said statute."

20. The decree restrained the state officers from interfering with the appellees,

> "for doing any legal act to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Nebraska or elsewhere, and generally from doing any act or thing to carry out or enforce

any of the provisions of said State Statute" (App. Br. 21).

21. On February 5, 1940, the defendants below filed a motion for a new trial with 22 affidavits attached (App. Br. 28-56).

22. The motion challenged the court's attention to the difference in the opinion and the findings of fact and conclusions of law in reference to the separability and the inducing cause matters set forth in the opinion and omitted from the findings of fact, conclusions of law, and decree.

23. The 22 affidavits were from a majority of the legislators of the State of Nebraska, stating that they voted affirmatively for the bill in question, because of its main anti-monopoly features and the enforcement and penalty provisions of the Act in reference to the combination declared unlawful, and that Sections 2 (A) and 2 (B) and 2 (D) all deal with the individual composer and were not the inducing cause for the affirmative votes of the legislators.

24. The court overruled the motion for the new trial and thus accepted as final and conclusive its findings of fact, conclusions of law and decree, and thereby as appellants contend, abandoned the inseparability features of the one unconstitutional section of the Act, which the court in its opinion stated, was inseparable from, and was the inducing cause for, the enactment of the statute.

25. Therefore, on appeal, this Court is confronted with an opinion that should be treated as supererogatory, and was so treated by the lower court. For the purpose of this appeal the Court should review only the findings of fact, conclusions of law and decree as entered on January 25, 1940, to *determine reversible error.*

26. On June 27, 1940, when the petition for appeal was presented and allowed and citation issued, the appellants filed fourteen assignments of error (App. Br. 57-67).

Principally, these assignments stated that after the court had found the facts, heretofore related in both its opinion and findings of fact, it erred in granting the

injunction against the enforcement of the statute against the combination that was proved to be unlawful and operating within the State of Nebraska as a price-fixing monopolistic organization acting in restraint of trade, as defined by the particular statute in question. Further that the findings of fact and conclusions of law set forth no proper grounds to sustain the final permanent injunctive decree.

27. There are nine points relied upon for reversal (App. Br. 68-74). These points are briefly as follows:

POINT NO. I.

"While copyrighted vocal and instrumental musical compositions may grant individual monopolies, they cannot be unitedly exercised to restrain competition and to fix prices; and a suit to enjoin such combination to restrain commerce and trade in copyrighted musical compositions is not one arising under the Copyright Laws of the United States."

POINT NO. II.

"There is nothing in the Constitution of the United States which precludes a state from adopting and enforcing statutes which secure competition and preclude combinations which tend to defeat it; and the state is the sole judge within reasonable limitations, of what laws shall be enacted for the protection and welfare of its people and as to when and how the police power of the state shall be exercised."

POINT NO. III.

"The state may pass such reasonable regulations in reference to the sale and use of copyrighted material by the individual owner and his publisher within the State of Nebraska as its legislature may deem proper, when the enactment is not prohibited by the Copyright Act nor in derogation of it."

POINT NO. IV.

"A state statute prohibiting monopolies in copyrighted vocal and instrumental musical compositions

does not militate against the commerce clause of the Federal Constitution when the acts of the unlawfully combining conspirators are so carried on as to be intrastate transactions."

POINT NO. V.

"The penalties of an anti-monopoly statute may not be considered so drastic as to be nonenforceable and to deprive those affected by it of the due process and equal protection clauses of the State and Federal Constitutions, when the act itself gives full and complete protection in the courts, and when the penalties for violation are from $1.00 to $5,000, and when the criminal provisions provided are misdemeanors with penalties not to exceed one year in prison, and when such fine or imprisonment may be imposed only after a full and complete hearing on the merits in the courts of the state, and when jury trial is guaranteed by the act and the Constitution of the State. The court may consider similar penalties in other anti-monopoly statutes in Nebraska and in the nation as an aid in sustaining the act."

POINT NO. VI.

"Where there is a conflict in the considered opinion of the Court and the findings of fact, conclusions of law, and decree subsquently entered, the opinion will be considered supererogatory; and the findings of fact, conclusions of law, and decree only will be considered on appeal."

POINT NO. VII.

"If a three-judge Federal Court, sitting under the provisions of Section 266 of the Judicial Code, in its findings of fact, conclusions of law, and decree makes no finding, conclusion, or decree that a state statute permanently enjoined is violative of a Federal statute or the Federal or State Constitution, the Supreme Court of the United States in reviewing the case is justified in reversing the cause, dissolving the permanent injunction, and ordering the case dismissed because the basis for the three-judge federal

court's jurisdiction is the repugnancy to a Federal statute or some provision of the Constitution."

POINT NO. VIII.

"If on appeal to the United States Supreme Court in an action brought under Section 266 of the Judicial Code, wherein the lower court granted a permanent injunction, the appellate court should consider an opinion rendered by the lower court previous to the findings of fact, conclusions of law and decree, holding that one subsection of the Act in question was inseparable from the balance of the Act, and was the inducing cause for its passage, and for that reason declared the entire Act nonenforceable, then the appellate court should re-examine such question and sustain the enforceability of all the balance of the Act, when it is clear that after striking out the unconstitutional part of the statute, the residue is intelligible, complete, and capable of execution. Especially is this true when the state court has never passed upon the question."

POINT NO. IX.

"The issue of whether or not a particular subsection of an act was the inducing cause for its passage is a matter of legislative intent which must be pleaded in order to raise the issue; and if not so raised, the trial court errs in any findings or ruling on the subject. It is proper for the parties adversely affected by such erroneous ruling to call the trial court's attention thereto in a motion for rehearing and a showing by affidavits of a majority of all the legislators who voted for the act that said subsection was not the inducing cause for its passage nor for their affirmative votes."

ARGUMENT TO THE COURT PREPARED FOR ORAL PRESENTATION

The legislative act in question (App. Br. 135-150) is divided into two main parts, separately sectioned, numbered and paragraphed.

1. Section 1 is directed against a combination of composers and publishers, who so combine to fix and collect license fees for public performance for profit of copyrighted vocal and instrumental musical compositions for use within the state, providing the members of such combination are made up of persons, firms or corporations constituting a substantial number of those within the United States who own or control copyrighted vocal and instrumental musical compositions. The appellee, ASCAP, has been proven to be such an unlawful combination and does so operate within the State of Nebraska in contravention of Section 1 of the Act.

2. Section 1 of the National Copyright Act grants exclusive rights in five separate items therein defined. The appellee, ASCAP, is concerned with only one of those rights, namely, "to perform the copyrighted work publicly for profit, if it be a musical composition, and for the purpose of public performance for profit."

The Nebraska Act uses the same identical language (App. Br. 138-9).

3. Section 5 of the National Copyright Act sets up thirteen (13) classifications of works for copyright registration. The use of only one, designated as "*musical compositions,*" is covered by the Nebraska Statute.

4. The other twelve classifications defined in the National Copyright Act, and in which many copyright owners may be interestsed, are not the subject matter of the Nebraska statute, nor does the appellee, ASCAP, claim herein nor has it asserted any rights in any of the other twelve classifications for copyright registration, save and except, as stated, the "public performance rights for profit of musical compositions." Neither the appellants nor the appellees, are interested in the classification described as "dramatico-musical compositions," or "motion pictures," "photoplays," or motion

pictures other than photoplays. The appellee, ASCAP, concedes that it neithers owns, sells nor publishes any music or music equipment; that its combination of composers and publishers deals only in what is known as the "small" public performance rights in vocal and instrumental musical compositions, as distinguished from the "grand" rights—such as the right to make moving pictures, dramatico-musical entertainment or plays, or any of the other classifications eligible for registration under the National Copyright Law.

5. There exists no combination of copyright owners or their assigns of any of the twelve other classifications designated for registration by the National Copyright Act. The testimony of the witnesses is clear in that regard. Each is in competition with the other, in those twelve other classifications, as well as in the promotion of their sheet music sales, their dramatic creations, their recording rights on phonograph records, and all other rights granted under the Copyright Act. These rights are all separable. There exists no combination in restraint of trade as a price-fixing monopoly in any of the other twelve classifications defined by the National Copyright Act. It remained for ASCAP alone to build up over a period of the last several years a complete monopoly in the "small" public performance rights of vocal and instrumental musical compositions, as demonstrated clearly by the opinion and the findings of fact of the court below, and which remain unchallenged in that factual particular, on this appeal.

6. The individual appellees are members of the combination declared unlawful by Section 1 of the Nebraska Act. Some of these individuals deal in dramatico-musical copyrights; in recording rights; in photoplays; and in moving pictures; and all of them more or less in the sale of sheet music that is used for private performance. But the Nebraska Statute in none of its parts makes any reference to any of these rights granted to the appellees under the National Copyright Law; consequently, they should be eliminated from consideration in this case. A careful reading of the Nebraska statute will prove the

accuracy of the appellants' position. Therefore, the reference made by the lower court in its opinion to these various other rights under the National Copyright Act, was obiter dictum.

7. Furthermore, the Nebraska Act in no way prohibits a combination of copyright owners of vocal and instrumental musical compositions from combining for the purpose of investigating infringements; establishing facts upon which to base their fees for licenses; nor does it prevent ASCAP from aiding and assisting in the protection of the rights of any of its members under the National Copyright Law; or to combine together for the purpose of bettering their conditions; enlarging their markets; simplifying procedure; encouraging the use of music; nor to otherwise indulge in activities for the benefit of its members. It only prevents substantial numbers of copyright owners from combining together to fix prices for public performance rights of vocal and instrumental musical compositions in restraint of trade; and of dividing up the income thus collected by the unlawful combination among its members as dividends, rather than as royalties for the individual copyright owners. Nowhere in the Act does it prohibit anyone from fixing and determining prices for public performance rights for profit; or making collections in whatever manner the composer and his publisher might desire so long as they do not combine in substantial numbers to fix prices and control the sale of public performance rights for profit in restraint of trade in those rights in Nebraska.

8. Under Law Point I (App. Br. 68), appellants have cited a number of well considered cases, sustaining the validity of Section 1 of the Nebraska Act, and all of the enforcement provisions in reference thereto.

9. Under the terms of the Sherman Anti-Trust Act, and various state anti-monopoly statutes, the question has frequently arisen, whether or not the intangible or incorporeal right known as "public performance" fell within the definition of "commodities," or "material," or "products," as set forth in those anti-monopoly stat-

utes. It has herefore been variously decided in reference to different intangible rights. But the legislature of the State of Nebraska under its police power reserved the right to declare as unlawful, when acting within the boundaries of that state, any combination that dealt unlawfully in most anything, including franchises or other intangible rights or privileges, among which are "public performance rights."

10. Therefore, whether the dealing in public performance rights is "trade" or "commerce" or is a "product" or "commodity," is immaterial in the consideration of the Nebraska statute, because it especially legislated against an unlawful combination in public performance rights in copyrighted vocal and instrumental musical compositions.

11. It has been repeatedly held that the National Copyright Act, because it granted the individual a monopoly for a limited number of years, was no defense to an attack under an anti-monopoly statute directed against those who combined those rights to fix prices in restraint of trade.

12. The lower court so held in its opinion of December 28, 1939 (App. Br. 9). No cross-appeal has been lodged as above stated.

13. The lower court has held that the common law copyright is not a question in this case. But the appellees claim that the Nebraska Act is faulty because it does not include the common law copyright, and therefore is discriminatory. This position is unsound because the composer loses his common law copyright right the moment he obtains his publication rights under the National Copyright Law and generally publishes or sells those rights. Therefore, there can be no conflict in that regard. Furthermore, the common law copyright is lost the moment the composer offers his rights generally for public performance for profit. Thus the common law copyright should be disregarded in this appeal.

14. Under Law Point Number II (App. Br. 68), a number of cases have been set forth that prove that the state in the exercise of its police power is the judge

of the content of its legislation, and even though it may be unwise in the mind of a reviewing court, or even impractical and perhaps not the best in the court's views, nevertheless it should be held valid under the Tenth Amendment.

15. Therefore, if the legislature of the State of Nebraska wishes to curtail the activities of an unlawful combination, dealing in public performance rights, and if the legislators found that the many music users in their state are best protected by a statute which prohibits such combination, then the legislative decision in the matters should not be disturbed by the judicial branch of our government.

16. Under Law Point III (App. Br. 69) a number of well reasoned cases have been cited, which are authority and precedent for the State of Nebraska to pass reasonable regulations in reference to every use that may be made within the State, of copyrighted musical compositions, as long as the provisions are not in derogation of, or in conflict with, the National Copyright Law.

17. The decisions under Law Points I and III of the appellant's brief announce a very definite principle in reference to the National Copyright Law, which is: *that the field of copyright use and performance has not been preempted by Congress.* Only in a very limited particular has Congress legislated, and that is by granting the exclusive right, with the power of assignment, to the individual, for a limited number of years and the right, inferentially, to determine his own price and to collect compensation for those rights from the user. Nowhere in the National Copyright Law is there authority for the ASCAP organization to carry on within the State of Nebraska, in the manner found by the lower court.

18. ASCAP *contends* that unless an organization operates as it does in connection with public performance rights, the authors and composers of vocal and instrumental musical compositions would have no way of collecting for those rights; that it thus deals because of necessity. Such argument has been answered in the

numerous decisions set forth in appellants' brief. In the language of this High Court it has been repeatedly stated that necessity and convenience, even though producing a more practical result, is no justification for an otherwise unlawful monopoly. The lower court recognized these principles of law, but in its opinion, rendered on December 28, 1939, after a full and complete hearing (App. Br. 22), the court surprised counsel for the appellants by announcing that Section 2 (B) and indirectly 2 (A) of the Nebraska Statute, which dealt with the individual composer, was the inducing cause for the passage of the entire act and inseparable therefrom, and was unconstitutional because in derogation of the National Copyright Law, and for that sole reason declared the whole statute unenforceable.

19. Under Law Point IX (App. Br. 73), appellants have raised the same point they did in the court below in its motion for rehearing and in its assignments of error, i. e., *that such issue should have been plead,* and should on appeal be disregarded for that omission.

20. However, there is justification in the record for the conclusion that the lower court abandoned this inseparability feature, for when the findings of fact, conclusions of law and decree (App. Br. 12-21) were signed and entered, no mention was made therein of the "inducing cause" and "inseparability" features that were set forth in the previous opinion of the court. Furthermore, when the lower court's attention had been called to this omission, by timely motion for new trial or rehearing, and the same was argued before the three-judge Federal Court, it overruled that motion and, as appellants contend, abandoned that issue and adopted only the court's findings of fact, conclusions of law, and decree as entered, without the inseparability feature as a basis for invalidating the whole statute.

21. Those findings of fact and conclusions of law do not sustain the decree for a permanent injunction because the findings reiterate almost entirely the findings of fact in connection with the unlawful activities; the strong monopolistic control; and the price-fixing features

of the ASCAP organization as set forth in the opinion. But the court justified its permanent injunction by its findings that it was *necessary* and *expedient* for ASCAP to so operate. Nowhere in the findings of fact or conclusions of law is it mentioned that any part of the act, either in reference to the individual or in reference to the unlawful combination, is in derogation of the National Copyright Law, or in conflict with any part of the Constitutions of the United States or the State of Nebraska.

22. Nevertheless the lower court restrained and enjoined *permanently* the law-enforcing officials of the State of Nebraska from carrying out any of the terms of the Act. Therefore, appellants contend that in the absence of adequate findings of fact and conclusions of law to sustain the decree, reversible error appears upon the face of the final papers from below and now before this Court for action and the cause should be reversed and dismissed.

23. There is no doubt that this Court does have the right to inquire into the basis for the opinion as well as the findings, if it so desires, and perhaps might treat the opinion other than supererogatory.

24. For that reason appellants believe it their duty to explain their position that Sections 2 (A) and 2 (B), either or both, are readily separable sections; and is a state problem that has never been decided by a state court.

25. Section 2 (A) (App. Br. 138), after stating that all authors and composers shall have within the State of Nebraska the full privileges conferred by the National Copyright Act, requires that the composer, in conjunction with his publisher, and independently of the unlawful combination defined by Section 1, shall fix upon his musical composition in whatever form it may be printed and published, the selling price thereof, either for private rendition, or if it is meant for public rendition for profit, the selling price thereof. Those words are copied from the National Copyright Law.

26. Section 2 (A) of the Nebraska Act does not compel or require the composer to grant public performance rights within the State of Nebraska, nor does it attempt to limit him in the matter of charges therefor. It states that the composer shall fix and determine at the time, when and if he sells his music for public performance and if meant for public performance for profit, the price for that purpose or any other purpose he wishes; and to make his collection therefor at the time he parts with his public performance for profit through the medium of the music arranged and sold for that purpose.

27. At this point, it is well to view a practical aspect of the business of publishing music. ASCAP is made up of all of the important or substantial music publishing houses in the United States, together with a limited number of composers. These publishing houses, according to the evidence, have acquired by outright purchase the ownership for all purposes the vast amount of copyrighted musical compositions in America. About twenty or more of these publisher members own large catalogs of music, which had been introduced as evidence in this case. The record so shows.

28. Section 1 of the Nebraska Act does not define as an unlawful monopoly a publishing house that owns copyrighted music, no matter how vast the amount might be. For example: Irving Berlin Company has approximately 10,000 pieces of music, in which all of the rights, excepting the public performance rights, are owned by that company. It has assigned only the public performance rights or "small" rights on "songs" exclusively to ASCAP. If ASCAP is dissolved in Nebraska because it is an unlawful monopoly acting within the State, the public performance rights for all the music obtained from the Irving Berlin Company, for example, will revest in that owner. The same will be true with Schirmer, Harms, Warner Bros., and all of the other music publishing houses that have combined together to make up the ASCAP monopoly. Nowhere does the Nebraska Act define a music publishing house, no matter how

large, as an unlawful monopoly acting in restraint of trade. It is only a combination of substantial numbers of music houses as owners that combine together to fix prices in restraint of trade in public performance rights that Section 1 of the Nebraska Act declares to be unlawful when so acting in that manner within Nebraska.

29. However, Section 2 (A) does state that such a classification, whether it be a publisher that owns thousands of pieces, or an individual composer that owns one or more pieces, when they sell their music for public performance rights for profit must fix the selling price thereon. Section 2 (B) provides, as a penalty measure, that if the owner refuses to do so in defiance of the requirement, then a person who buys that music shall have the right to publicly perform it for profit without paying anything further for the public performance rights that have not been reserved or restricted or withheld.

30. The lower court held that Section 2 (B) was the inducing cause for the passage of the Act and was inseparable from all the balance of the Act. Appellants understand that Section 2 (A), 2 (B) and 2 (D) (the latter in reference to the filing of the copyrights with the Secretary of State by the individual or the publisher) may, any one or all three, be stricken from the Act, and no enforcement officer of the State of Nebraska and no defendant in a case would be affected in the enforcement of all the remaining portions. If an action were started to dissolve the unlawful combination, any one, or all three, sections dealing with the individual, would not be brought into play. Or, on the other hand, if an individual composer sought to enforce his rights for public performance, even though he had not collected the selling price for public performance when the music was sold for that purpose, such legal controversy would stand absolutely independent of the balance of the Act, namely, the Section 1 provision against the unlawful price fixing combination, and the enforcement provisions in reference thereto.

31. As appellants understand, the National Copyright Law and the court decisions except decrees *established by consent* neither announce that a composer or his publisher has the right to collect the "small" public performance rights *each and every time music is played by the user who purchased it obviously for public performance rights and with no specific restrictions against* its repeated use for that purpose. Orchestrations or other arrangements or rearrangements are necessary for bands and orchestras when playing these compositions; these are bought from the publisher for the composer's profit and both well know that such music is so purchased for use for public performance for profit.

32. The case of Herbert vs. Shanley, in which the opinion was written for this Court by the late Justice Holmes, is cited by ASCAP and published in its advertisements, sometimes with the picture of Judge Holmes, as the legal authority for the right of ASCAP to collect for public performance rights each and every time the music is played publicly for profit, even though bought and paid for obviously for public performance rights by that particular purchaser.

33. The Herbert vs. Shanley case decides one point and only one, and that is that it is not necessary that an admission be charged at the door of an establishment where the music is played, in order to constitute public performance for profit. The court evidently *refused* to hold that the composer was *entitled to collect each and every time the music in that case was played for public performance for profit.* Under the Copyright Law and the decisions in reference to dramatico-musical compositions that are played on the stage, or elsewhere, the composer *is* protected against *repeated* performances by the users, and therefore always a cash deal is made when the dramatico-musical composition is licensed for a term of years, or a percentage of the box office receipts is provided. There is no authority in the National Copyright Act nor in the decisions in connection with non-dramatic musical compositions granting the right to collect for public performance each time—unless by special con-

tract or arrangement or notice of withholding the right entirely. After the user had bought the music and paid for it for public performance rights, the law construes that it was released and alienated to the purchaser for public performance rights and for use as frequently as the user might wish.

34. The Jewell La Salle case, cited by the appellees (opinion of this Court given by Justice Brandeis) is no authority for the activities of ASCAP in collecting for each and every time music purchased for public performance is so played. That case held that the presentation of music over a radio, in a hotel, or in the rooms of a hotel, was a public performance, but the Court refused to hold that it was a public performance for profit.

35. There have been some cases that have been decided by *consent decrees* entered by arrangements between the ASCAP attorneys and those on the other side, which hold that ASCAP may collect its public performance rights "whilst and where they may," but that is not binding upon the legislature of the State of Nebraska, nor the citizens of our state who were not parties to such "consents." Congress has legislated upon the subject, only by granting to the copyright owner and his assigns the public performance right, but Congress carefully avoided granting him the right to collect on an ordinary musical composition after it was sold for public performance purposes, each and every time that the individual who bought it played it publicly for his own profit.

36. The composer *may* collect each and every time there is a performance of a dramatico-musical composition, because there is justification for it in the National Copyright Law and the decisions in reference thereto. However, the Nebraska Act does not mention dramatico-musical compositions. Therefore, ASCAP and the other appellees are not concerned with such performing rights. Thus it appears there *is* justification for the validity of Section 2 (A) of the Act in question because it deals independently with the individual copyright owner's rights.

37. When the legislature of the State of Nebraska sought to avoid and prevent further unlawful practices by some other combination and some other organization that might arise to hamper both the composer and the user, it provided that public performance rights for profit in the ordinary "small" vocal and instrumental musical compositions shall be bargained for and collected at the time such music is sold for that purpose, because when the composer or his assigns parts with the right without a contract for this special use, he releases his performance right for that purpose to the purchaser for such repeated uses as that particular owner might wish unless a contract is made or a restriction is reserved to the contrary, and this may be done under the Nebraska law.

38. Appellants again call the Court's attention to the fact that the state courts have not passed upon any of the questions here involved; and especially they have not passed upon the "separability" and the "inducing" cause features mentioned in the opinion *alone*. Therefore, if this appellate Court decides that the opinion, which based the invalidity of the entire Act upon those features, is before this Court for review, then these matters which we have here outlined orally should be taken into consideration and study given to the problem as has been more fully set forth with authorities in appellants' brief.

39. If the Court decides that Sections 2 (A) and 2 (B) and 2 (D), or any one of those three sections, dealing with the individual, are in derogation of the National Copyright Act, and that the legislature of Nebraska overstepped its police power in enacting those provisions, then appellants contend that the balance of the Act must stand as valid in all its other parts.

40. If, however, the Court should decide the inseparability feature is pertinent and necessary for a decision in this case, then appellants believe they are justified in calling the Court's attention to the fact that the permanent injunction should be modified or set aside entirely, and the appellants, enforcing officials of

the State of Nebraska, given an opportunity to have those particular *state matters* reviewed by the courts of the State of Nebraska in a suit brought for that purpose, either under the provisions of the Act itself, or in some other appropriate manner in the present action.

41. Appellants believe, however, that the State of Nebraska has the right to determine in what manner public performance rights shall be *used and dealt with and bargained for within the State of Nebraska;* that in so doing it does not in any way act in derogation of the National Copyright Act. The reading of the cases in appellants' brief and those of the appellees as well, will convince this Court that ASCAP is dealing with an intangible and incorporeal right, namely, the right of public performance for profit, which right is being abused by the appellee, ASCAP.

42. Unless the copyright owner and his publisher confer and devise some lawful plan of bargaining for their public performance rights on the music they decide to sell for public performance rights within the State of Nebraska, they cannot complain because the legislature pointed the way to an orderly and legal method for them, to be enforced by law if necessary, for the benefit of all parties concerned.

43. Furthermore, the evidence shows that the composer and publisher would make more money from a practical standpoint in handling their public performance rights in the manner provided in Section 2 (A) of the law. A compliance would do away with the necessity for this overriding organization, known as ASCAP, which has taken upon itself the interpretation of the law and everybody's rights in dealing with public performance rights for profit. Most certainly the record in this case is clear that ASCAP has performed and is performing in a manner that was never intended by the National Congress when it passed the Copyright Law.

44. ASCAP by the method under which it does business should be convinced by this Court's decision that nowhere does the National Copyright Act give them the right to charge 5% of the gross receipts of a busi-

ness for a blanket license; or, so much per seat in a theatre where its music is played; or, so much per year for a hotel based upon the size of its dance floor; or for the collection of any sum of money it can exact from the very many small users of music in Nebraska that must depend for their livelihood in part upon the public performance rights of music exclusively controlled by ASCAP as found by the lower court.

45. If, as ASCAP contends, the collection of public performance rights for profit may only be accomplished by carrying on the business in the illegal manner in which it does carry on, then it is obvious that ASCAP violates every principle of American jurisprudence in reference to monopolies and price-fixing practices in restraint of trade, in order to accomplish its objectives and purposes. Such position is not tenable. There is reversible error, apparent in the record, because the findings of fact, and conclusions of law, which must properly support the permanent injunctive decree, are based fundamentally upon necessity and expediency alone.

The appellants upon behalf of all of the citizens of the State of Nebraska request this High Court to reverse the decree because the record clearly shows that the entire subject is surcharged with a definite public interest and that it is within the powers reserved to the people of the State of Nebraska to cause their legislature to pass, and the appellant State officials to enforce, the Nebraska legislative bill in question.

WILLIAM J. HOTZ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF STATE OF NEBRASKA, ET AL.,

Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

L. J. TEPOEL,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellees.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

MOTION TO DISMISS OR AFFIRM.

(Filed July 3, 1940.)

SIRS:

Please take notice that upon defendants'-appellants' petition for appeal, order allowing appeal, citation on appeal, cost bond on appeal, statement directing attention to Rule 12, subsection (3), assignment of errors and jurisdictional statements, including the papers annexed thereto, heretofore filed herein by defendants-appellants, the undersigned hereby move pursuant to Rule 12, subdivision (3) of the Rules of the Supreme Court of the United States for an

order dismissing the appeal herein or affirming the order appealed from upon the following grounds:

1. That the order appealed from is not a final decree granting or denying a permanent injunction and therefore is not within the provisions of Sections 238 and 266 of the Judicial Code (28 U. S. C. Secs. 345, 380).

2. That the appeal is solely from a discretionary order of this Court denying a motion for a re-hearing or for a new trial and that such order is not reviewable by the Supreme Court of the United States.

3. That no abuse of discretion on the part of the District Court in the entry of said order is alleged or assigned.

4. That the defendants' "motion for a new trial with twenty two affidavits attached" is not a proper part of the jurisdictional statement and should be disregarded by the Court in view of the fact that the order entered upon such motion is not reviewable.

Dated: Omaha, Nebraska, July 3, 1940.

Yours, etc.,

L. J. TePoel,
Solicitor for Complainants,
Office & P. O. Address,
605-8 Farnam Building,
Omaha, Nebraska.

To:

Walter R. Johnson, Esq.,
Attorney General of Nebraska,
Attorney for Defendants-Appellants,
Lincoln, Nebraska.

William J. Hotz, Esq.,
John Riddell, Esq.,
Andrew Bennett, Esq.,
Of Counsel.

MEMORANDUM OF PLAINTIFFS-APPELLEES IN OPPOSITION TO JURISDICTIONAL STATEMENT AND IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

(Filed July 3, 1940.)

In this suit brought by appellees under Section 266 of the Judicial Code (Tit. 28 U. S. C. Sec. 380), the United States District Court of the District of Nebraska, Lincoln Division, consisting of Hon. Archibald K. Gardner, Circuit Judge, and Hons. Thomas C. Munger and J. A. Donohoe, District Judges, entered a decree on *January 25, 1940* restraining appellants from enforcing the provisions of Chapter 138 Nebraska Session Laws 1937, p. 488.

On February 5, 1940, appellants filed a "motion for new trial with twenty two affidavits attached." A copy of the motion papers is annexed to appellants' jurisdictional statements.

The appellants' motion was heard by the District Court on March 25, 1940, and the motion was denied on March 28, 1940, at which time the following order was entered:

> "The Defendants' Motion for a New Trial, and for other relief, filed on February 5, 1940, in the above entitled case, which has heretofore been submitted to the Court, consisting of Archibald K. Gardner, Circuit Judge, Thomas C. Munger, District Judge and J. A. Donohoe, District Judge is hereby overruled."

The appeal herein is directed to the last mentioned order and not to the decree of injunction entered by the Court on January 25, 1940.

The citation on appeal herein directs appellees to show cause "why the decree rendered against the said appellants on *March 28, 1940,* as in said appeal mentioned, should not be corrected * * *." No order or decree other than that of March 28, 1940 is mentioned in the citation.

The petition for appeal likewise is directed only to the order of March 28, 1940. The decree entered on January 25, 1940 is mentioned, but there is no request that said decree be reviewed except insofar as such decree was attacked upon the motion for a new trial. The portion of the petition praying for an order allowing an appeal, reads as follows:

> "1. The above captioned defendants and appellants petition Your Honors for an order allowing an appeal from the order overruling their motion for new trial and rehearing, and to correct the decree entered, in the United States District Court, for the District of Nebraska, Lincoln Division, on March 28, 1940."

Appellees are filing herewith a motion to dismiss or affirm under Rule 12, subdivision (3) of the Rules of the United States Supreme Court, on the ground that the order appealed from is an order denying a motion for a new trial or a rehearing and is therefore not a final decree granting or denying a permanent injunction within the meaning of Sections 238 and 266 of the Judicial Code (28 U. S. C. Secs. 345, 380) and that in any event, the order entered upon the motion for a new trial is discretionary and no abuse of discretion on the part of the District Court is assigned as error.

Point I.

The Appeal Should Be Dismissed for Lack of Jurisdiction.

Appellants rely upon Sections 238 and 266 of the Judicial Code (28 U. S. C. Secs. 345, 380) to support the jurisdiction of the United States Supreme Court. Section 238 reads in part as follows:

> "*Sec. 345 (Judicial Code, section 238, amended.) Appellate jurisdiction from decrees of United States District Courts.* A direct review by the Supreme Court of an interlocutory or final judgment or decree of a dis-

trict court may be had where it is so provided in the following sections and not otherwise: * * *

* * * * * * *

(3) Section 380 of this title."

Section 266 (28 U. S. C. Sec. 380) provides that "A direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit", *i. e.*, a suit where an application for injunction to restrain enforcement of a State statute is heard by a district court of three judges.

The appeal herein is not one from a final decree granting or denying a permanent injunction, it is from the order denying a motion for a new trial.

Appellants can not attack the injunction decree upon an appeal from such an order. The only question involved upon such an appeal is whether or not the trial court abused its discretion.

In *National Shoe Co.* v. *Nathews*, 92 F. (2d) 751 (C. C. A. 5) the court dismissed an appeal from an order denying a motion to vacate a prior order granting a bankrupt's discharge. In that case as in the case at bar, the assignment of errors was directed to the final order itself as well as to the order denying the motion for a new trial. The court held that since the petition for appeal recited that appellant was appealing from the later order (denying the motion to vacate) rather than from the earlier order (which was on the merits), the earlier order could not be reviewed. The court held that the matter was jurisdictional, and further that an appeal could not be taken from the discretionary order denying the motion to vacate and thereupon dismissed the appeal. Said the court at p. 753:

"The appeal having been confined to the order of January 13, 1937, which was an order denying a rehear-

ing, it must be dismissed as not presenting any matter subject to review by this court."

Point II.

The Order of March 28, 1940, Denying the Motion for a Rehearing Was Not Appealable.

Almost a century ago, the Supreme Court laid down the rule in an opinion by Mr. Justice Story that no appeal lies from an order denying a rehearing since that matter rests in the sound discretion of the trial court. *Brockett* v. *Brockett*, 2 How. 238, 240. In that case there was also an appeal from the final decree itself. The Court entertained the appeal from the final decree but refused to consider the appeal from the order denying a rehearing. See in accord:

Indianapolis, etc., R. R. v. *Horst*, 93 U. S. 291, 301;
San Pedro, etc., Co. v. *United States*, 146 U. S. 120, 137;
Steines v. *Franklin County*, 14 Wall. 15;
In re Annin & Co., 95 F. (2d) 381, 382 (C. C. A. 2).

The motion to dismiss the appeal or in the alternative to affirm should be granted.

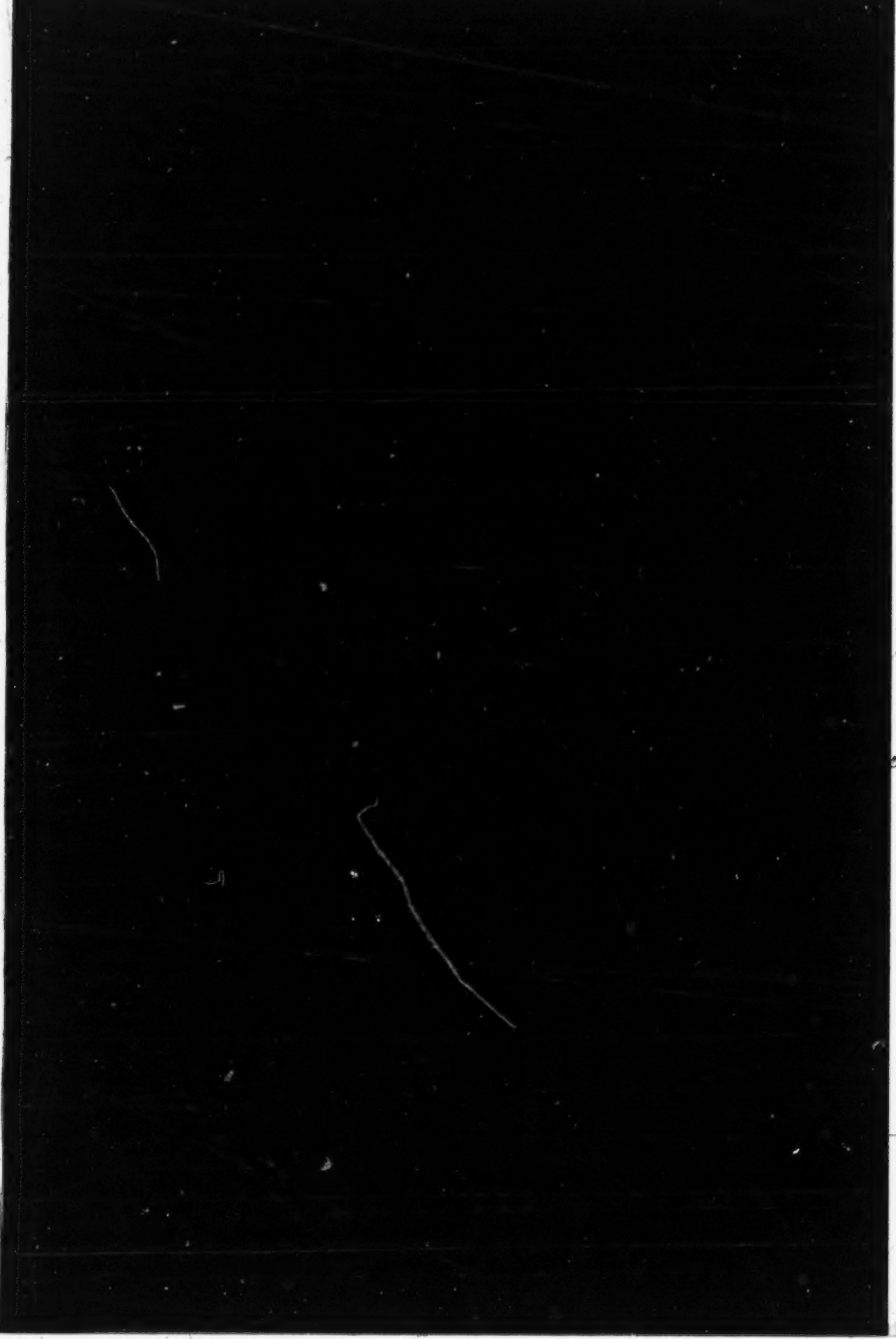
Respectfully submitted,

L. J. TePoel,
Solicitor for Plaintiffs-Appellees,
Office & P. O. Address,
605-8 Farnam Building,
Omaha, Nebraska.

Louis D. Frohlich, Esq.,
Herman Finkelstein, Esq.,
Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF THE STATE OF NEBRASKA, ET AL.,

Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,

Appellees.

SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Your petitioners, Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, suggest that there is a diminution of the record in the above entitled cause and respectfully move that this Honorable Court issue its writ of certiorari herein directed to the United States District Court for the District of Nebraska,

Lincoln Division, commanding that court to certify and send to this Court certain papers which are of record in that court in this cause. These papers are particularly described as follows:

1. Transcript of evidence upon the trial, held September 18, 19, 20 and 21, 1939, pages 1-503, inclusive, in question and answer form, as reported by Gordon L. Harman, Shorthand Reporter (Add. Tr. 1-503).[1]

2. Deposition of Sigmund Spaeth in question and answer form, pages 4-88, inclusive (Add. Tr. 504-593).

3. Deposition of Abraham Schwartz in question and answer form, pages 89-171 (Add. Tr. 594-677).

4. Deposition of Walter S. Fischer in question and answer form, pages 172-246 (Add. Tr. 678-753).

5. Deposition of Irving Caesar in question and answer form, pages 247-291 (Add. Tr. 754-799).

6. Deposition of Edwin H. Morris in question and answer form, pages 292-335 (Add. Tr. 800-844).

7. Deposition of George W. Meyer in question and answer form, pages 336-366 (Add. Tr. 845-876).

8. Deposition of Ella Herbert Bartlett in question and answer form, pages 367-413 (Add. Tr. 877-924).

9. Deposition of Will Von Tilzer in question and answer form, pages 414-472 (Add. Tr. 925-984).

10. Deposition of Edgar Leslie in question and answer form, pages 473-515 (Add. Tr. 985-1034).

11. Deposition of Jerome Kern in question and answer form, pages 1-26 of California depositions (Add. Tr. 1035-1062).

12. Deposition of Sigmund Romberg, in question and answer form, pages 27-44 of California depositions (Add. Tr. 1063-1083).

13. Plaintiffs' Exhibit 13 annexed to deposition of Irving Caesar (list of Irving Caesar's compositions) (Add. Tr. 1310-1319).

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[1] References to "Add. Tr." refer to pages of additional transcript certified by the Clerk of the District Court on December 23, 1940 and on file in this Court.

14. Plaintiffs' Exhibit 18 annexed to deposition of George W. Meyer (list of George W. Meyer's compositions) (Add. Tr. 1320-1331).

15. Plaintiffs' Exhibit 19 annexed to deposition of Ella Herbert Bartlett (Contract between Victor Herbert and M. Witmark & Sons [6/8/10]) (Add. Tr. 1361-1366).

16. Plaintiffs' Exhibit 20 annexed to deposition of Ella Herbert Bartlett (Contract dated 4/2/14 with Victor Herbert) (Add. Tr. 1367-1372).

17. Plaintiffs' Exhibit 21-E annexed to deposition of Ella Herbert Bartlett (Contract between Victor Herbert and T. B. Harms) (Add. Tr. 1332-1338).

18. Plaintiffs' Exhibit 22 annexed to deposition of Ella Herbert Bartlett (Copyrights on "Red Mill") (Add. Tr. 1349-1350).

19. Plaintiffs' Exhibit 23 annexed to deposition of Ella Herbert Bartlett (Copyrights on "Naughty Marietta") (Add. Tr. 1351-1352).

20. Plaintiffs' Exhibit 24 annexed to deposition of Ella Herbert Bartlett (Copyrights on "Mademoiselle Modiste") (Add. Tr. 1353-1355).

21. Plaintiffs' Exhibit 25 annexed to deposition of Ella Herbert Bartlett (Renewals of copyrights on "Mademoiselle Modiste") (Add. Tr. 1356-1357).

22. Plaintiffs' Exhibit 26 annexed to deposition of Ella Herbert Bartlett (Renewals of copyrights on "Red Mill") (Add. Tr. 1358-1359).

23. Plaintiffs' Exhibit 27 annexed to deposition of Ella Herbert Bartlett (Renewals of copyrights on "Babes in Toyland") (Add. Tr. 1360).

24. Plaintiffs' Exhibit 29 annexed to deposition of Edgar Leslie (list of Edgar Leslie's compositions) (Add. Tr. 1382-1383).

25. Exhibit 1 annexed to deposition of Jerome Kern (list of Jerome Kern's compositions) (Add. Tr. 1384-1400).

26. Exhibit 4 annexed to deposition of Sigmund Romberg (list of Sigmund Romberg's compositions) (Add. Tr. 1401-1410).

27. Plaintiffs' Trial Exhibit 1 (Gene Buck's compositions) (Add. Tr. 1084-1089).

28. Plaintiffs' Trial Exhibit 15 (in part). It is necessary to include only one of the twenty contracts embraced in this exhibit. That contract appears at pages —— to —— of Appellees' Additional Transcript. This typical contract should be used in place of appellants' summary (Appellants' Tr. Vol. III, p. 30).

29. Plaintiffs' Trial Exhibit 16 (in part). In addition to appellants' summary of this exhibit (Appellants' Tr., p. 30) or in lieu of the part thereof which describes a contract with a "newspaper-owned station," the record should include the contract between the Society and Huse Publishing Company (Add. Tr. 1452-1453).

30. Plaintiffs' Trial Exhibit 17 (tabulation of receipts from the State of Nebraska from January 1, 1928 to June 30, 1939 (Add. Tr. 1090).

31. Plaintiffs' Trial Exhibit 18 (Schedule of cost of operating and commissions paid in Nebraska, 1932-37) (Add. Tr. 1091).

32. Plaintiffs' Trial Exhibit 20 (Schedule of sheet music sales which grossed over a million copies) (Add. Tr. 1092-1094).

33. Plaintiffs' Trial Exhibit 21 (Schedule of licenses in effect 1922-39) (Add. Tr. 1095).

34. Plaintiffs' Trial Exhibit 22 (Page 1122 and first twenty lines of Page 1123 of Copyright Hearings, 1936) (Add. Tr. 1455-1456).

35. Plaintiffs' Trial Exhibit 29 (Table 19 of Federal Communications Commission Bulletin) (Add. Tr. 1096).

36. Plaintiffs' Trial Exhibit 32 (Sample sheet from ASCAP Index) (Add. Tr. 1097).

37. Plaintiffs' Trial Exhibit 33 (Circular explaining ASCAP Index) (Add. Tr. 1098-1105).

38. Plaintiffs' Trial Exhibit 35 (Advertisement of Lang-Worth Feature Programs, Inc.) (Add. Tr. 1106).

39. Plaintiffs' Trial Exhibit 36 (Chart showing Society's accounts with foreign societies) (Add. Tr. 1107).

40. Plaintiffs' Trial Exhibit 38 (List of compositions of William J. Hill) (Add. Tr. 1108-1111).

41. Plaintiffs' Trial Exhibit 39 (List of compositions of Philip Sousa) (Add. Tr. 1112-1123).

42. Plaintiffs' Trial Exhibit 40 (List of compositions of Oley Speaks) (Add. Tr. 1124-1127).

43. Plaintiffs' Trial Exhibit 41 (List of compositions of Deems Taylor) (Add. Tr. 1128-1131).

44. Plaintiffs' Trial Exhibit 42 (1921 contract between Society and Malec Bros.) (Add. Tr. 1132).

45. Plaintiffs' Trial Exhibit 43 (1922 contract between Society and Malec Bros.) (Add. Tr. 1133).

46. Plaintiffs' Trial Exhibit 44 (Letter from Amusement Owners Protective Association of Nebraska) (Add. Tr. 1134).

47. Plaintiffs' Trial Exhibit 49 (pages 140-143 of "Radio Broadcasting" for September, 1933) (Add. Tr. 1135-1138).

48. Plaintiffs' Trial Exhibit 53 (Letter of May 12, 1939 from E. N. Blazer to Eppley Hotels Co.) (Add. Tr. 1139-1140).

49. Plaintiffs' Trial Exhibit 62 (List of suits filed by the Society in Nebraska) (Add. Tr. 1141-1152).

50. Plaintiffs' Trial Exhibit 64 (Contract between SESAC and Station WOW) (Add. Tr. 1153-1155).

51. Defendants' Exhibit 45 (Agreement between National Broadcasting Company and Station WOW) (Add. Tr. 1156-1159).

52. Defendants' Exhibit 52 (Form of first notice sent by Society to infringers) (Add. Tr. 1160-1163).

53. Defendants' Exhibit 54 (Agreement between Columbia Broadcasting System and Station KOIL dated April 25, 1938) (Add. Tr. 1164-1169).

54. Defendants' Exhibit 58 (Answers to interrogatories propounded to Walter Fischer and exhibits 1-10, inclusive, thereto annexed) (Add. Tr. 1275-1292).

55. Defendants' Exhibit 59 (Answers to interrogatories propounded to Saul Bornstein and exhibits 1-10, inclusive, thereto annexed) (Add. Tr. 1293-1308).

56. Defendants' Exhibit 60 (Answers to interrogatories propounded to Gene Buck and exhibits 1, 2 and 3 thereto annexed) (Add. Tr. 1171-1250; 1373-1381).

57. Defendants' Exhibit 61 (Answers to interrogatories propounded to Gustave Schirmer and exhibits 1-10, inclusive, thereto annexed) (Add. Tr. 1251-1274).

58. Docket Entries (Add. Tr. 1464-1470).

59. Appellees' Designation of Additional Portions of Record filed July 26, 1940, with Proof of Service (Add. Tr. 1411-1414).

60. Counter-Designation of Record by Plaintiffs-Appellees, with Proof of Service, filed July 31, 1940 (Add. Tr. 1415-1420).

61. Counter-Designation filed pursuant to order of August 20, 1940, together with exhibits thereto annexed, together with Proof of Service thereof (Add. Tr. 1421-1457).

62. The request to the Clerk of the District Court to certify to this Court certain papers which are of record in that court in this cause, filed in the District Court on December 16, 1940 (Add. Tr. 1458-1463).

63. Certificate of the Clerk of the District Court, dated December 23, 1940, transmitting said papers to this Court (Add. Tr. 1472-1474).

Reasons for This Motion.

1. The Testimony in Question and Answer Form and Certain Exhibits must be Referred to in Resolving Certain Issues of Fact Raised by Appellants' Assignments of Error and Points Relied upon in this Court.

(a) Appellants' assignment of error "X" asserts that the court below erred in refusing to find a number of facts (App. Tr. 81).[2]

(b) Appellants' assignment of error "XII" attacks one of the findings of the court below holding that the State statute which the court held invalid could not possibly be complied with (App. Tr. 84).

(c) Appellants' assignment of error "III" refers to certain facts found by the court below and assigns as error that the injunction should not have been granted in view of those findings of fact (App. Tr. 78-79).

---

[2] References to "App. Tr." refer to pages of the transcript heretofore filed by appellants.

If there be any doubt about the interpretation to be placed on the facts found, it will be necessary to have all the evidence before the court.

(d) Appellants' assignment of error "VII" urges that certain sections of the statute should have been upheld because they were enacted as a proper exercise of the police power in view of "fraud and unlawful practices" perpetrated by appellees in Nebraska. Appellees dispute the existence of any such evidence, and in view of this assignment of error it is essential that all the evidence be before this Court (App. Tr. 80).

(e) Appellants' assignments of error "IX" and "XI" also raise questions of fact (App. Tr. 81).

2. Appellants Failed to File a Praecipe in the District Court promptly after Taking their Appeal as Required by Rule 10 (2) of the Rules of this Court.

(a) The appeal in this case was allowed on June 27, 1940 (App. Tr. I, 72-3). On the same day, appellants filed a document entitled "Brief and Authorities in Support of the Assignment of Errors and Law Points with Authorities to be Relied Upon for Reversal *in Lieu of the Designation Required by Supreme Court Rule No. 13 in Reference to Designation of Law Points*" (App. Tr. I, 85-91).

(b) Although that document purported to comply with Rule 13 of the Rules of this Court, it was not accompanied by a designation of the parts of the record which appellants thought necessary for the consideration of the points submitted. Nor was any designation filed at that time by appellants with the Clerk of the District Court indicating the portions of the record to be incorporated into the transcript as required by Rule 10 of the Rules of this Court.

(c) Appellees were at a loss to understand the nature of the record upon which appellants intended to rely. Appellees realized that it was necessary to send a transcript of the record to this Court within forty days after the time the appeal was allowed (this appeal having been allowed on June 27, 1940) and were uncertain as to whether appellants intended to present the case to this Court solely upon the papers served upon them on or about June 27, 1940 or whether they proposed to docket the full record in this Court.

(d) Appellees waited a reasonable time after June 27, 1940 and did not receive any praecipe from appellants as required by Rule 10, subdivision 2 of the Rules of this Court. Thereupon, on July 26, 1940 appellees, acting upon the assumption that appellants did not propose to incorporate in their record any papers other than those served on June 27, 1940, filed a designation of additional papers to be incorporated in the record (Add. Tr. 1411-14).

(e) The day after this designation was served and filed by appellees, appellants for the first time filed a praecipe dated July 27, 1940, with a request that the Clerk of the District Court file the same with the clerk of this court within forty days after June 27, 1940, i. e., on or before August 6, 1940 (App. Tr. I, 181-3). Said praecipe did not designate the testimony of the witnesses in question and answer form, but rather an alleged narrative of such testimony which had not been submitted to appellees and which, for reasons to be hereinafter stated, is incorrect and incomplete.

(f) Immediately upon receipt of these papers, appellees filed a new counter-designation on July 31, 1940 (Add. Tr. 1415-20) in which appellees stated their objections to certain parts of the record prepared by appellants and requested

the addition of certain other parts of the record (Add. Tr. 1415-20).

(g) Thereupon Judge Donohoe in the court below, entered an order on August 1, 1940 setting a hearing on September 6, 1940 to settle the differences between appellants and appellees. Thereafter, on August 20, 1940, the court below adjourned the hearing until October 7, 1940 and directed that an additional counter-designation be filed by appellees on or before September 23, 1940.

(h) Thereafter and in conformity with the said order, appellees served a further designation of additional parts of the record to be transmitted to this Court and a more detailed statement of their objections to the record as prepared by appellants (Add. Tr. 1421-57). In order to remove all doubt about the form of record which appellees considered proper, a full and complete itemization was made of the papers which appellees regarded as a proper record.

(i) Appellants filed a "Resistance to the Appellees' Counter-Designation of the Record on File Submitted and Filed by Appellants" on the ground, among others, that this Court was the appropriate forum to decide the contents of the record on appeal rather than the court below. Appellants there stated (p. 6):

"XVIII.

"That under Sub-division "H" of Rule 75 of the Code of Civil Procedure, and which is referred to and made a part as far as possible of Rule 10, Paragraph 2 of the Rules of the Supreme Court of the United States, this cause may be docketed upon appeal in the Supreme Court of the United States; and after the appeal, it is within the province of the appellate court, on a proper suggestion, to take cognizance and enter an order in accordance with the prayer hereof."

Other objections are also made to the counter-designations filed by appellees.

(j) On October 15, 1940, the court below entered an order overruling appellees' objections to the proposed record, and sustaining appellants' objections to the appellees' proposed additional portions of the record.

3. The Appellants' Transcript Is Defective in the Following Particulars:

(a) The oral testimony, depositions and answers to interrogatories are improperly condensed. Certain answers to interrogatories are entirely omitted. This may be corrected by substituting Items 1-12, inclusive, and Items 54-57, inclusive, of the papers described above (pages 1-1083; 1171-1308; 1373-81 of Additional Transcript) in place of Volume II of Appellants' Transcript, pages 1-128.

The purported condensation of the testimony does not fairly represent the testimony given. This applies to the testimony of each and every witness and to the whole thereof to such an extent that it would be useless to attempt to refer to any specific part of such testimony. We urge, therefore, that the purported condensation of appellants be eliminated and that the testimony in question and answer form be substituted as permitted by Rule 75(c) of the Rules of Civil Procedure.

Appellants' condensation of the testimony does not show how or for what purpose the exhibits were offered in evidence. For example, Plaintiffs' Exhibits 2, 3, 4 and 5 are bunched together without anything to show why they were offered in evidence (Applts. Tr. Vol. II, 2); Defendants' Exhibits 55, 56, 57, 58, 59, 60 and 61 are likewise bunched together in the record prepared by appellants without any indication of the manner in which or the purpose for which they were offered (Applts. Tr. Vol. II, 67). All the other exhibits are mentioned as if to support certain statements

purported to have been made by the witnesses without the necessary identification showing the purposes for which such exhibits were offered.

The depositions which were read into the record (Add. Tr. 307-14) show the practical effect of the state statute upon composers, authors and publishers of copyrighted works. Appellants have summarized those depositions in the same manner as the testimony of the witnesses who appeared at the trial. These summaries appear at pages 70-124, inclusive, of the record prepared by appellants.

The answers to interrogatories, with exhibits thereto annexed, addressed by appellants to certain of the plaintiffs and their officers were placed in evidence by appellants as their Exhibits 58, 59, 60 and 61 (App. Tr. Vol. II, 67, Vol. III, 41, Add. Tr. 1171-1308). Thus appellants admitted their relevancy. Yet appellants summarily dismissed them in their proposed record by merely referring to a single question and the answer thereto and taking excerpts from a single form of contract (App. Tr. Vol. II, 125-128). The answers to interrogatories addressed to plaintiff Gene Buck were *completely* omitted with appellants' statement that "in the main all of the answers to the interrogatories which he answered were covered by his testimony given at the trial and, therefore, the same is not repeated herein." Appellees refrained from taking up the time of the court below with the oral testimony of Mr. Buck concerning the many matters which were covered in his answers to the interrogatories; appellants must have been of the same opinion because they themselves offered these answers to interrogatories in evidence. Those answers and the exhibits annexed thereto should be a part of the record before this Court.

(b) Certain exhibits are incorrectly summarized in Volume III of Appellants' Transcript. We request that in these cases the entire exhibits be incorporated in the record. Items 13-27, inclusive, and Items 30-53, inclusive, of the

papers described above (pages 1310-1410; 1084-1169; 1436-1456 of Additional Transcript) should be substituted in place of the summaries of those exhibits appearing in Volume III of Appellants' Transcript, pages 46-49, 29, 31-39 and 41.

It will not be necessary to print all these exhibits in full. Certain of them were also made exhibits in the companion cases of *Gibbs* v. *Buck* and *Buck* v. *Gibbs* (October Term, Nos. 610 and 611, respectively) and short summaries of such exhibits have been agreed to by both parties in those cases. If similar summaries are acceptable to appellants in the case at bar, a considerable amount of printing will be saved. This applies to Items 13, 14, 24, 25, 26, 27, 41, 42, and 43 of the papers designated above, being Plaintiffs' Deposition Exhibits 13, 18 and 29 annexed to the depositions taken in New York, and Exhibits 1 and 4 annexed to the depositions taken in California, and Plaintiffs' Trial Exhibits 1, 39, 40 and 41, respectively.

The summaries referred to above will be annexed to appellees' designation of the parts of the record to be relied on, if this application is granted.

(c) Certain exhibits which have been incorrectly summarized by appellants include a number of contracts. It is necessary that one of the typical contracts in each case be before the court. This is provided for in Items 28 and 29 of the papers designated above, which should be used to supplement certain statements in appellants' summary of Plaintiffs' Trial Exhibits 15 and 16 (Applts. Tr. Vol. III, pp. 30-31).

(d) Items 58-62, inclusive, of the papers designated above, consist of Docket Entries and designations of portions of the record filed in the court below. This may be dispensed with in printing but they should be before this

Court to facilitate the preparation and printing of the record.

(e) Item 63 of the papers designated above is the Certificate of the Clerk of the District Court, dated December 23, 1940, transmitting to this Court the papers described in Items 1-62, inclusive.

The record in this cause has not yet been printed. This application is made before the printing of the record so that there will be no delay in the argument of this cause, together with the argument of the companion cases of *Gibbs* v. *Buck* and *Buck* v. *Gibbs* (October Term, Nos. 610-611, respectively).

4. Appellees Are Entitled Under Rule 10 (2) of This Court to Have the Testimony of Witnesses in Question and Answer Form Substituted for the Alleged Narrative Statement of Appellants.

Rule 10 (2) of this Court provides that Sec. (c) of Rule 75 of the Rules of Civil Procedure is applicable to an appeal to this Court from a Federal District Court. Such latter Rule provides that an appellee, if dissatisfied with the narrative statement prepared by the appellant, "may require testimony in question and answer form to be substituted for all or a part" of said narrative statement. As previously stated, appellees are dissatisfied with the whole of the narrative statement prepared by appellants. It follows that appellees are entitled to have the testimony in question and answer form, including, of course, the depositions, substituted for the alleged narrative statement of the appellants.

Wherefore, your petitioners pray that a writ of certiorari be issued out of, and under the seal of this Honorable Court directed to the United States District Court for the District of Nebraska, Lincoln Division, commanding that court

to certify and send to this Court the papers enumerated herein.

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellees.

I, Herman Finkelstein, counsel for the appellees in the above entitled cause, do solemnly swear that the facts recited in the foregoing "Suggestion of a Diminution of the Record and Motion for a Writ of Certiorari" are true; except such facts as are alleged upon information and belief, and as to those facts, that I believe them to be true.

HERMAN FINKELSTEIN,
Counsel for Appellees.

Sworn to and subscribed before me this 11th day of January, 1941.

FRANCES P. STANLEY,
[SEAL.] *Notary Public, D. C.*

My commission expires February 15, 1942.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 312

HARRY R. SWANSON, individually and as Secretary of State of Nebraska, *et al.*,

Appellants,

vs.

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*

BRIEF OF APPELLEES

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellees.

April, 1941.

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Supreme Court of the United States

OCTOBER TERM, 1940

HARRY R. SWANSON, individually and as Secretary of State of Nebraska, *et al.*, *Appellants*, *vs.* GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*	No. 312

BRIEF OF APPELLEES*

Opinions Below.

The opinion of the District Court for the Western District of Nebraska (R. I, 125-132) is reported in 33 F. Supp. 377. A prior unreported opinion of that court granting a temporary injunction was filed November 13, 1937 (R. I, 121-3).

Statutes Involved.

The Nebraska Statute, the validity of which is involved, is the Act of May 17, 1937, Chapter 138, Nebraska Laws, 1937 (Session Laws, Nebraska, 1937, pp. 488-501). The Statute will be referred to in this brief as the "State Statute." It is printed in full at pages 115-131 of the Appendix to appellees' brief and at R. I, 74-88. Its provisions are summarized below (pp. 25-33).

The State Statute is substantially the same as the Florida Act of June 9, 1937 (Volume I, General Laws of Florida, 1937, Chapter 17807) involved in the companion case of *Watson (Gibbs)* v. *Buck*, October Term, 1940, No. 610.

* Italics used in this brief are ours unless otherwise indicated.

This case also involves the Federal Copyright Act (35 Stat. L. 1075, Tit. 17, U. S. C., as amended) which is printed in Copyright Office Bulletin No. 14. Copies of this Bulletin will be handed to the Court on the argument.

Scope and Contents of this Brief.

As the Nebraska Statute is substantially the same as the Florida Statute of 1937 which is before this Court for review in Case #610, the following brief is almost the same as that which is filed in Cases #610 and #611, so far as they deal with the last mentioned Florida Statute. In some respects the records are not identical and this has required changes in the respective briefs. Moreover, the two briefs contain references to the records in the respective cases.

The main point relied upon in the Florida brief, i.e., that appellees are not entitled to any relief because they have allegedly violated the Sherman Act and are thus, as it is claimed, guilty of "unclean hands," is not advanced in the brief for appellants in the Nebraska case. Consequently, that point is not considered in this brief except as it is necessarily shown to be without merit in the discussion of the decision of this Court in *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, under Point II hereof. The point is discussed under Point VI of our brief in the Florida case and under Point I of the reply brief in that case.

Statement of the Case.

I. Nature of the suit and proceedings below.

This suit was brought on the *joint* behalf of all members of the American Society of Composers, Authors and Publishers (hereinafter referred to as the "Society"), an unincorporated association recognized by the Laws of the State of New York, consisting of approximately 1,425 composers and authors and 131 publishers of music, and *also* on behalf of certain members of the Society in their individual capacities, to enjoin enforcement of the State Statute on the ground that it is in conflict with the Federal

Constitution and treaties between the United States and foreign countries (Complaint, R. I, 1-36, Findings "2" and "4," R. I, 133-4).

A temporary injunction restraining the enforcement of the State Statute was granted on November 13, 1937 by a statutory District Court consisting of Judge GARDNER, Circuit Judge, and Judges MUNGER and DONOHOE, District Judges (R. I, 123-5). No appeal was taken from that decree (R. I, 102).

Appellants filed an answer and motion to dismiss the complaint, alleging that appellee Society was a price-fixing monopoly and violated the State Statute and therefore was not entitled to equitable relief (R. I, 98, 100, 103, 107-8).

Existence of the requisite jurisdictional amount was amply established as a fact, and was conceded by appellants (R. I. 167-8).

On January 25, 1940, the court below (consisting of Judge GARDNER, Circuit Judge, and Judges MUNGER and DONOHOE, District Judges), after a trial on the merits, granted a permanent injunction restraining enforcement of the State Statute in its entirety (R. I, 139-41). The Findings of Fact and Conclusions of Law are printed at R. I, 132-9.

Appellants filed a motion for a new trial (R. I, 141-62) which was overruled on March 28, 1940 (R. I, 162-3).

II. Organization of appellee Society was necessary to meet the evil of wholesale infringement of copyrighted musical works by unauthorized public performances for profit.

A. THE NATURE OF THE RIGHT OF "PUBLIC PERFORMANCE FOR PROFIT" REQUIRES COLLECTIVE ACTION ON THE PART OF CREATORS AND PUBLISHERS OF COPYRIGHTED MUSICAL WORKS.

Section 1(e) of the Copyright Law of 1909 confers on all persons who comply with the provisions of that law, "the exclusive right * * * to perform the copyrighted work publicly for profit if it be a musical composition." This

right is often called the "petit droit" or "small right", to distinguish it from the "stage right" or "grand right" which is protected under subdivision (d) of Section 1 of the Copyright Law. The latter section gives owners of copyrighted dramatic works (including dramatico-musical works such as operas, operettas and musical comedies) the exclusive right "to perform or represent the copyrighted work publicly," regardless of whether or not the performance is given for purposes of profit.

Although the stage right had been protected against unauthorized public performances as early as the Copyright Act of 1856 (Act of August 18, 1856, 11 Stat. 138-9), similar protection was denied to composers of *non*-dramatic musical works until enactment of the Musical Copyright Act of 1897 (Act of January 6, 1897, 29 Stat. 481-2, amending R. S. Sec. 4966).

When the law of 1897 was enacted, there were few places where performances of non-dramatic musical compositions were given. The twentieth century, however, brought radical changes in the form of musical entertainment. A very substantial use of copyrighted music in the home on phonograph records developed during the first decade of the century (R. I, 170-72). The second decade witnessed a new form of entertainment *outside* the home in the form of cabarets which mushroomed up throughout the country beginng in 1912 and 1913 (R. I, 172). Patrons were lured into these establishments by featuring the "hit" songs, or leading compositions of current stage shows (R. I, 172).

Notwithstanding the statutory grant of small performing rights in 1897 and 1909, none of these establishments had ever obtained a license from the copyright owner, or paid any compensation for such use prior to the organization of the Society in 1914 (R. I, 172-7, 346-7, 473-4; R. II, 612, 667, 696, 707, 751, 776-7, 784, 1047).

Protection of this so-called "small right" at that time was impossible because copyright owners had no feasible means of discovering infringements of this kind (no record of performances being kept by users, and no means of

ascertaining infringements being available to copyright owners without having a person stationed at the premises when the infringement took place) and because users could not afford to negotiate with each of thousands of copyright owners for each separate performance (Finding "7," R. I, 135-6).

In 1914, the problem became so acute that some of the foremost composers and authors of America, under the leadership of Victor Herbert, organized appellee Society as a cooperative association to combat this evil of widespread unlawful performances of their copyrighted works in a field where the individual creator was completely helpless and had theretofore received no income whatsoever (R. I, 169-72, 174-5, 187, 474, 483, 497, 509; R. II, 666-7, 917).

The court below summed up the situation then existing as follows (Finding "7," R. I, 135-6):

> "7. Prior to the organization of the plaintiff Society, authors, composers and publishers who had obtained copyrights for their productions had no practical means of enforcing the exclusive right given them by the Copyright Act. They were not so equipped nor organized to discover violations of their rights, and it would require much time and a large amount of money to detect infringement and to enforce their rights by means of litigation. Few of them secured any revenue from the public performance for profit of their copyrighted musical compositions. Users of music, on the other hand, who wished to obtain the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go and could not economically obtain individual licenses for the separate performance of the large numbers of works required by them daily. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit and to give users ready access to a substantial repertoire of music for such purposes that the Society was organized."

B. Cooperative Licensing is Necessary Because of Divided Ownership of Performing Rights and Because the Owners of These Rights Reside at Points Far Distant from the Places Where Performances of Their Works Are Given.

Publishers were made members of the Society because as a rule the copyrights are in their names (R. I, 213-4). Some contracts between the more important writers and their publishers merely give the publisher publication rights (See Pl. Dep. Ex. 19, R. II, 1019, 682; Pl. Dep. Ex. 21-E, R. 1029, 683); others add mechanical rights (See Pl. Dep. Ex. 20, R. II, 1023, 1025, 682). Victor Herbert always reserved all performing rights to himself, and retained a reversionary interest as to all rights in the event of the publisher's bankruptcy (Pl. Dep. Exs. 19, 20, 21-E, R. II, 1019-1023, 682; 1023-27, 682; 1029-35, 683).

Generally the publisher obtains the right to secure copyright, but in such cases the performing rights of the composer and author are protected by the "Standard Uniform Popular Songwriter's contract" which contains a provision that the contract is "subject to any existing agreements between all of the parties hereto and the American Society of Composers, Authors and Publishers" (Pl. Dep. Ex. 3, R. II, 797-8, 523).

There are members of the Society in 31 of the States, 545 residing in New York, 197 in California, 46 in Illinois, 35 in New Jersey, 29 in Massachusetts, 25 in Pennsylvania, 15 in Ohio and Connecticut, and smaller numbers in Alabama, Colorado, Florida, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, South Carolina, Tennessee, Texas, Virginia, Washington, Wisconsin, Washington, D. C. and Territory of Hawaii (List of Members, R. II, 924-67). Only one member resides in Nebraska (R. II, 930).

Obviously these members have no means of ascertaining the fugitive and fleeting performances of their works in more than 32,000 establishments in the forty-eight states except through such an organization as the Society.

III. How the Society functions.

The Society is managed by a board of twenty-four directors, twelve of whom are composer-author-members and twelve publisher-members selected as provided in its Articles of Association (R. I, 51-6, 330-2). Agreements between the Society and users are arrived at in negotiations between the management of the Society and committees representing users, the management of the Society being subject to the jurisdiction of the Board of Directors of the Society (R. I, 230).

Eligibility for membership of a composer in the Society depends upon his having written and regularly published at least five of his compositions; eligibility of a publisher depends upon his having been regularly engaged in the music publishing business for a period of not less than one year (R. I, 47). Each member of the Society executes an agreement in the form of Exhibits "B" and "C" annexed to the complaint; all expired on December 1, 1940, and are automatically renewable thereafter (R. I, 37-45, 183, Pl. Dep. Exs. 1, 2, 6, 14, 31, 33, R. II, 797-804).

The Society has reciprocal agreements with similar societies serving the same function in foreign countries; the agreement with the British Society is typical (Pl. Ex. 15, R. II, 806-13, 184). The reciprocal payments under these agreements are set forth in Plaintiffs' Exhibit 36, R. II, 833; R. I, 254.

Part of the royalties received by the Society from licensees are devoted to giving financial aid to members of the Society, their widows, infant children or indigent parents (Articles of Association, Sec. 7, R. I, 69-70).

The net license fees remaining after deducting operating costs ranging from seventeen to twenty per cent., are divided into two equal funds which are distributed to members every three months; one such fund is placed at the disposal of the publishers' classification committee, and the other at the disposal of the writers' classification committee; each of these groups classifies its own members on the basis of profits and the popularity of their respective works, the number of performances of which the Society

has records, etc. (R. I, 501-2). The publishers are not concerned with the manner in which the writers distribute their royalties; nor do the writers have anything to do with distribution of the publishers' fund (R. II, 794-5).

Payment on the basis of each individual performance is admittedly impossible (R. I, 203).

Obviously the contribution of the several members of the Society varies. The novice with five compositions to his credit can hardly be placed in the same class with the seasoned writer whose works number in the hundreds and who has won public acclaim by the perennial appeal of his works. Writers in the latter class include the late Victor Herbert whose estate is represented in the Society by his daughter (appellee Ella Herbert Bartlett) and her brother Clifford Herbert (R, II, 680-705; Pl. Dep. Exs. 22, 23, 24, 25, 26, 27, R. II, 1037-45, 685-7); appellee Deems Taylor (Pl. Ex. 41, R. II, 851, R. I, 299-300); the late Ethelbert Nevin whose estate is represented in the Society by his widow, the appellee Anne Paul Nevin (R. I, 345-52; R. II, 1047-52, 897); and the witnesses, Irving Caesar (R. II, 611-36; Pl. Dep. Ex. 13, R. II, 1017, 611); Edgar Leslie (R. II, 739-763; Pl. Dep. Ex. 29, R. II, 1046, 744); George W. Meyer (R. II, 661-679; Pl. Dep. Ex. 18, R. II, 1017-18, 662); Jerome Kern (R. II, 764-77; Pl. Dep. Ex. 1, R. II, 1014-5, 764); Sigmund Romberg (R. II, 777-785, Pl. Dep. Ex. 4, R. II, 1015-6, 778); Gene Buck (R. I, 168-224; Pl. Tr. Ex. 1, R. II, 805, R. I, 169).

IV. The blanket license is the only feasible method of licensing the "small right."

A. It is Impossible to Assign in Advance a Separate Price for Each Performance of Specified Compositions; Nor is it Possible to Bargain Separately for each Use. The Blanket License Overcomes These Obstacles.

There are two possible methods of licensing performing rights; one is on a basis of the separate licensing of each composition for each separate performance; the other is a blanket license which permits the licensee to perform any composition in the licensor's repertoire without designat-

ing specific compositions in advance of the performance or securing separate licenses therefor. The Society's licenses have been issued on a blanket basis because no other feasible and practical method of licensing the small performing rights has ever been devised, although possible alternatives have been vaguely suggested but not described by the broadcasters from time to time (R. I, 256-7).

The Society issues its license to more than 30,800 establishments annually (Pl. Tr. Ex. 21, R. II, 818-A, R. I, 198). In a single year, there are more than sixty-five million performances of musical compositions in these establishments (R. I, 203). This figure is extremely conservative. There are 700 broadcasting stations in the United States, of which 70 are connected with churches and universities and have a free license from the Society (R. I, 199). The three radio networks and twenty-five of the 700 broadcasting stations in the United States picked at random, had 2,630,000 performances in 18,000 programs for a three-month period in 1939 (R. I, 309). Thus these stations alone had more than 10,500,000 performances that year.

The number of performances annually by the 30,000 non-radio licensees may be gauged by the fact that dance halls giving a three-hour program perform 30 compositions in a single evening (R. I, 336). Taking that as an average, almost a million compositions are performed in a single evening by users other than radio. This system eliminates the necessity of the Society's checking on each performance and eliminates the necessity of the licensee's keeping a record of, and reporting to the Society, each separate use; indeed a system based on payment for individual uses would necessitate an expenditure of three times the present cost (R. I, 256-7). These establishments do not keep a log or record of every separate performance (R. I, 337-8, 344); nor do broadcasters concern themselves with the ownership of any copyrights of the compositions broadcast (R. I, 460). The Society does not check the uses in such establishments except for check-ups on certain network programs. If there were no blanket licenses it would be necessary to check each performance in each establishment. It is impossible to check all uses of copyrighted

works unless a person skilled in music is present continuously at all places where music is being performed publicly for profit. This would be very costly if the Society were required to have investigators stationed at each of the 30,800 establishments now having a blanket license. Such economic waste is obviated by the blanket license. It also makes it possible for users to satisfy their patrons by performing *any* composition that such patron may request (R. I, 336, 344), enabling them to do so at a moment's notice.

The alternative to issuing blanket licenses would be a system of licensing each composition separately for each performance. Such a system is completely unworkable for a user who makes any substantial or extensive use of music, and would result in a destruction of the right of public performance for profit of copyrighted musical compositions. It is impossible to fix a price in advance which would fairly compensate the author or constitute a fair measure of payment to the user because each use differs from every other use and because it is impossible to set up machinery that will enable either the user or the creator to bargain on the basis of each separate use.

Dr. Sigmund Spaeth, a composer of musical works, a writer of books and a radio commentator (R. I, 471-2), testified that in fixing a price for a performance of his works, it would be necessary to take into consideration the profit likely to be made by the user, the size and importance of the establishment concerned, the elaborateness or complicity of the production, the size of the potential audience, and lastly, the possible effect upon his own returns in other ways from that same territory (R. I, 482).

Similar testimony as to the impossibility of fixing a price for performances in advance was given by witnesses Jerome Kern, the author of many famous dramatico-musical works (R. II, 771-2); Irving Caesar, a composer of numerous popular songs (R. II, 618); Sigmund Romberg, a composer of many famous operettas (R. II, 781); George W. Meyer, a popular composer (R. II, 666). Mrs. Anne Paul Nevin, the widow of the famous composer, Ethelbert

Nevin, testified that she had no sufficient experience that would enable her to place a price on each composition (R. I, 349) and Ella Herbert Bartlett, daughter of the late Victor Herbert, testified similarly (R. II, 694-5) as did Will Von Tilzer, a publisher of musical compositions (R. II, 709-11).

Walter S. Fischer, President of plaintiff Carl Fischer, Inc., publishers of all kinds of music except popular music (R. I, 569), testified that he has no agent in the State of Nebraska and sells copies of his compositions to jobbers who in turn sell to music stores in Nebraska (R. I, 580; see also R. II, 717). Some sales are made directly by his company to such music stores (R. I, 580). To attempt compliance with this Statute, it would therefore be necessary to print separate compositions for sale and distribution in the State of Nebraska; moreover, it would be impossible for a publisher to sell to jobbers who in turn sell copies of compositions throughout the country. The publisher has no means of compelling the jobbers to affix a price or to collect performance fees (R. II, 645, R. I, 540). There is not enough space on a sheet of music to cover all the various possibilities that would enter into fixing a price for the performance (R. I, 580-1). It is impossible as a practical matter, to fix such a price and to check on performances to see that performances were given only from compositions purchased in the State of Nebraska upon which a price for performances had been paid (R. I, 535-9, 580-3; see also R. II, 645-9, 617-21).

Neither composers nor publishers have any control over mechanical records or rolls. They may not affix a price upon them nor may they regulate the manner or place of their sale (R. I, 578-9, 490, 528-9, 538; R. II, 746). Nor could they compel the manufacturers of mechanical records and rolls to pay them any performing fee (R. I, 579, 529; R. II, 621, 708, 773, 780).

The value of a song fluctuates from time to time; there is no way of knowing what constitutes a fair price for performances and other uses when a song is first published (R. II, 621; R. I, 581-2). Television is a public per-

forming right which will shortly be on a commercial footing, but it is impossible to determine at this time a price for such right or to affix such a price (R. I, 587; R. II, 621, 716, 773, 782).

Through this system of blanket licensing, a feasible method has been adopted under which all users may have ready access to a vast number of copyrighted musical compositions at a minimum of expense, without any interruption to their entertainment, and with little risk of infringing copyrighted works.

The license fees paid are in most cases less than the cost of a bookkeeping system. The additional cost to radio broadcasting stations, if they were to operate on a per piece plan, is apparent when one considers that it would require four additional auditors in each station to keep track of the transcriptions used for a period of slightly more than an hour each day (R. I, 412-3).

The Society furnishes to all of its 30,800 licensees a list of its members "to enable all concerned to readily ascertain if the performing rights in a certain composition are embraced under the ASCAP license * * * " (Pl. Tr. Ex. 4, R. II, 788). It is a simple matter for a user to inspect the sheet music where the names of the publisher and writer are listed and if the name of a publisher or writer therein listed appears upon the membership list which is furnished to the user, such work may be used under the Society's license (R. I, 216).*

Practically all licensing of this kind, whether by the Society or by other organizations, is conducted on a blanket license basis. For example SESAC (Society of European

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* Occasionally users demand a catalogue of all compositions in the Society's repertoire—not for the purpose of securing licenses to play those compositions, but rather allegedly to *avoid* using those compositions (Def. Ex. 51, R. II, 793-4). It is significant that the user making the demand had never been sued for infringement by anyone in fifteen years, that it was admittedly unnecessary to use such a catalogue for a hotel having the Society's license, and that the suggestion to demand such a catalogue emanated from counsel for appellants in the case at bar, rather than from the user (R. I, 449-50).

Stage Authors and Composers) controlling an extensive catalogue of publishers who are copyright owners, likewise issues blanket licenses to broadcasters (Pl. Tr. Ex. 64, R. II, 867, R. I, 470).

The National Broadcasting Company furnishes its transcription services to radio broadcasting stations at flat fees, regardless of the use made of such transcriptions (R. I, 417-8).

The British Performing Right Society which "controls the performing rights in more than a million musical works," likewise grants to users "general licenses to perform all or any of the works under its control * * * at an inclusive fee." *Performing Right Society* v. *Theatre of Varieties,* [1924] A. C. 1; 93 L. J. (K. B.) 33, 35.

If this Statute or any part of it, were to be upheld and the users should thus succeed in destroying the Society, they would continue to insist upon a *blanket* basis of dealing by buying the entire catalogue of individual publishers (R. I, 414, 432, 439-40). Incidentally, it is significant that the broadcasters intend to ignore the composers and authors completely and to buy rights solely from the publishers if the State Statute should be upheld, and the Society destroyed in consequence.

B. The Blanket License Enables the Society to Issue Licenses at a Very Low Cost to the User.

It is not suggested that appellees charge exorbitant fees; indeed the average annual license fee paid to the Society by users of music in Nebraska for the right to perform publicly for profit the copyrighted compositions of approximately 46,000 composers (some users in Nebraska pay as low a fee as $30. per year) demonstrates that the Society is most reasonable in the matter of charges (R. I, 213). The schedule of annual license fees (as of the year 1938) was as follows (Finding No. "5", R. I, 134-5; Pl. Tr. Ex. 17, R. II, 815; R. I, 186):

250 motion picture theatres paid annual fees totalling $12,701.20, or an average of $50.80 annually;

107 dance halls and miscellaneous establishments paid annual fees totalling $4,549.35, or an average of $42.52 annually;

24 hotels and restaurants paid annual fees totalling $2,826.30, or an average of $117.76 annually;

10 radio broadcasting stations paid annual fees totalling $45,712.69, or an average of $4,871.27 annually.*

It is interesting to compare the provision of the Copyright Law which imposes minimum damages of $250 for the unauthorized performance of a single copyrighted composition (Tit. 17, U. S. C., § 25; *Jewell-LaSalle Realty Co.* v. *Buck*, 283 U. S. 202) with the above schedule of license fees showing that in most cases motion picture theatres, dance halls, hotels and similar establishments pay the Society much less than $250 *annually* for the privilege of performing all the copyrighted works in the Society's repertoire.

During a fourteen-year period from 1926 to 1939, the Society was compelled to bring ninety-five infringement suits in Nebraska (Pl. Tr. Ex. 62, R. II, 861-6, R. I, 467). That exhibit shows that most of the suits were disposed of for nominal sums (in the vast majority of cases for substantially less than $100), the defendant thereupon taking a license so that his performances thereafter were lawful. In most cases where no license was taken, the judgment recovered was uncollectible because the defendant had disappeared, or was execution proof, as shown by such exhibit.

The necessity for instituting this number of suits in Nebraska is readily apparent when viewed in the light of

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* The net revenue of the 10 broadcasting stations in Nebraska from sales of time on the air in 1935 was $510,000 (R. I, 240). During that year, license fees paid by those stations to the Society were $34,165.32 (Pl. Tr. Ex. 17, R. II, 815; R. I, 186).

In 1937, the net sales of time on the air had almost doubled, being $1,096,369 (Pl. Tr. Ex. 29, R. II, 821; R. I, 241). Yet the license fees paid to the Society by such stations for the year 1937 had risen only to $43,712.70 (Pl. Tr. Ex. 17, R. II, 815).

the refusal of all the hotels in Nebraska to pay any license fees prior to 1921 (R. II, 917). In other words, as the court below found, a number of users refuse to respect the rights of copyright owners until investigations are made, infringements ascertained, and suits brought (Finding "13", R. I, 137). The exhibit shows that the Society does not collect the $250 minimum damages permitted under the Copyright Act.

Station WOW of Omaha, Nebraska, pays a blanket annual fee of $9,100 to the National Broadcasting Company (known as NBC) for the privilege of using as much or as little of its transcription service as it desires (R. I, 417-8). WOW uses only one hour and five minutes of such transcriptions each day (R. I, 413). WOW also receives from NBC a blanket license to use sustaining programs, in return for which WOW gives NBC sixteen free hours of time on station WOW for each 28-day period (Deft's. Tr. Ex. 45, R. II, 870; R. I, 397). This is equivalent to a payment of $60,000 annually for this service (R. I, 424).

WOW pays its musicians $29,000 per annum for one and one-half hours of music each day that originates in its own studios (R. I, 395). WOW's gross business amounts to $470,000 annually (R. I, 410). Of this amount it pays 15% or $70,000 to the advertising agencies who act as intermediaries between the sponsors and the broadcasting station (R. I, 410-11). NBC supplies WOW with commercial programs for twelve out of its nineteen hours of operation (R. I, 425). Four hours of this are devoted exclusively to music (R. I, 414). Two hours and twenty minutes are devoted to musical transcriptions and live performances originating in its own station, thus having six and one-third hours of its nineteen hours of operation devoted to music. The musical programs are much more valuable than non-musical programs. This is illustrated by the fact that a short advertising talk of one hundred words, called a "spot announcement," costs the advertiser $15 when interposed between two *dramatic* programs, but cost $25 when interposed between two *musi-*

cal programs (R. I, 427). WOW claims that 85% of certain of its musical programs are devoted to the Society's music (R. I, 393). It cannot tell accurately because it does not keep a record of the compositions performed on its stations (R. I, 393, 397, 400, 416-7, 434).

For the license which the Society gives to WOW it receives annually $22,800 (R. I, 410).

Although the Society's rates have been fair and nondiscriminatory, certain users have for many years refused to pay any license fees to the Society or its members until after investigations were made by the Society, infringements ascertained, and suits brought. The court below found (R. I, 137):

> "13. The Society's practice has been to grant blanket licenses to theatres according to their seating capacity, to radio broadcasting stations according to their income, power and coverage, and to hotels, cabarets and dance halls according to their respective size, business done, number and size of orchestras, methods of performance, income and standing. Certain of such users have for many years consistently refused to pay license fees to the Society or its members, until investigations were made by the Society, infringements ascertained and suits brought."

V. The right to restrict non-dramatic performances of certain compositions must be reserved in order to protect dramatic rights.

Certain compositions which are integral parts of stage plays or motion pictures, are often placed on a restricted list by members of the Society in order to limit the number of performances of such compositions on the radio because repetitious and indiscriminate performances of such compositions destroy the value of the stage play or motion picture of which they are a part and in which very large sums are invested (R. I, 255, 318, 545-6; R. II, 640-2, 775, 779). Members are required to act in good faith in exercising this right (Ex. "B," annexed to Compl., R. I, 38).

In the field of serious music, composers restrict their works in order to have such works introduced by reputable artists who refuse to render a new work if it is being performed by lesser artists at the same time (R. I, 577).

The "small right" or non-dramatic right which these statutes primarily affect, is only one of the many rights granted under the Copyright Act. Each right may be vested in separate owners or groups of owners. The author owes a duty to the owners of other rights not to so use the small rights as to destroy other rights which the author has bargained away.

Jerome Kern, a composer of musical comedies and light operas such as "Show Boat," "Sally," "Sonny," "The Cat and the Fiddle," "Music in the Air," and many others (R. II, 764-7), summed up the situation as follows (R. II, 775):

> "A. My compositions have been, as I testified before, written for stage productions. While production is runing both in big cities and on tour, it is desirable to prevent others from performing these compositions, because such performance would be in competition with the particular stage production, and would destroy the commercial value of such production. Therefore, I have invariably restricted the public performance of my compositions until these compositions and the plays in which they appeared have run their course. That is true with all production writers. To permit these compositions to be performed indiscriminately for profit would jeopardize the commercal value of the compositions and the stage productions in which they were performed and for which they were written. For that reason I cannot and will not determine and fix a price to be charged for the public performance for profit of my compositions at the time of the publication of these compositions. Many a composition is published that has no value at all from a viewpoint of sheet music sales. Its chief and most often its only value is for the stage production performance or the grand right. These compositions are always restricted by me and by my publisher."

VI. The Society is the author's sole means of protection against the piracy of his copyrighted works in the field of public performance for profit.

The Society has continuously functioned since 1914, solely for the purpose of doing for its members what they cannot do for themselves individually, namely, licensing the right of public performance for profit upon fair and reasonable license fees, and protecting them against infringement of their copyrights; *at no time has it dealt in any commodity; it has not dealt in sheet music, nor exercised any functions with respect to mechanical rights of reproduction* (R. I, 184).

Anything which destroys cooperative societies of authors will restore the situation existing in 1914 when no author received any royalties from the performances of his musical compositions and when infringement was the rule rather than the exception. Most of the Society's licensees were wilful infringers of all copyrighted works before the Society apprehended them. Prior to 1914 users never voluntarily requested a license (R. I, 174). They still do not pay any attention to the copyright status of the works they use (R. I, 375-6, 397, 400, 416-17, 434). Yet they have never been sued for infringement by any unorganized composer, author or publisher (R. I, 375). They feel that they will enjoy complete exemption from the operation of the copyright laws if the Society is destroyed (R. I, 374).

It is submitted that the State Statute was enacted for the purpose of destroying the only effective means of obtaining any remuneration from the licensing of the right of public performance for profit. This right is the only valuable right now left to both author and publisher in view of the diminishing returns from sales of sheet music and phonograph records on which authors and publishers formerly depended for their livelihood.* The

* Prior to the time that radio became popular, many of the "hit" songs sold from 1,000,000 to 3,000,000 copies (Pl. Tr. Ex. 20, R. II, 816, 740-3). Today 200,000 to 300,000 copies are considered good (R. II, 613-4, 740-3).

income from those sources has been reduced as much as 70 to 90%. (Pl. Tr. Ex. 22, R. I, 198; R. II, 819; R. I, 194-5, 305-6, 479-81, 532; R. II, 662-4, 667-8, 711-14, 740-3, 775-6). Indeed, the main source of an author's income today is the amount he derives through the Society from the licensing of the right of public performance for profit (R. I, 347, 349-50; R. II, 667-8, 672, 691-2, 751). The same applies to publishers, with the additional fact that the cost of publishing music has increased tremendously in the meantime (R. I, 306-10, 589; R. II, 714-5, 718-20).

VII. Organized efforts to destroy appellee Society as means of securing free use of right of public performance for profit.

The broadcasters, hotel owners, motion picture theatre operators and other users have always presented a united front in negotiating for music through their respective national organizations (R. I, 175, 211, 223-4, 271-2, 406-410).

Organized resistance to the Society's activities has always had as its sole object the destruction of the right of public performance for profit, so that users might have the same *free* access to the copyrighted musical compositions of members of the Society that they enjoyed before 1914. Among the schemes for accomplishing this end have been attacks on the Society as an alleged monopoly, interposed as defenses to suits for infringement,[1] bringing a suit against the Society in the New York State Courts, claiming that the Society operated in restraint of trade,[2] filing com-

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[1] See, *e.g.*, *Harms* v. *Cohen*, 279 Fed. 276, 280 (E. D. Pa., 1922); *Buck* v. *Hillsgrove Country Club, Inc.*, 17 F. Supp. 643 (D. C. R. I.).

[2] An application for injunction against the Society brought by the Motion Picture Exhibitors League of America to restrain the Society's activities on the ground that it was an alleged monopoly, was denied in *174th Street & St. Nicholas Ave. Amusement Co.* v. *Maxwell*, 169 N. Y. Supp. 895 (1918).

plaints with the Federal Trade Commission,[3] and introducing numerous bills in Congress seeking to amend the Copyright Act so as to permit the users of music to perform publicly for profit the compositions of the Society's members without compensation (R. I, 176-181).[4]

Appellees have been compelled to establish in many litigations that the rights given to copyright proprietors to publicly perform for profit musical compositions, covered various situations in which an attempt was made to publicly perform the musical compositions for profit without paying anything therefor to the copyright proprietors.

In *Herbert* v. *Shanley Co.* (229 Fed. 340), and *John Church Co.* v. *Hilliard Hotel Co.* (221 Fed. 229), the Cir-

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[3] Charges against the Society before the Federal Trade Commission were dismissed in 1923 (R. I, 231-2).

[4] The following Bills were introduced in Congress, having as their object the amendment of the Copyright Law so as to destroy the right of public performance for profit as applied to copyrighted musical compositions, some of the bills seeking to enact legislation in many respects similar to the state statute:

68th Congress, 1st Session: H. R. 713 (Dec. 5, 1923); H. R. 6250 (Jan. 26, 1924); S. 2600 (Feb. 22, 1924); S. 3078 (April 10, 1924); H. R. 8685 (Apr. 15, 1924); H. R. 8734 (Apr. 17, 1924);

69th Congress, 1st Session: S. 2328 (Jan. 7, 1926); S. 2811 (Jan. 16, 1926); H. R. 11209 (Apr. 12, 1926);

70th Congress, 1st Session: S. 4467 (May 3, 1928);

71st Congress, 1st Session: S. 1386 (June 4, 1929);

71st Congress, 3rd Session: S. 5687 (Jan. 5, 1931);

72nd Congress, 1st Session: H. R. 10364 (Mar. 10, 1932); H. R. 10740 (Mar. 22, 1932); H. R. 10976 (Mar. 30, 1932); H. R. 11948 (May 7, 1932); S. 1035 (Dec. 9, 1931); S. 3985 (Mar. 2, 1932);

73rd Congress, 1st Session: S. 342 (Mar. 13, 1933);

74th Congress, 1st Session: S. 2465 (Mar. 13, 1935); S. 3047 (August 12, 1935);

75th Congress, 1st Session: S. 7 (Jan. 6, 1937); H. R. 2695 (Jan. 12, 1937); S. 2031 (Mar. 29, 1937); H. R. 10633 (May 16, 1938).

cuit Court of Appeals for the Second Circuit held that the rendition of a copyrighted musical composition by a hotel orchestra and by professional singers accompanied by an orchestra, respectively, where no separate charge was made for the music, did not constitute a public performance for profit within the meaning of the Act. These decisions, however, were *reversed* by this Court (242 U. S. 591), where it was said (p. 594):

> "If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. * * * *It is enough to say that there is no need to construe the statute so narrowly.*"

The effort of moving picture theatre proprietors to escape the charge of infringement when *parts* of copyrighted musical compositions were played by orchestras, organs or other musical instruments during the showing of moving pictures, and where no separate charge was made for the music, was met by several adverse decisions. *Harms* v. *Cohen,* 279 Fed. 276 (E. D. Pa.); *Pastime Amusement Co.* v. *M. Witmark & Sons,* 2 F. (2d) 1020 (C. C. A. 4), aff'g 298 Fed. 470 (1924); *Irving Berlin, Inc.* v. *Daigle,* 31 Fed. (2d) 832 (1929, C. C. A. 5).

In numerous cases against owners of dance-halls, hotels, theatres and other establishments, it was necessary to overcome the defense that the orchestra was an independent contractor, and that the owner of the establishment had no control over the compositions performed. *Waterson, Berlin & Snyder Co.* v. *Tollefson,* 253 Fed. 859 (S. D. Calif.); *Harms* v. *Cohen,* 279 Fed. 276 (E. D. Pa.); *Witmark* v. *Bamberger,* 291 Fed. 776 (D. C. N. J.); *Witmark* v. *Pastime,* 298 Fed. 470, aff'd 2 F. (2d) 1020 (C. C. A. 4); *M. Witmark & Sons* v. *Calloway,* 22 F. (2d) 412 (E. D. Tenn.); *Dreamland Ballroom, Inc.* v. *Shapiro,* 36 F. (2d) 354 (C. C. A. 7); *Berlin* v. *Daigle,* 31 F. (2d) 832 (C. C. A. 5); *Buck* v. *Della Russo,* 25 F. Supp. 317 (D. C.

Mass.); *Buck* v. *Dacier,* 26 F. Supp. 37 (D. C. Mass.); *Buck* v. *Crescent Gardens,* 28 F. Supp. 576 (D. C. Mass.). See claim of hotel in Nebraska as recently as 1939 (Dfts. Tr. Ex. 51, R. II, 793, R. I, 448-50). The same defenses have also been unsuccessfully interposed abroad. *Performing Right Society* v. *Mitchell,* 131 L. T. 243 (1924); *Canadian Performing Right Society* v. *Famous Players,* 140 L. T. 657.

In many cases performances by a phonograph record or perforated music roll upon a player piano were held to constitute "public performances for profit". *M. Witmark & Sons* v. *Calloway,* 22 F. (2d) 412 (E. D. Tenn.); *Buck* v. *Lester,* 24 F. (2d) 877 (E. D. S. C.); *Buck* v. *Heretis,* 24 F. (2d) 876 (E. D. S. C.); *Berlin* v. *Daigle,* 31 F. (2d) 832 (C. C. A. 5); *Lutz* v. *Buck,* 40 F. (2d) 501 (C. C. A. 5), cert. den. 282 U. S. 880.

Finally, this Court in *Buck* v. *Jewell-LaSalle Realty Company,* 283 U. S. 191, established that the re-broadcasting by hotels or other public places of musical compositions which had been broadcast by radio, was within the protection of the Copyright Act. It had been previously held in a number of cases that broadcasting by radio of the rendition of a copyrighted musical composition constituted an infringement of the copyright.[5]

All these attempts to deprive appellees and others similarly situated of rights granted to them by Congress having failed, the users conceived the idea of nullifying these

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[5] *M. Witmark & Sons* v. *Bamberger,* 291 Fed. 776 (D. C. N. J.); *Remick* v. *General Electric Co.,* 4 F. (2d) 160 (D. C. S. D. N. Y.); *Remick* v. *American Automobile Accessories Co.,* 5 F. (2d) 411 (C. C. A. 6), reversing the District Court for the Southern District of Ohio; cert. den. 269 U. S. 556; *Remick* v. *General Electric Company,* 16 F. (2d) 829 (D. C. S. D. N. Y.). Cases in other countries are in accord: *Messager* v. *British Broadcasting Company, Ltd.,* [1927] 2 K. B. 543; same case on appeal [1928] 1 K. B. 660 (Court of Appeal), [1929] A. C. 151 (House of Lords); *Performing Right Society* v. *Hammond's Bradford Brewery Co.,* [1934] ch. 121; *Chappell & Co. Ltd.* v. *Associated Radio Co. of Australia,* 50 Victorian Law Rep., 350 (1925), (Sup. Ct., Victoria).

rights through state legislation (R. I, 180-2, 373-4).[6] A Louisiana statute enacted in 1934 imposed confiscatory taxes upon the Society (Act No. 137 of La., 1934). This was held invalid in *State* v. *Lucas,* 199 So. 126 (Sup. Ct. La., 1940, printed at p. 154 of Appendix herewith submitted).

In an action brought in 1935 by the Attorney General of the Superior Court of the State of Washington alleging the Society to be a monopoly, Judge WRIGHT dismissed the suit and held the Society to be a beneficent organization (Appendix, pp. 156-9). In 1937, statutes substantially along the lines of the State Statute were passed in Florida, Washington and Tennessee. (These statutes are all printed in the Appendix.) A Montana statute enacted in 1937 (see *Carl Fischer, Inc.* v. *Shannon,* 26 F. Supp. 727) was recently repealed (H. B. No. 188, enacted February 26, 1941). A similar bill, passed by the Michigan legislature, was vetoed by Governor (now Mr. Justice) MURPHY on July 27, 1937. Copies of the veto message were handed to this Court on the argument of the appeal in *Gibbs* v. *Buck,* 307 U. S. 66.

The users of music very frankly stated that their purpose in passing these statutes was to avoid the obligation of paying for public performances for profit of copyrighted music, the proponents of the State Statute having urged all users in Nebraska to get in touch with their legislators to have the Statute passed for the following purposes (Pl. Tr. Ex. 44, R. II, 853, R. I, 374):

> *"Our first big problem is the promotion of the bill 478, which will protect us against the payment of the so-called license to play copyrighted music at public performances for profit.* We have been forced to pay the American Society of Composers, Authors and Publishers long enough and we believe that if we all do our part, we will be able to keep this graft out of the state of Nebraska."

[6] The bills introduced in 35 state legislatures are enumerated in Cohn, *Music, Radio Broadcasters and the Sherman Act.* 29 Georgetown L. J. 407, 416-9 (1941).

VIII. The Society controls only a small part of available music.

The amount of copyrighted music is infinitesimal when compared with the entire amount of music available for which no payment whatsoever need be made to the creators or publishers of the works (R. I, 248-54, 260, 300-305, 428-9, 501-2). This is known as the public domain. In many cases new popular arrangements are made of this old public domain music (R. I, 301-2, 437).

The Victor Record Company, which is owned by the Radio Corporation of America (the parent of the National Broadcasting Company), has a catalogue of 900,000 compositions in the public domain (R. I, 300-301). The American Record Company, which is owned by the Columbia Broadcasting System, likewise has a very extensive public domain catalogue (R. I, 303). So extensive is the field of music outside the repertoire of the Society that the Radio Corporation of America for a time operated Station WJZ and other stations without utilizing the works of the Society (R. I, 177).

The broadcasters have recently organized a corporation known as Broadcast Music, Inc. for the purpose of enabling the broadcasters to operate without access to the Society's license (R. I, 249, 430-31).[7]

Although the record does not disclose the fact, we believe the Court may take judicial notice of the refusal of the radio networks and their affiliated stations to obtain a license from, or to broadcast, any compositions in the repertoire of the Society since January 1, 1941.

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[7] Consent decrees were recently signed by both the Society and Broadcast Music, Inc., in *United States* v. *Broadcast Music, Inc.* (Civil Action No. 459, E. D. Wis., decree entered Feb. 3, 1941); *United States* v. *American Society of Composers, Authors and Publishers* (Civil Action No. 13-95, S. D. N. Y., decree entered March 4, 1941). The latter decree is hereinafter referred to and described (*infra*, p. 62).

In addition to the public domain music and the music of the Broadcast Music, Inc., there are a great many large catalogues available to broadcasters, including Langlois & Wentworth (R. I, 303-4, 432; Pl. Tr. Ex. 35, R. II, 832, admitted R. I, 250), Schubert Publishing Company, Bright, Coff & Hartell, Universal Edition, Associated Music Publishers, G. Ricordi of Milan (R. I, 303-4).

In addition, there are several other licensing agencies such as the Society of European Stage Authors and Composers, known as SESAC, Davis & Schwegler and the Society of Jewish Composers and Authors (R. I, 252-3, 304) in addition to a great many other music publishers in the United States who are not members of the Society (Pl. Tr. Ex. 37, R. II, 791, R. I, 297).

IX. The State Statute.

The court below held that the State Statute was unconstitutional in its entirety because its purpose and effect was to deprive appellees of rights granted to them under the Federal Copyright Act. In accomplishing this purpose, the Statute *also* ran afoul of the equal protection clause and the due process clause of the Federal Constitution.

The State Statute has two unmistakable objects, one, to deprive composers, authors and publishers of copyrighted musical works of the only means of protecting themselves against infringement by public performances for profit, and secondly, to attaint all who endeavor to exercise such rights, however remote their conduct may be from any possible charge of illegality. A brief enumeration of the provisions of the Statute will show the surprising lengths to which it goes in deterring copyright owners from exercising their rights in the State of Nebraska.

(1) It is unlawful for composers, authors or publishers or assigns of copyrighted musical compositions to form any society or other entity or group when the members therein constitute a substantial number of the persons

"within this State or *outside* thereof" owning or controlling "*copyrighted* vocal or instrumental musical compositions", and when one of the objects of such group is the determination and fixation of license fees required for itself or its members for any use or rendition of copyrighted musical compositions for private or public performance for profit. Such a society is called a "combination" and is "declared to be an unlawful monopoly in this State (Nebraska)"; and such "fixing of prices," and the collection or attempting to collect such license fee is "declared illegal and in restraint of trade", and is "declared to be an illegal *intra*-state transaction within this State and shall be subject to the terms and penalties of this Act" (Sec. 1).

The purpose of the legislature in enacting this statute is best exemplified by the last sentence of Section 1 which establishes *prima facie* guilt merely by showing that "a substantial number of all authors, composers, proprietors, publishers, owners or their heirs, successors or assigns of copyrighted vocal or instrumental musical compositions in the United States, are shown to be members of any society, association, club, firm, partnership, corporation, group or entity."

It will be shown that the practical effect of this section of the Statute is to make it impossible for American composers and authors to license the performing rights in their musical works on a cooperative basis under a so-called "blanket license" in a field where destruction of the cooperative enterprise means the surrender of the right of public performance for profit granted to them pursuant to the Federal Copyright Act.

Inasmuch as the Statute does not condemn any combination fixing license fees unless "the members therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions," broadcasters and other users who do not constitute a substantial number of persons who own or control copyrighted compositions, are permitted to form a corporation for the

purpose of doing the very things which a cooperative society of copyright owners is barred from doing. The radio broadcasters have organized a corporation known as Broadcast Music, Inc. for that very purpose (R. I, 249, 428-31).

(2) Copyright owners (whether members of a combination or not) are prohibited from permitting sheets of music or phonograph records of their works to be sold in the State of Nebraska unless such sheets of music or such records contain thereon in legible form a price independently determined and arrived at for all uses and purposes. Any purchaser paying the price, is given the full right of public performance for profit by himself or by such others as he may license to perform the same (Sec. 2-A).

The following Findings of the court below amply demonstrate the impossibility of complying with this Section (R. I, 137-8, Findings 16 and 19):

> "16. Many thousand of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded under the compulsory license provision of Section 1(e) of the Copyright Act by manufacturers of phonograph records, music rolls and electrical transcriptions. Such manufacturers have paid to copyright owners not more than two cents for each record and said copyright owners have no right to demand any further sums from such manufacturers; complainants and others similarly situated have no control over the sale or disposition of such phonograph records, music rolls or electrical tran. ript-ions and they can not compel the manufacturers thereof to affix any price upon them or to collect a price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected respectively for the public performance for profit thereof. Such manufacturers have no right, title or interest in the public performance for profit of such copyrighted compositions."

"19. The Statute can not possibly be complied with because among other things, under their respective contracts with the authors and composers, the publisher-members of the Society (including publisher-complainants) have the right to and do give away and distribute free of charge, professional copies of the compositions copyrighted by said publisher-members within the State of Nebraska; this is a practice in the business and is done to create a desire for such compositions on the part of the public, make said compositions popular and give them commercial value."

(3) If no price is affixed for the several uses of the copyrighted work, the purchaser is free to use the same for public performances for profit free of all liability for copyright infringement. This prohibition applies whether the copyright owner acts as an individual or in combination with others (Sec. 2-B).

(4) Section 2-C provides that the purchaser of copies of such compositions may not resell, copy, print, publish or vend the composition.

This is an empty gesture in view of the present lack of substantial income from that source (Pl. Tr, Ex. 22, R. I, 198, R. II, 819; R. I, 194-5, 305-6, 479-81, 532; R. II, 662-4, 667-8, 711-14, 740-3, 775-6).

(5) All composers, authors and publishers of copyrighted works, whether or not members of any society or association condemned by Section 1 must file in the office of the Secretary of State a copy of each composition to be sold by them, upon which shall appear over the signature of each a statement to the effect "that he or it controls the sale or disposition of such composition" and provided further that a filing fee of twenty-five cents shall accompany each copy filed (Sec. 2-D).

(6) All of the Society's *existing* contracts are declared void and non-enforceable (Sec. 3).

(7) Owners of broadcasting stations in Nebraska are allowed to broadcast copyrighted compositions in the repertoire of the Society (which is "a combination declared unlawful by Section 1 hereof") without the payment of any license fee (Sec. 4-A).

(8) A similar exemption from any requirements to pay copyright royalties is given to owners of motion picture theatres and other places of public performance within the State for performances of copyrighted works when such performances are given by means of living performers or through such mechanical means as loud speakers, radio broadcasting and electrical transcriptions (Sec. 5-A).

(9) Owners of Nebraska radio broadcasting stations are permitted to rebroadcast copyrighted musical compositions originating or emanating from an affiliated station without the State. The out-of-State broadcaster is prohibited from charging the Nebraska broadcaster any license fee for the purpose of paying or repaying the same to the Society (Sec. 4-B).

(10) Persons supplying broadcasts, transcriptions, records, films or artists to owners of theatres in Nebraska for performances of copyrighted music, are prohibited from collecting any moneys from such Nebraska theatre owners for the purpose of reimbursing the out-of-State person for license fees paid by him to the Society (Sec. 5-B).

(11) All copyright owners, who are members of a condemned combination, are prohibited from suing any Nebraska broadcaster or theatre owner for infringement where the performance is given by means of broadcasts, records, films, electrical transcriptions or living performers brought into the State from outside the State. Use of copyrighted compositions in this manner is declared to be "intrastate business of this state and subject

to the control, regulation and prohibitions set forth in this act notwithstanding that such copyrighted musical compositions originated or emanated from without this state" (Sec. 6).

The copyright owner in such cases, is allowed to assert his rights only as against the person outside the State who sends the broadcasts, records, films, electrical transcriptions or living performers into the State (Sec. 6).

(12) The Statute creates certain *irrebuttable presumptions* which bar appellees from establishing facts showing that their conduct is reasonable and lawful or that the State of Nebraska has no jurisdiction in respect of the acts complained of. The following provisions of the Statute are illustrative:

(a) If a substantial number of composers, authors or publishers of copyrighted works combine for the purpose of jointly licensing their works (the compositions of each being entirely different from the compositions of the other) and determine to grant a single license for their combined copyrighted works at a stipulated fee, they are deemed guilty of combining to restrain trade (Sec. 1).

Appellees are denied all opportunity to show that they do not in fact restrain trade, or that the combination is necessary as the only reasonable means of protecting and licensing the right of public performance for profit of their several copyrighted compositions. In this respect this Statute, which attempts to regulate activities of copyright owners, differs from the general anti-monopoly laws of Nebraska which permit defendants to show that they do not actually restrain trade or that their combination is reasonable.

In fact the Statute declares that a *prima facie* case shall be made out against such composers and authors merely upon proof that they are members of any society, association, group, firm, partnership, corporation, group or entity which consists of a substantial number of composers, authors, publishers or owners of copyrighted musical com-

positions regardless of the purpose of such organization (Sec. 1).

(b) All existing contracts between the Society and Nebraska users are *declared* to have been entered into as *intra*-state transactions and are declared invalid (Sec. 3).

(c) Any person outside the State of Nebraska who obtains a license to perform appellees' copyrighted works, and who sends performers or the instrumentalities from which performances may be given into Nebraska, and who attempts to collect license fees from Nebraska users for the purpose of reimbursing himself for payments made to appellees, is "declared to be an agent and representative" of appellees (Secs. 4-B and 5-B).

(d) The use or performance of copyrighted compositions by Nebraska broadcasters, theatre owners, etc., by means of receiving and re-broadcasting or reproducing performances by means of radio broadcasts, sound producing instrumentalities or apparatus, or electrical transcription, or by living performers sent into the State from without the State "shall be considered for the purpose of this Act, as *intra*-state business of this State and subject to the control, regulation and prohibition set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State" (Sec. 6).

The statute then proceeds to regulate business transacted beyond its borders *as if* such business were transacted within the State.

(e) Anyone who acts as a representative of the Society in Nebraska, no matter how petty his function or how remote his representation is "deemed an official representative and agent of the Society," and the Society "shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative *or the agent of such representative* as herein defined". The legal effect of such service

of process is declared to be the same "*as if* served upon a duly elected officer or managing agent or other official representative upon whom service might *otherwise* be made upon such combination within this State" (Sec. 7-A).

(13) In order to discourage appellees from attempting to assert the exclusive rights granted to them under the Copyright Act, violation of the State Statute subjects violators to severe and unusual penalties and forfeitures of constitutional rights as follows:

(a) Violation of the statute carries a penalty of $50 to $5,000 or one to ten years imprisonment or both (Sec. 8).

(b) Collection of copyright royalties is deemed a separate offense from the combination (Sec. 1).

(c) All persons who negotiate, collect or attempt to collect license fees for the Society or who act as its representative or agent are declared to be part of the combination and are made subject to the penalties of the Statute, even though they do not participate in the combination (Sec. 7-B).

(d) If individual users in Nebraska sue for violation of the Statute they may recover attorneys' fees as well as damages (Sec. 10-A).

(e) If the defendants in any suit or proceeding fail to furnish evidence incriminating themselves they are subject to a fine of $100 for each day that they fail to produce such evidence, notwithstanding that personal service may not have been made upon them (Secs. 11-A and 11-B). It is significant that if the information is provided it may be used for self-incrimination because the Statute does not grant immunity from prosecution based upon information so furnished.

(f) All penalties are made cumulative to all other rights, remedies and provisions under other Nebraska laws (Sec. 13).

The cumulative penalties referred to are those enumerated in the general Nebraska anti-trust laws (Comp. St. Neb. 1929, Art. 8, Ch. 59, Secs. 801, 802) which imposes *additional* penalties of not more than $5,000 or imprisonment of one to ten years or both. Appellees are brought within said sections of Chapter 59 of the Compiled Laws by reason of Section 1 of the State Statute under which the Society (because of the nature of its organization) is "declared illegal *and in restraint of trade.*"

(14) Jurisdiction to sue or prosecute under the Statute is vested in the Attorney General of the State and the several County Attorneys, and a receiver may be appointed (Sec. 9-A, B, C, D, 10-A); if such State officials fail to act upon request, any aggrieved individual may institute such civil proceedings as the State officials might have brought (Sec. 10-B).

(15) The Statute contains the usual separability clause (Sec. 12).

Summary of Argument.

For a summary of the argument, we refer the Court to the captions and sub-captions of the points hereinafter advanced. Any other summary within permissible bounds would be inadequate.

ARGUMENT.

I. The State Statute violates the copyright clause of the Federal Constitution.

The objections to the State Statute under the Copyright Clause are twofold: (1) it invades a field delegated to Congress, nullifying the most vital provisions of the 1909 revision of the copyright laws, and confiscating

appellees' right of public performance for profit by barring them from licensing their copyrighted musical compositions in the only manner that is commercially feasible; (2) it discriminates against owners of copyrighted works.

Before discussing these objections, it will be necessary to examine the practical operation of the statute rather than the form of descriptive words which it employs (cf. *Nelson* v. *Sears, Roebuck & Co.*, 85 L. Ed. 522, 524 [1941 Adv. Sh.]; *Best & Co. Inc.* v. *Maxwell*, 61 Sup. Ct. 334, 85 L. Ed. 274, 275 [1941 Adv. Sh.]; *Thompson* v. *Consolidated Gas Utilities Corp*, 300 U. S. 55, 79-80 [1937]).

(a) The provisions of the State Statute shows clearly that it attempts to nullify or abridge the provisions of the Copyright Law which give to owners of copyrighted musical compositions the exclusive right of *public performance for profit* as interpreted by numerous decisions. *Herbert* v. *Shanley*, 242 U. S. 591; *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191; *Pastime Amusement Co.* v. *M. Witmark & Sons*, 2 F. (2d) 1020 (C. C. A. 4), aff'd 298 Fed. 470; *Berlin* v. *Daigle*, 31 F. (2d) 832 (C. C. A. 5); *Harms* v. *Cohen*, 279 Fed. 276 (E. D. Pa.); *M. Witmark & Sons* v. *Calloway*, 22 F. (2d) 412 (E. D. Tenn.); *Lutz* v. *Buck*, 40 F. (2d) 501 (C. C. A. 5), cert. den. 282 U. S. 880; *Buck* v. *Lester*, 24 F. (2d) 877 (E. D. S. C.); *Buck* v. *Heretis*, 24 F. (2d) 876 (E. D. S. C.); *Remick* v. *American Automobile Accessories Co.*, 5 F. (2d) 411 (C. C. A. 6); *Society of European Stage Authors, Composers and Publishers* v. *New York Statler Hotel*, 19 F. Supp. 1 (S. D. N. Y.); *Messager* v. *British Broddcasting Co.* [1928] 1 K. B. 660, 140 L. T. R. 227; rev'd on other grounds [1929] A. C. 151.

(b) The State Statute does not contain any legislative finding as to any existing evil requiring its passage. Nor was any established at the trial. The court below held that the Act could not be justified as a method of exercising the police power of the State (R. I, 131).

(c) The State Statute was not prompted by any *bona fide* desire to protect the State of Nebraska against combinations monopolizing or restraining trade for the following reasons:

(1) The pre-existing Nebraska statutes amply regulate and punish all such combinations (Comp. St. Neb. 1929, Art. 8, Ch. 59, Secs. 801-822).

(2) The State Statute condemns appellees by *declaring* their Society to be operating in restraint of trade (Sec. 1). It does not give them an opportunity to show the reasonableness of the combination, whereas other combinations are exempt from the general Nebraska anti-trust laws if they are found to be reasonable. *Cf. Brock* v. *Hardie,* 114 Fla. 670, 154 So. 690, 693, 696 (1934).

(3) It was neither reasonable nor necessary to exempt, by non-inclusion, owners of non-copyrighted works (*i. e.,* unpublished works enjoying common-law protection) and combinations of users, who are permitted to buy outright the copyrights of a substantial number of copyright owners (the copyright owners acting independently of each other, but the users acting collectively).

(4) The penalties and confiscatory provisions of the State Statute were not reasonably necessary to meet any alleged evil (Secs. 8 to 11B).

(5) It was not reasonable to give the 391 users in the State the right to use appellees' copyrighted works without compensation and to bar appellees from suing for infringement (Secs. 4-A, 4-B, 5-A, 5-B, 6).

(6) It was not reasonable to extend the prohibitions of the Act to composers, authors and publishers of copyrighted works not acting in concert (Secs. 2-A, 2-B and 6).

(7) It was not reasonable to create arbitrary presumptions for the purpose of subjecting appellees to the juris-

diction of the Nebraska courts although they are all non-residents of the State (Secs. 4-B, 5-B, 6, 7-A, 7-B).

The private purpose which motivated this statute is apparent when viewed in the light of the many previous attempts of users to destroy the Society as a means of obtaining *free* use of appellees' copyrighted works (*supra*, pp. 19-23).

A. The Action of Congress in Fully Covering the Field in the 1909 Revision of the Copyright Act Bars the States from Making Any Regulations in That Field.

The Constitution of the United States completely removed the regulation of copyrights from the sphere of state jurisdiction and vested supreme power in that subject in the Congress of the United States. Article 1, Section 8, Clause 8, gives the Congress the power:

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries;"

Of course, no principle is better settled than that the States may not trespass upon the powers delegated by the Constitution to the Congress when the field has been occupied by the latter. However, two of the cases of this Court are collected in the footnote.[8] As Mr. Justice Frankfurter pointed out in his work, *Mr. Justice Holmes*

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[8] *Napier* v. *Atlantic Coastline Ry. Co.*, 272 U. S. 605 (Georgia and Wisconsin statutes requiring certain safety appliance on locomotives, held in conflict with Federal Locomotive Boiler Inspection Act although Interstate Commerce Commission had not exercised its authority in field covered by State legislation; *Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216, 226 (Indiana statute held inconsistent with system of equal distribution among creditors of national banks as established by federal law).

and the Supreme Court, at page 72 (1938), the purpose of conferring certain powers upon Congress was to overcome the dangerous "Balkanization" of this nation which existed before the Constitution was adopted.

Congress, in 1909, made a sweeping general revision of the copyright laws for the purpose of making simple, certain and uniform the requirements for the protection of literary property throughout the country. The Report by Mr. Currier, from the Committee on Patents of the House of Representatives on February 22, 1909, in submitting the bill which subsequently became the Copyright Act of 1909, stated that the Copyright Act "should be revised so that protection to the honest literary worker, artist, or designer shall be *simple* and *certain.*" (H. R. Report No. 2222—Sixtieth Cong., 2d Sess., 1909, p. 1.)

The fact that there were different federal laws relating to copyright was abhorred by President Roosevelt in his message to Congress in December, 1905, in which he urged a general revision. The President then said (Report No. 2222, pp. 1-2):

> "Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection; *they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public;* they are difficult for the courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public. Attempts to improve them by amendment have been frequent, no less than 12 acts for the purpose having been passed since the Revised Statutes. To perfect them by further amendment seems impracticable. A complete revision of them is essential. Such a revision, to meet modern conditions, has been found necessary in Germany, Austria, Sweden, and other foreign countries, and bills embodying it are pending in England and the Australian

colonies. It has been urged here, and proposals for a commission to undertake it have, from time to time, been pressed upon the Congress.

"The inconveniences of the present conditions being so great, an attempt to frame appropriate legislation has been made by the Copyright Office, which has called conferences of the various interests especially and practically concerned with the operation of the copyright laws. It has secured from them suggestions as to the changes necessary; it has added from its own experience and investigation, and it has drafted a bill which embodies such of these changes and additions as, after full discussion and expert criticism, appeared to be sound and safe. In form this bill would replace the existing insufficient and inconsistent laws by one general copyright statute. It will be presented to the Congress at the coming session. It deserves prompt consideration."

The Committee further quoted a statement of Thorvald Solberg, Register of Copyrights, to the effect that "the laws as they stand fail to give the protection required, are difficult of interpretation, application and administration, lead to misapprehension and misunderstanding and in some directions are open to abuses" (*Ibid,* p. 2).

The Committee pointed out that such a situation existed when the Constitutional Convention met, and the copyright clause was adopted to remove such burdens upon authors. The Committee's Report states (*Ibid,* p. 2):

> "When the convention met and framed the Constitution of the United States copyright laws existed in 12 of the 13 States, but the requirements for the registration of copyrights differed greatly, making it burdensome to an author seeking to protect his work. *The need of a law which would be effective in all the States was so apparent that a provision was incorporated in the Constitution,* * * *."

It was felt that *Congress* was creating new property rights and could annex to their enjoyment such conditions

as *Congress* deemed expedient (Report No. 2222, p. 9, citing *Wheaton* v. *Peters*, 8 Pet. 591 [1834]).

The 1909 Law fully covered the field of copyright within the grant of constitutional power by stating explicitly the nature of the rights granted, designating the persons who might enjoy them, limiting such rights to a fixed period of time, prescribing the remedies for infringement including the recovery of minimum damages, establishing the means of safeguarding the public against innocent infringement, regulating assignments, and specifying certain conditions for the enjoyment of specific rights granted.

All rights granted under the 1909 Copyright Law were expressly made exclusive (Sec. 1). This Court had many times previously passed upon the exclusive nature of those rights. *Burrows-Giles Lithograph Co.* v. *Sarony*, 111 U. S. 53, 56, 59 (1884); *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 291 (1907); *Caliga* v. *Inter Ocean Newspaper Co.*, 215 U. S. 182, 188 (1909).

Not even the United States may invade the *exclusive* rights of owners of copyrights or patents. *United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178, 186, 189 (1933); *James* v. *Campbell*, 104 U. S. 356, 358 (1881); *United States* v. *American Bell Telephone Co.*, 167 U. S. 224, 249-50 (1887). *A fortiori*, the State of Nebraska may not invade these exclusive rights in the manner attempted by the State Statutes.

It is well settled, that copyright owners cannot be compelled to grant licenses except upon their own terms and at prices fixed by such owners (*F. A. D. Andrea, Inc.* v. *Radio Corp. of America*, 88 F. (2d) 474 (C. C. A. 3), aff'g 14 F. Supp. 226, cert. den. 300 U. S. 681; *Buck* v *Hillsgrove Country Club, Inc.*, 17 F. Supp. 643 [D. C. R. I.]). The several States may not pass laws to the contrary (*Henry Bill Pub. Co.* v. *Smythe*, 27 Fed. 914, 917 [S. D. Ohio]).

Congress included among the separate and distinct exclusive rights granted to the owner of a copyright in a musical composition the exclusive right:

"(a) To print, reprint, publish, copy and vend the copyrighted work * * *.

"(e) To perform the copyrighted work publicly for profit if it be a musical composition and * * * to make * * * any form of record in which the thought of an author may be recorded and from which it may be read or reproduced * * *" (Act of Mar. 4, 1909, 17 U. S. C., § 1).

The exclusive *performing* rights (Sec. 1(e), *supra*) include performances by live musicians in hotels, restaurants and night clubs (*Herbert* v. *Shanley*, 242 U. S. 591 [1917]); performances by means of radio broadcasting or rebroadcasting (*Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191 [1931]); and by means of radio receiving sets in hotel rooms operated from a master-controlled set (*Society of European Stage Authors and Composers, Inc.* v. *New York Statler Hotel, Inc.*, 19 F. Supp. 1 [1937, S. D. N. Y.]).

The only limitation which the Copyright Act places upon the exclusive rights granted by Section 1 is that under certain circumstances a manufacturer of phonograph records may record a copyrighted work without the consent of the author upon paying two cents for each record made; but the payment of this two cent royalty does not give the manufacturer the right of public performance for profit. This provision (Section 1[e]) reads in part as follows:

"* * * whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments

manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the twentieth of the next succeeding month. *The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit: And provided further,* That it shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

"In case of the failure, of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this Act, not exceeding three times such amount.'

The Copyright Law permits a purchaser of a phonograph record or electrical transcription to perform it privately, but he may not perform it *publicly for profit* without the express consent of the copyright owner. *Irving Berlin, Inc.* v. *Daigle,* 31 F. (2d) 832 (C. C. A. 5); *Lutz* v. *Buck,* 40 F. (2d) 501, cert. den. 282 U. S. 880.

This separation of the *recording* right from the *performing* right carries out the general purpose of the Copyright Act to separate all of the several rights embraced in a copyright from the rights transferred by a sale or other

disposition of the material object copyrighted (such as a book, motion picture film, sheet of music, etc.).[9]

The separate rights which a copyright owner obtains, are listed in subdivisions "(a)" to "(e)" of Section 1 of the Copyright Act. Section 3 of the Copyright Act permits a further subdivision of the rights in a copyrighted work by directing "that the copyright * * * shall protect all the copyrightable component *parts* of the work copyrighted."

The rights granted under the Copyright Act are not mere personal rights which the author alone may enjoy. They have all the attributes of property. They may be assigned or bequeathed; and the successors in interest have the same exclusive rights which the author himself enjoyed. Section 8 of the Copyright Act provides "that the author *or proprietor* of any work made the subject of copyright by this Act, or his executors, administrators or *assigns*, shall have the copyright in such work under the conditions and for the terms specified in this Act * * *." The only persons who are not accorded all these rights are certain

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[9] Section 41 reads as follows (Copyright Office Bull. No. 14. p. 22):

> "SEC. 41. The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."

Purchase of the material object (*e. g.* engraved plates, books, sheets of music, etc.) was held not to give any rights in the copyright in *Stephens* v. *Cady*, 14 How. 528 (1852); *Stevens* v. *Gladding*, 17 How. 447 (1854); *Henry Bill Pub. Co.* v. *Smythe*, 27 Fed. 914, 921 (S. D. Ohio); *Harms* v. *Cohen*, 279 Fed. 276, 280 (E. D. Pa.); *National Geographic Soc.* v. *Classified Geographic*, 27 F. Supp. 655, 660 (D. C. Mass.); *Davenport Quigley Expedition* v. *Century Productions*, 18 F. Supp. 974 (1937, S. D. N. Y.); *Chappell* v. *Boosey*, 21 Ch. Div. 232 (1882).

alien authors or proprietors. All citizens of the United States are entitled to the benefit of all the provisions of the Copyright Act.

B. The State Statute Confiscates Appellees' Right of Public Performance for Profit.

It has been shown that both in the United States and elsewhere, it has been impossible to detect infringements of, or to license, the right of public performance for profit except through collective action on the part of composers, authors and publishers. The unorganized composer, author and publisher even now suffer from unlimited piracy of their works. Appellee Society alone compels the bulk of the users to respect the Copyright Act. If a composer or author is not a member of the Society, his works are freely infringed. The users pay no attention whatsoever to the copyright status of the works they use; they keep no record of them (R. I, 337, 375-6, 397, 400, 416-417, 434); broadcasters make no effort to ascertain the titles or copyright status of compositions transmitted by them (R. I, 397, 400, 416, 434); the state statute under attack does not require the users to keep such a record. So helpless is the individual author that users other than the large radio networks have never been compelled to pay royalties or to defend infringement suits brought by individual composers, authors or publishers (R. 375, 397, 400-1, 416, 434, 449). Broadcasters do not pay individual composers for their music (R. I, 460; 376-7). Station WOW only once paid an author a performance fee—on that occasion the fee was one dollar (R. I, 436).

The State Statute bars authors from acting collectively in the only manner available to them; and if they do act collectively, the users are given free use of their works. Thus, by statute, the author is faced with the dilemma of losing his performing rights by failing to employ the only available means to protect them; or he may employ such means, only to have the statute strip him of his rights.

Section 1 of the State Statute provides that if composers and authors engage in such cooperative enterprise wherein a single fee is fixed for the right to perform any or all of the compositions embraced in their repertoires, they shall be barred from collecting any license fees from persons who render their copyrighted compositions "privately or publicly" through personal performance or through radio or any instrumentality or sound-producing apparatus and forbids such license fees from being collected "in *any* court *within* the boundaries" of Nebraska and provides that each such collection or attempted collection "shall be a separate offense hereunder" and such combination is "declared to be an unlawful monopoly in this State" (Sec. 1). All *existing* agreements of such a cooperative group are invalidated and their attempted enforcement is made unlawful (Sec. 3).

Sections 4-A, 4-B, 5-A and 5-B expressly permit all broadcasting stations, theatres, moving picture houses and similar places of entertainment, to perform publicly for profit any and all of the musical compositions copyrighted by members of any society condemned by Section 1 without the payment of any copyright royalties and without any liability for infringement.

Section 6 of the State Statute grants to Nebraska users the free use of all copyrighted musical compositions, *whether owned by members of a combination or not,* if the means of reproduction or the talent giving the performances come into the State from outside the State. It is customary to import such means of reproduction and talent from outside the State (R. I, 336, 341-2, 344).

Thus the statute completely confiscates appellees' right of public performance for profit.

C. The State Statute Abridges and Regulates Rights Granted to Appellees under the Copyright Act, and Bars Them from Separately Licensing the Several Rights Granted to Them by Congress.

(1) Sections 2-A and 2-B of the State Statute nullify sections 1(e) and 41 of the Copyright Law (quoted *supra,*

pp. 40-41, 42, footnote) by requiring the seller of any copy or record of a copyrighted musical composition to surrender all *performing* rights upon selling copies or records in Nebraska. This prevents the composer and author from selling publication or recording rights to one person and performing rights to others. The court below found that many thousands of copyrighted compositions owned by plaintiffs have been recorded under the compulsory license provision of Section 1(e) of the Copyright Act by manufacturers of phonograph records who pay the copyright owners not more than two cents for each record and such copyright owners have no right to demand any further sums from such manufacturers, and that the plaintiffs and others similarly situated have no control over the sale or disposition of such phonograph records and cannot compel the manufacturer to affix any price upon them, or to collect a price for the public performance for profit, or if collected to remit the sum collected for the public performance for profit (Finding "16", R. I, 137). There are a great number of separate performing rights each of which is licensed to different persons.

(2) The State Statute (Secs. 1, 4-A, 4-B, 5-A, 5-B, 6) deprives copyright owners of the right to license the rebroadcasting of their works as well as the public performance of their works by means of radio receiving sets, thus setting at naught rights granted by the Congress under the Copyright Law.

(3) The State Statute deprives copyright owners of the right to license their copyrighted works to licensees in other States, by providing that a license given to users outside the State confers a license upon users in the State of Nebraska without the separate consent of the copyright owner, and in fact, regardless of his consent (Secs. 4-B, 5-B, 6).

(4) Suits for infringement in the federal courts against Nebraska users are barred whenever such Nebraska user

imports from without the State, the means for giving such performances (Sec. 6).

(5) All composers, authors or publishers of copyrighted musical compositions, whether or not members of a combination condemned by Section 1, must file in the office of the Secretary of State a copy of each such composition accompanied by a filing fee of twenty-five cents for each copy filed. (Sec. 2D) This sets up a system of registration separate and apart from that required in the Copyright Act.

(6) The Copyright Law (Tit. 17, U. S. C.), provides all the safeguards against innocent infringement that Congress has deemed necessary or proper. The Copyright Law provides that every copy of the copyrighted work must bear *a notice of copyright;* that *copies must be deposited* in the Office of the Register of Copyrights; that the copyright notice must state the *name of the proprietor* and the *year in which copyright was secured* (17 U. S. C., Secs. 9, 12, 18). *Assignments* of copyrights must be *recorded* with the Register of Copyrights (17 U. S. C., Secs. 42-46). The *Register of Copyrights keeps a full index* of all copyright registrations and assignments which is printed at periodic intervals, furnished to all parties desiring them at a nominal price (17 U. S. C., Secs. 56, 57). The *Record books* of the copyright office are *open to public inspection.* The State Statute sets up a new system of registration distinct from and in conflict with that set up by Congress.

This phase of the Copyright Act was recently considered by this Court in *Washingtonian Pub. Co.* v. *Pearson,* 306 U. S. 30 (1939).

The requirement of the State Statute that a copy of each composition must be filed before licensing the same has no possible relation to any public interest of that State, and its purpose can only be to harass and annoy appellees and to make it so expensive and impossible to comply with the Statute as to cause appellees to abandon any attempt to enforce and protect their copyrights in Nebraska.

D. The State Statute Discriminates Against Owners of Copyrighted Works.

Although in certain instances states may make laws which may affect rights derived from the Federal Constitution, such laws must be reasonable and must not discriminate against the exercise of a federal right. *Fox Film Corp.* v. *Doyal,* 286 U. S. 123 (1932); *Best & Co.* v. *Maxwell,* 61 Sup. Ct. 334 (1940); *Walling* v. *Michigan,* 116 U. S. 446, 454 (1886); *Welton* v. *Missouri,* 91 U. S. 275 (1875); *Bethlehem Motors Co.* v. *Flynt,* 256 U. S. 421 (1921); see *Bacardi Corp.* v. *Domenech,* 311 U. S. 150 (1940).

The State Statute ignores this principle.

(1) The State Statute discriminates against owners of copyrighted musical works by failing to include, and thereby exempting, owners of musical works protected under the common law.

The State Statute does not affect *common law* rights in musical compositions; they are in terms limited to "copyrighted" compositions. Those rights are not destroyed until the work is published, after which time the author must rely solely upon rights granted under the Copyright Law. *Wheaton* v. *Peters,* 8 Pet. 591 (1834).

The public performance of a dramatic or musical composition is not a publication and does not destroy common law rights. *Ferris* v. *Frohman,* 223 U. S. 424, 435 (1912); *Nutt* v. *National Institute, Inc.,* 31 F. (2d) 236, 238 (C. C. A. 2).

This likewise applies to performances by means of radio broadcasting. *Uproar Co.* v. *National Broadcasting Co.,* 8 F. Supp. 358, 362 (D. C. Mass.) mod. 81 F. (2d) 373, cert. den. 298 U. S. 670.

It must be remembered that the State Statute does not apply to combinations relating to the licensing of publication rights or motion picture rights or any other right under the Copyright Law except *performing* rights. The performing rights, unlike the publication rights, are just as

valuable and just as useful whether a work is copyrighted or merely protected by the common law.

The State Statute permits all the owners of *non*-copyrighted musical and dramatico-musical works throughout the world, to combine to fix the price at which they would grant licenses for the public performance of their works without being subject to the penalties of the Act. If this Statute were upheld, no one would copyright his work because of a desire to take advantage of this exemption. Thus, those who have already copyrighted their works and have lost their common law rights would be at a distinct disadvantage. This is not a remote possibility. It is precisely what would happen if this law were upheld.

Composers and authors may send their compositions to performers for the limited purpose of performing their works without publishing or copyrighting the works and without losing any common law rights. If this should be done, the entire purpose of Article 1, Section 8, Clause 8, pertaining to copyrights and the Copyright Act passed in pursuance thereof will be completely nullified. Any law relating to copyrights must subserve the purpose of the copyright clause of the Constitution, which was primarily intended to serve the public interest of the nation by enriching the public domain with works upon the expiration of the term of copyright. This can be accomplished only by encouraging authors to copyright their works. The copyright law gives the necessary inducement by conferring upon copyright owners exclusive rights for a limited period. *Grant* v. *Raymond,* 6 Pet. 218, 241-3 (1832); *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 127-8 (1932); *Kendall* v. *Winsor,* 21 How. 322, 327-8 (1858).

What incentive remains to copyright a work if the States may pass laws *discriminating* against owners of copyrights as distinguished from rights protected at common law? The evidence in the case at bar shows without contradiction, that with respect to musical compositions, the right of *publication* which was once the most valuable r enjoyed by a copyright owner, has now dwindled

to the vanishing point (R. I, 194-5, 306, 478-81, 532, 589; R. II, 643, 663-4, 667-8, 711-13, 740-2, 775-6; Pl. Tr. Ex. 20, R. II, 816-18; Pl. Tr. Ex. 22, R. II, 819).

In 1909, Congress adopted a new policy of extending copyrights to unpublished works as well as to published musical and dramatico-musical works. The report of the Patents Committee submitting the 1909 Copyright Law to Congress stated, "If an author desires to keep his dramatic work in unpublished form and give public representations thereof only, this right should be fully secured to him by law. We have endeavored to so frame this paragraph [Sec. 1(d)] as to amply secure him in these rights" (Rep. No. 2222, H. R. Sixtieth Cong., 2d Sess., 1909, p. 4). At the same time it was made clear in Section 2 of the Copyright Law that Congress did not intend to invade the field of common law rights as to authors who might choose not to secure copyright.[10] The field of common law rights continued to be, as theretofore, solely within the domain of State legislation.

The number of *unpublished* musical works copyrighted under section 11 of the Copyright Law of 1909 has increased in leaps and bounds. Whereas in the fourteen year period from 1912 through 1925, almost four-fifths of all musical compositions registered for copyright were *published* works (284,296 of such compositions being published, the remaining 76,292 being unpublished); for the succeeding fourteen year period, more than one-half of the musical compositions registered for copyright were *un*published works (there were only 195,359 published musical compositions copyrighted as against 231,512 unpublished), with the present trend showing a ratio of more than two unpublished copyrighted musical compositions for each such published

[10] Section 2 of the Copyright Act provides:

> "2. Nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

work. (See annual catalogues of Register of Copyrights relating to musical compositions.) There are many advantages to be gained in desisting from copyrighting unpublished works. If a work is copyrighted, its duration is limited to a period of fifty-six years. If it is not copyrighted, the owner, so long as he does not publish his work, is entitled to protection under the laws of the several States, including the State of Nebraska *perpetually*.

The discrimination by the Statute against copyrighted works will handicap those who have already copyrighted their works, and will deter others from copyrighting their works in the future.

If the purpose of this Statute be to curb monopolies and combinations in restraint of trade there is no reason for exempting non-copyrighted works. The owners of such works are just as capable of monopolizing the field of performing rights as are owners of copyrighted works.

This classification shows on its face that the true purpose of the Statute is to deprive copyright owners, and especially the members of appellee Society, of rights granted to them by the Federal Constitution. Such a Statute cannot be upheld. *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375 (statute aimed at interstate commerce); *Truax* v. *Raich*, 239 U. S. 33 (statute designed to restrict aliens' right to secure employment); *Buchanan* v. *Warley*, 245 U. S. 60 (discrimination against colored race under guise of protecting public against race-riots); *Schneider* v. *State*, 308 U. S. 147; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *DeJonge* v. *Oregon*, 299 U. S. 353; and *Lovell* v. *City of Griffin*, 303 U. S. 444 (statutes limiting right of free speech and free assembly under guise of police power); *State ex rel. Fulton* v. *Ives*, 123 Fla. 401, 167 So. 394 (invasion of barbers' right of contract not justified by public welfare).

In *Schneider* v. *State*, 308 U. S. 147, *supra*, it was said at page 161:

> "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be

> astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

(2) The penalties and forfeitures imposed for violation of the State Statute are far more severe than those imposed under other Nebraska laws on combinations actually monopolizing or restraining trade.

The laws of Nebraska defining and punishing combinations which *actually* monopolize or restrain trade are found in Compiled Statutes, Neb., 1929, Article 8, Chapter 59, sections 801-822.

Sections 801 and 802 of the general anti-trust law impose a fine of not more than $5,000 or imprisonment for one year, or both.

The State Statute involved in the case at bar imposes these penalties by reason of the provision making all penalties *cumulative* (Section 13). Section 8 of the State Statute imposes *additional* penalties of not more than $5,000 or imprisonment of one year, or both. *In addition,* the State Statute deprives groups affected by it of certain rights and copyrights granted under the Federal Constitution and Statutes; it nullifies all existing contracts, declares them to be entered into as intrastate transactions and in restraint of trade, and makes their attempted enforcement a violation of the Statute (Section 3).

The State Statute penalizes persons affected by it by giving to users in Nebraska a free license to perform their

works if such performances are made by means of picking up broadcasts emanating from outside the State or by means of importing electrical transcriptions, sound projection instrumentalities or apparatus, performers, musicians, singers, players, orchestras, bands or other artists or talent (Sections 4-A, 4-B, 5-A, 5-B and 6), and prohibits the persons affected from obtaining redress in the Federal courts for the infringement of their works (Section 6). It subjects them to the jurisdiction of the State of Nebraska even though in fact, they are not present within the State (Sections 7-A, 7-B, 9, 10-A and 10-B). It makes all their agents, no matter how innocent, guilty of a violation of the Act and subject to all the penalties under Section 7-B—a provision not to be found in the general laws of Nebraska relating to monopolies and restraints of trade.

SECTION 9 permits the dissolution of any condemned combination which includes a combination which may be wholly outside the State of Nebraska, under Section 1, which extends its scope to the entire United States. The general law contains no such provision. It empowers the State to regulate and punish only those corporations which *actually* do business in the State (Sections 807-812). The general law, however, does not resort, as does the State Statute, to a fiction by which foreign corporations are *deemed* to be doing business in the State.

SECTION 11-A compels those subject to the State Statute to furnish exact copies of all documentary evidence, records or data which may incriminate, and Section 11-B makes the failure to furnish such documents a contempt of court and carries with it a fine of $100 for each day of failure to furnish such documents. The general law of Nebraska authorizes the subpoenaing of all persons, but it grants immunity from prosecution to all persons summoned and examined for any violations of such laws (Sections 808, 822).

This comparison of the laws defining and punishing *actual* monopolies and restraints of trade with the State Statute which creates a presumption of guilt regardless of whether trade is actually monopolized or restrained, is very significant. It shows a deliberate intention to discriminate against the persons subject to the State Statute, to deny them the equal protection of the laws, and to deprive them of their property without due process of law.

(3) The State Statute discriminates against copyright owners by denying them the right to show the reasonableness of their association and the fact that they do not actually monopolize or restrain trade.

The statutes relating to combinations monopolizing or restraining trade generally as defined in Article 8, Chapter 59 of the Compiled Statutes of Nebraska do not condemn them unless they *actually* monopolize or restrain trade (Secs. 801-822, *supra*). *Cooperative* associations *such as the Society,* have been held not to be in violation of the general anti-trust laws of the State, *Nebraska Wheat Growers Assn.* v. *Norquest,* 113 Neb. 731, 734, 204 N. W. 798 (1925).

In spite of this exemption of cooperative associations generally, a cooperative association of composers, authors and publishers of copyrighted works is declared illegal and discriminated against under the State Statute, even though they do not deal with any article of trade or commerce. No economic reason has been advanced for discriminating against an association of copyright owners operating in a field where cooperative action alone will protect composers and authors and where they do not deal with any article of trade or commerce.

II. The attempt to destroy appellees' property rights by legislative fiat constitutes a violation of the Fourteenth Amendment, and invalidates the Statute in its entirety. In effect the Statute is a bill of attainder.

A. THE STATUTE FALLS SQUARELY WITHIN THE CONDEMNATION OF *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, BY CREATING ARBITRARY PRESUMPTIONS MAKING APPELLEES PRIMA FACIE GUILTY.

(1) The attempt to destroy the Society by a Statute which declares that it shall be deemed to be in restraint of trade without giving the Society a right to show that it is not in restraint of trade is similar to the attempt of the State of Louisiana in *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, to legislate the American Sugar Company out of existence in that state. A statute there declared the business of refining sugar to be impressed with the public interest "by reason of the nature and by reason of the monopolization thereof", and on that footing certain regulations were made. It authorized an inspector to make reasonable regulations affecting any branch of sugar refining in the public interest and to prevent monopoly, and then provided that any person engaged in the business of refining sugar within Louisiana who systematically paid in Louisiana a lower price for sugar than he paid in any other state "shall be *prima facie* presumed to be a party to a monopoly or combination or conspiracy in restraint of trade." Drastic penalties followed, as in the case of the State Statute leading ultimately to the appointment of a receiver. Failure to operate a plant for a period of one year or to sell it within six months thereafter also gave rise to the appointment of a receiver with a power to sell the plant within twelve months after appointment. The statute provided that an injunction could be issued or a receiver appointed after a hearing, subject to an appeal.

In that case the court pointed out that the following allegations of the bill "throw special light upon the case" (p. 82): The plaintiff, American Sugar Company, built a new refinery in Louisiana and closed an old one in the State to save expense; it purchased less than one-half of Louisiana sugar crop, often paying lower prices in Louisiana than it would pay in New York. The answer alleged that plaintiff was a monopoly and combination in restraint of trade completely controlling the sugar trade in Louisiana; that suits had been brought against it by the United States and others under the Sherman Act. Other facts were alleged in the answer attempting to show that the plaintiff was in fact a monopoly. In affirming a decree granting an interlocutory injunction, this Court said at page 85:

> "The answer is signed by the Attorney General of the State; and if he were authorized to interpret the meaning of the other oice of the State heard in Act No. 10, would seem to import that the latter was a bill of pains and penalties disguised in general words. For the first division of the answer shows that the plaintiff is the only one to whom the act could apply and that the statute was passed in view of the plaintiff's conduct, to meet it. It is upon the assumption of the latter fact that the argument is pressed that the plaintiff has no standing in equity since it made the legislation necessary. If the connection were admitted it would be so much the worse for the constitutionality of the act. We deem it enough to say that neither that supposed connection nor the general intimations of the plaintiff's wickedness in the answer deprive it of its constitutional rights or prevent it from asserting them in the only practicable and adequate way.
>
> "The statute bristles with severities that touch the plaintiff alone, and raises many questions that would have to be answered before it could be sustained. We deem it sufficient to refer to those that were mentioned by the District Court; a classification which,

> if it does not confine itself to the American Sugar Refinery, at least is arbitrary beyond possible justice,—and a creation of presumptions and special powers against it that *can have no foundation except the intent to destroy.*"

In commenting on the presumption making the Sugar Company guilty of being an unlawful monopoly and in holding the *entire* Act invalid, the Court said at page 86:

> "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' *Mobile, Jackson & Kansas City R. R.* v. *Turnipseed,* 219 U. S. 35, 43. The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But *it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.* If the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of the plaintiff's monopolizing it and that therefore the plaintiff should be *prima facie* presumed guilty upon proof that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws. *We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed.*"

Applying that decision to the case at bar, the Society is made guilty of being a combination in restraint of trade because its members constitute a substantial number of composers, authors and publishers who have assigned their performing rights to the Society which in turn (in negotia-

tion with users' organizations) fixes the price of a license for the public performance for profit of the copyrighted musical compositions of the members of the Society. That activity is declared to be an unlawful combination in restraint of trade, regardless of whether or not it is in fact and in law such a combination.

(2) In addition to the presumptions of guilt, there are certain conclusive presumptions with respect to doing business in the State, the character of the business, etc., which are not based upon actual facts, and which result in vesting the courts of Nebraska with jurisdiction to deprive appellees of their property without actually being within the jurisdiction of the State. The presumptions are set forth *supra*, pp. 30-32). These arbitrary presumptions cannot be sustained. The State may not deprive appellees of their property which actually has no *situs* in the State of Nebraska or subject them to a personal judgment, as the Statute attempts to do, without actually securing jurisdiction over their persons. The Statute attempts to vest such jurisdiction in the Nebraska courts by setting up fictions which would bring them within the State. Such an attempt was condemned in *Bailey* v. *Alabama*, 219 U. S. 219, where it was said at page 244:

> "What the State may not do directly it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, *it is not permitted to accomplish the same result by creating a statutory presumption which upon proof of no other fact exposes him to conviction and punishment.*"

In *Morrison* v. *California*, 291 U. S. 82, it was said at page 90:

> "* * * 'The legislature may go a good way in raising [a presumption] or in changing the burden of proof, but there are limits.' *McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86. What is proved

> must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience. 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' "

One of the extreme extents to which the State Statute goes in creating a conclusive presumption opposed to the actual fact is found in the provision of Section 6 that "the use or rendition by radio broadcast, radio re-broadcast" of a copyrighted musical composition "shall be considered for the purpose of this Act, as *intra*state business of this State and subject to the control, regulation and prohibition set forth in this Act, notwithstanding that such copyrighted musical compositions originated or emanated from *without* this State." Of course, radio broadcasts know no state frontiers.[11]

B. The State Statute Discriminates in Favor of Those Who Have Not Copyrighted Their Compositions Pursuant to the Statute of 1909, But Rely Upon Their Common Law Right, as Against Those Who Have Availed Themselves of the 1909 Act.

The discrimination here referred to has been fully covered under the preceding point (*supra*, pp. 47-51). What is there set forth need not be repeated because the only difference is that there the discrimination is shown to violate the copyright provision of the Federal Constitution, and here it violates the equal protection feature of the Fourteenth Amendment. Manifestly there can be no reasonable

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[11] It is settled that radio broadcasting is interstate commerce (*Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650 [1936]; *Federal Radio Communications* v. *Nelson*, 289 U. S. 266 [1933]), and the subject of broadcasting is entirely covered by the Federal Communications Act (48 Stat. 1064, Title 47, U. S. C. 151-609) pursuant to the "Interstate Commerce" clause of the Federal Constitution.

basis for the discrimination, so far as the objects and purposes of the statute under attack are concerned, between composers and authors who avail themselves of the 1909 Act and those who rely upon their common law right.

C. The State Statute Discriminates in Favor of Copyright Owners Residing Outside of the United States, as Against Those who Reside Within the United States.

The State Statute applies only to "persons, firms or corporations *within the United States* who own, or control vocal or instrumental compositions" (Sec. 1). Foreigners may buy up a great number of American copyrights and combine for the same purposes as appellees without being subject to this law. Such organizations of foreigners already exist, as heretofore shown (R. I, 184, 253, 304). This Statute deliberately exempted them from its operation. No valid reason has been or can be assigned why this discrimination against copyright owners residing in the United States should exist. The American Society represents a great many foreign societies. Under the Statute it would be necessary and proper for these foreign societies to divorce themselves from the American Society and to have a separate licensing agency which could continue to do what the Society now does so long as none of the copyright owners resided in the United States. The Statute is aimed clearly at the American Society of Composers, Authors and Publishers and no other organization.

D. The Statute Discriminates Between Owners of Copyrighted Musical Compositions and Other Copyright Owners.

The Statute, by failing to include owners dealing in other forms of licensing of copyrighted works, exempts them from its operation. For example, it is well known that the Associated Press and virtually all the newspaper syndicates, license their services on a blanket basis. The news-

paper which subscribes to one of these services must pay, whether it uses the material or not. These associations necessarily deal with a great number of copyrights. A newspaper may subscribe to one or more of the syndicated news services, and may be compelled to pay a stipulated fee for the license accorded, regardless of the actual use of the material supplied by the copyright owner. Each of these syndicates must have a substantial number of copyrighted stories or news items available or they cannot furnish any worthwhile service. Likewise they must fix a blanket fee for the right to use any or all of their respective copyrighted works. Yet they are not subject to the provisions of the State Statute and are not "declared illegal and in restraint of trade" because of their operations.

The same applies in the field of licensing motion pictures and many other forms of copyrights and rights thereunder. But all are exempt from the operation of this Statute.

Discriminations made by the State Statute in condemning solely the creators and owners of property rights in musical compositions who copyright their works are grossly unreasonable. It is as if the Statute should say in terms to composers and authors, "You may injure the public by monopolizing and restraining trade in the licensing of musical compositions—which privilege is denied to those who copyright their works—provided only you fail to copyright your works," or "You may likewise injure the public if you turn your talents to fields other than musical or dramatico-musical works, whether you copyright them or not, provided, only, you do not compose and copyright dramatico-musical compositions," or "You may injure the public in any manner condemned by the Statute so long as you assign your copyrights to persons not residing within the United States." Since performing rights may be licensed whether the works are copyrighted or protected under common law principles, or whether they are owned by Americans or foreigners and since rights under copyrights may be licensed in the manner condemned by

owners of rights in copyrights other than performing rights, the non-existent evils which the Statute is purportedly designed to reach may result from the operations of any of the exempted groups.

III. The State Statute cannot be justified under the police power.

A. The State Statute Was Not Enacted in the Public Interest.

The court below held that the statute was not a reasonable exercise of the police power of Nebraska (R. I, 131). This conclusion was abundantly justified by the evidence in the case and no attempt was made in the court below to demonstrate that any of the public other than the 391 users of Nebraska would be benefited by the act. They, in turn, would be benefited by escaping the necessity of paying royalties for the use of music duly copyrighted under the laws of the United States. The statute itself cannot be justified as being in the public interest, if it was passed for the benefit of that particular class. The legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. *Lawton* v. *Steele,* 152 U. S. 133, 137.

B. The Statute is Designed to Prohibit a Lawful Enterprise.

In the case at bar, appellees are engaged in occupations not only harmless in themselves but which bring to countless thousands that pleasure and entertainment which only music affords, and which have been carried on without detriment to the public interest, but to its benefit. They are now, as a practical matter, prohibited by the State Statute. Such interference with the conduct of their private business is arbitrary and unnecessary. *Lawton* v. *Steele, supra.*

The activities of the Society were held to be entirely lawful in New York in *174 St. & St. Nicholas Ave., Amusement Co.* v. *Maxwell,* 169 N. Y. Supp. 895, and in *State of Washington* v. *American Society of Composers, Authors and Publishers* (Super. Ct. Washington, Thurston County, June 10, 1936 [printed in the Appendix]). The Federal Trade Commission came to a similar conclusion (R. I, 231-2). The legality of the foreign affiliated societies, and the necessity for their organization have likewise been upheld. *Performing Right Society, Ltd.* v. *Magistrates of Edinburgh,* 1922, Sess. Cas. 165; *Performing Right Society, Ltd.* v. *London Theatre of Varieties, Ltd.* [1924] A. C. 1; *Performing Rights Society, Ltd.* v. *Thompson,* 34 T. L. R. 351 (K. B., 1918.)[12]

[12] As previously stated (*supra,* p. 24, footnote) a consent decree was entered in the Southern District of New York on March 4, 1941, in a suit instituted by the United States against the Society. For the convenience of the Court, if this decree is deemed relevant to these suits, a copy will be handed up at the time of the argument. It will be noticed that it makes no adjudication of illegality, but enjoins the Society from refusing to license broadcasters on their request on a per program basis and from refusing to license other users on the basis of individual compositions, when requested. As a part of the settlement of the controversy between the Government and the Society, the latter pleaded *nolo contendere* to a criminal information filed against the Society, its officers and directors, and certain publishing firms, in the Eastern District of Wisconsin. There has never been an adjudication based upon a full exposition of the facts and law that the Society is an unlawful combination under the Sherman Act. There was a decision by a statutory court in the State of Washington (whose previous decision that it was without jurisdiction to entertain the suit brought by the Society to enjoin the enforcement of the Washington statute similar to those *sub judice* was reversed by this Court in *Buck* v. *Gallagher,* 307 U. S. 95) that the Society had violated the Sherman Act and, consequently, was not entitled to relief (*Buck* v. *Gallagher* [as yet unreported] W. D. Wash., Dec. 23, 1940). The point on which the decision was based was not raised by any of the defendants in that case. It was advanced by an intervenor (who had not raised the point in his pleadings) after plaintiffs and defendants had submitted the case on testimony previously taken before a special master. Appellees appealed this case to this Court on April 15, 1941, a petition for rehearing having been denied on that day.

National and state anti-trust laws are designed to regulate marketing, and may not be used as a screen to destroy it. Such laws are necessarily based upon the assumption that there is a right way and a wrong way of marketing property. There is only one way by which the owners of copyrighted musical compositions may obtain revenue for the public performance for profit of such compositions, and that way is by collective action. The evidence is conclusive that without such collective action the exclusive right of public performance for profit, vested in the copyright owner, becomes an unenforceable and valueless right, existing in theory only, and robbed of all commercial value. The individual copyright owner standing alone is helpless and hopeless. Necessity compels copyright owners to act collectively in order to exercise the exclusive right of public performance for profit. A statute which prevents them from acting collectively confiscates this right. Instead of promoting the licensing of this right the Statute destroys it.

Since Congress, in 1897 and in 1909, granted to composers the exclusive right to publicly perform for profit, we must assume that it meant to give to such composers something of value. Collective action in this case is the only practical means by which this most valuable right may be vindicated. As this Court said in *Washingtonian Pub. Co.* v. *Pearson,* 306 U. S. 30, 40, "Without right of vindication a copyright is valueless."

C. Appellants' Authorities Distinguished.

Appellants attempt to justify the State Statute as a reasonable regulation affecting commercial dealings in copyrights, under *Allen* v. *Riley,* 203 U. S. 347; *Patterson* v. *Kentucky,* 97 U. S. 501; *John Woods & Sons* v. *Carl,* 203 U. S. 358; *Ozan Lumber Co.* v. *Union County National Bank,* 207 U. S. 251; *Carbice Corporation* v. *American Patents Corp.,* 283 U. S. 27, 33; *Fox Film Corp.* v. *Doyal,*

286 U. S. 123; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436.

We have already seen that the State Statute was not enacted in the true public interest of the citizens of the State of Nebraska. The provisions of the Statute destroying the rights of copyright owners operating *individually* were certainly not necessary to accomplish the purpose of destroying any alleged *monopoly*. The provisions making the Society an unlawful combination in restraint of trade were not necessary if the Society really is a combination in restraint of trade, because earlier Nebraska Statutes which continue in effect, and the penalties of which are made cumulative, amply provide for the regulation and punishment of combinations in restraint of trade.

The regulations which were held reasonable in the cases relied on by appellants are of an entirely different scope.

In *Allen* v. *Riley, supra,* a Kansas Statute made it unlawful for any person to sell or barter any patented right without first filing in the particular county a copy of the letters patent, stating under oath that they were genuine and that they had not been revoked or annulled, and that such person had full authority to sell or barter the same. It further required that any note taken in consideration of a patent right must recite "Given for a patent right." These statutes were passed to meet a well-known evil. The Court pointed out that small expense was involved in complying with the statute, and that the statute was a reasonable means of meeting the evil of fraudulent sales of non-existent patents. In upholding the statute, the Court warned against such statutes as the one at bar, saying at page 355:

> "To uphold this kind of a statute *is by no means to authorize any State to impose terms which, possibly,* in the language of Mr. Justice DAVIS, *in Ex parte Robinson,* 2 Biss. 309, '*would result in a prohibition of the sale of this species of property within its borders,* and in this way nullify the laws of Congress which regulate its transfer, and destroy the

power conferred upon Congress by the Constitution.' *Such a statute would not be a reasonable exercise of the powers of the State.*"

Woods v. *Carl, supra,* and *Ozan Lumber* v. *Union County, supra,* followed *Allen* v. *Riley, supra,* in interpreting a similar Arkansas Statute.

Patterson v. *Kentucky, supra,* involved a Kentucky statute which required the inspection of oils and other inflammable fluids used for illuminating purposes, and prohibited the sale for such purposes of any substances which could ignite at a certain temperature. The defendant, who was convicted of selling oil in violation of the statute, defended on the ground that his process was protected by letters patent. The statute was upheld as a reasonably necessary means of protecting the lives and health of the citizens of Kentucky. As the Court pointed out, this was a mere police regulation "strictly and legitimately for police purposes," which said at page 506 that "police regulations which were enacted in *good faith,* and had appropriate and direct connection with that protection to life, health and property, which each State owes to her citizens" must be upheld.

The State Statute here was not enacted in good faith and has no appropriate or direct connection with the protection of the citizens of Nebraska, except to the extent that it immunizes 391 citizens of that State against enforcement of the Federal Copyright Act.

Appellants urged below that the purpose of the Nebraska legislature in passing this Statute cannot be considered, citing *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 126. In that case the court refused to "speculate as to the motives of the State" where there was nothing on the face of the statute or by its necessary operation to justify an assumption that the State had not acted in good faith.

In the case at bar, the purpose of the legislators appears both on the face of the Statute and in its practical operation. The State Statute makes it impossible for

any owner of a copyrighted musical composition to enforce the payment of royalties by Nebraska users who profit from the public performance of such copyrighted works whether the copyright owners act as individuals or whether they act collectively. If the copyright owners act as *individuals,* they are barred from collecting license fees for the public performance for profit apart from the amount charged for the sale of sheet music, and they cannot collect royalties from Nebraska users who import their music from other States by contract with third parties who give such performances by means of records or other articles or devices serving to reproduce the copyrighted work mechanically. If the copyright owners act *collectively* and attempt to issue blanket licenses (as permitted by the consent decree in *United States* v. *American Society, supra*), they necessarily run afoul of the Statute and are subject to their drastic penalties. If the purpose of this Statute were to regulate monopolies or combinations in restraint of trade, there would be no reason for limiting the rights of copyright owners who act as individuals. Those sections which curtail the rights of individual copyright owners, and which appellants would have this Court ignore, show clearly that the Statute was not passed in the *bona fide* public interest of the State of Nebraska.

Since the Statute *on its face* shows an absence of good faith, it is entirely proper to examine the circumstances surrounding its passage; and since the Statute was obviously passed for the benefit of a few users of music in the State of Nebraska, who secured passage of such Statute (Pl. Tr. Ex. 44, R. II, 853, R. I, 374), that fact is relevant in passing upon the question of whether the Statute was enacted in the public interest.

Carbice Corporation v. *American Patents Development Corp., supra,*[13] merely cites the above cases in a footnote at page 33 for the proposition that the grant of a United

[13] The proposition, broadly stated, decided in the *Carbice* case was that one could not, through the doctrine of contributory infringement, use a patent to procure a monopoly over an unpatented article.

States patent does not exempt the patented product from limitations imposed by said police power. This, of course, does not give the States the right to enact unconstitutional statutes under the guise of protecting the public interest. In that footnote, Mr. Justice BRANDEIS also refers to the case of *Webber* v. *Virginia,* 103 U. S. 344, where it is said at page 347:

> "It is only the right to the invention or discovery —the incorporeal right—which the State cannot interfere with."

The statute in *Webber* v. *Virginia* was held to discriminate against non-resident owners of patents and was invalidated on that ground. Referring to those subjects which come under the powers reserved to Congress, the Court there said at page 351:

> "Here there can, of necessity, be only one system or plan of regulations, and that Congress alone can prescribe."

As previously pointed out, if each State were free to make its own regulations on the subject of copyrights, some States might enact statutes like that of the State of Washington considered in *Buck* v. *Gallagher,* 307 U. S. 95, some might enact statutes like the State Statute, and others might conceive some other form of regulating copyrights. In such event, the constitutional provision reserving to Congress the power to secure to authors and inventors the exclusive rights in their respective writings and discoveries for limited periods of time would be completely nullified.

The State Statute not only discriminates against copyrights, but make the enjoyment of performance rights therein impossible. Those rights are actually confiscated. Thus the copyright owners affected by the Statute, are deprived of the very rights without which, under present day conditions, a copyright in a musical or dramatico-musical work is virtually worthless.

The *Ethyl Gasoline* case, *supra,* involved an *actual* restraint of trade in fixing the prices of non-patented articles moving in commerce.

The Society is not concerned with sheet music or any article of trade. It promotes licensing of copyrights by creating a practical method of licensing in a field where there was no licensing and *no means of licensing* before its organization. If it affects trade or commerce, it promotes rather than restrains it.

IV. The State Statute impairs obligations under existing contracts.

Section 3 of the State Statute provides that "All existing contracts, agreements, licenses or arrangements now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforcible in any Court within the boundaries of this State." The collection or attempted collection of moneys thereunder is made illegal and subjects the combination, its agents, members or representatives seeking to enforce the same to the penalties of the Statute. Each collection or attempted collection is a separate offense.

Thus the State Statute destroys all of the 391 contracts now existing between appellee Society (representing all its composer, author and publisher members jointly) and users located in the State of Nebraska.

The Constitution of the United States provides (Art. I, §10):

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

The contracts between the Society and users in Nebraska and between the Society and its members were valid when made. We need not consider whether these contracts are within the category of those which may be *ex post facto* invalidated in the public interest because, as we have en-

deavored above to show, the purpose of the law in destroying these contracts was solely to benefit the other parties to them at the plaintiffs' expense. It would seem to admit of no argument that that is beyond the power of the State.

In *Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, 62 (1935), the court invalidated an Arkansas statute which impaired the security of bondholders under the guise of the "public interest," pointing out that the underlying reality rather than the form or label controlled its judgment.

V. The State Statute violates the Fourteenth Amendment by interfering with appellees' right to do business outside the State and interferes with interstate commerce by requiring prices to be fixed on sheets of music and phonograph records coming from outside the State and prescribing the uses that can be made of such compositions and records, as well as by the provisions respecting broadcasting.

The Statute is so framed that in its practical operation appellees will be penalized, regardless of whether they do anything within the State of Nebraska.

For example, under Sections 2-A and 2-B of the Statute, unless the physical copy of the copyrighted composition or a manufactured record or other instrument from which the copyrighted composition may be reproduced, bears a notation as to the selling price for all uses and purposes, including private rendition and public rendition for profit, the purchaser of such copy or manufactured article is given the right to use or render or cause or permit others to use or render the copyrighted work in the State of Nebraska for any purpose whatsoever without further compensation, even though the Copyright Law gives the copyright owner distinct rights of publication and performance which he may separately license or sell.

In other words, when appellees grant the right of publication to publishers located in New York, or are

compelled to grant an involuntary license under Section 1 (e) of the Copyright Law to manufacturers of records located in any part of the United States, unless they see to it that the publisher or the manufacturer affixes to the record or article a price for all uses of the work in the State of Nebraska, the appellees are compelled to forfeit all rights under their copyrights so far as that State is concerned.

The evidence is uncontradicted that appellees have no control over manufacturers of phonograph records or piano rolls, and cannot compel the latter to affix a price (R. I, 191, 490-1, 528-9, 538-9, 578-9; R. II, 621-2, 644, 694, 708-9, 746, 733, 780-1), and that authors have no control over their publishers, and can not compel them to affix a price on the sheet music (R. II, 746). Professional copies are furnished gratis to artists as a necessary part of exploitation (R. I, 312, 317, 511, 560-1, 567). The Court below found that in this respect the statute could not be complied with (Finding "19", R. I, 138).

This penalty is imposed, even though appellees do no business in Nebraska, have no agent within the State, and do not come within the State themselves.

Failure to cause such a price to be affixed results in appellees being deprived of even the right to resort to the Federal Court to redress infringements of their copyrighted works.

All these penalties follow upon acts done or omitted *outside* the State.

If appellee publishers sell sheets of music in New York to purchasers who take them to Nebraska, and if those sheets of music do not have a price affixed thereon, the penalties of the Statute follow just as much as if appellees themselves sold the copies within the State.

The penalties in the form of deprivation of rights under their copyrights, are inflicted not upon the sellers of the sheets of music in Nebraska, but *upon the owners of the copyrights who have done nothing in that State.*

Section 4-A of the Statute gives radio stations the right to broadcast and rebroadcast appellees' copyrighted compositions, free of charge as long as appellees remain members of the Society.

Appellees are prohibited from issuing licenses to, and collecting from radio broadcasting stations located *without* the State, for the privilege of broadcasting or rebroadcasting within the State, because Section 4-B makes it unlawful for any such broadcasting station to pass on the charge to any user located in Nebraska.

Here, again, the Statute penalizes the appellees for acts done without the State.

Sections 5-A and 5-B of the Statute contain similar provisions in favor of motion picture theatres and other places of public amusement and entertainment, and prevent persons furnishing such entertainment from outside the State from collecting any license fees from users located within the State.

Section 6 shows that the whole object of the Statute is to exempt users of copyrighted music in the State from any payment whatsoever, because it is there provided that if the means of performing the music is sent to Nebraska from any other State, *regardless of whether the owner of the copyright is a member of any combination condemned by the Statute,* the sole responsibility rests upon the person located outside the State and not upon the user located within Nebraska, and the copyright owner is prohibited from bringing any suit for infringement in the Federal Courts for such infringing performance within the State.

Section 7-A shows an intent to deprive appellees of their rights notwithstanding the fact that they are not within the State, by providing that if any person acts as a representative in Nebraska for a combination made unlawful by Section 1, he shall be deemed an official representative and agent of the combination, and the combination

shall be deemed to be doing business in the State and service of process may be made upon such representative *or upon any agent of such representative,* with the same effect as if served on an officer or a managing agent or official representative upon whom service upon the combination might be made in the absence of this Statute.

Section 7-B bars the Society from assigning any claim that it has against users in Nebraska for license fees, by providing that any person who attempts to collect license fees, *or* who acts as representative or agent for any combination, is considered a part of the unlawful combination and subject to the penalties of the Statute.

If the Society should withdraw from the State, it would not be able to collect moneys due for license fees under existing contracts.

Any lawyer who attempts to bring suit to collect any such license fees would be guilty of violating this Statute. If he brought such a suit he would be deemed a representative of the Society and the Society would be deemed to be doing business and service upon him would subject the Society to the jurisdiction of the Nebraska courts and the penalties of the Statute under Section 8.

Upon securing such jurisdiction, the State Court is authorized to decree the dissolution of the Society and to enjoin its operations (Sec. 9-A, B, C, D).

If appellees wish to protect themselves against infringements of their works in Nebraska, they must refrain from licensing all persons located outside the State who have any affiliation with users in Nebraska; they must refrain from entering into publication contracts outside the State, unless the publisher agrees to affix a price for all uses of the work in Nebraska, and they must at their peril locate all manufacturers of records and other articles from which the copyrighted work may be produced, in the hope of inducing such manufacturers to affix a price for all uses of the copyrighted work.

Complications that would result from any such endeavor, are so numerous and so obvious, that it would serve no purpose to lengthen this brief by enumerating them.

This Statute is clearly an attempt by the State of Nebraska to project its legislation into other States and to regulate the business of plaintiffs outside the State.

In *Provident Savings Ass'n* v. *Kentucky*, 239 U. S. 103, a Kentucky statute imposed a tax of 2% on the collections of insurance premiums within the State and provided that any insurance company which had theretofore been authorized to transact business in the State, must report its business to the State so long as it continued to collect premiums from insurance theretofore written. Failure to make the report resulted in a fine of $500.00.

The Provident Company withdrew from the State and continued to receive premiums by mail in New York City. The State brought suit to recover the tax on premiums for five years after the company withdrew.

That statute was held to violate the Fourteenth Amendment on the ground that the statute was an attempt by the State to penalize the company for acts not done within the State and that it therefore violated the Fourteenth Amendment. This Court said at page 112:

> "• • • *Taxation without jurisdiction has been held to be a violation of the Fourteenth Amendment* (*Louisville & Jefferson Ferry Co.* v. *Kentucky*, 188 U. S. 385, 398; *Del., Lack. & West. R. R.* v. *Pennsylvania*, 198 U. S. 341, 358; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 209); and the principle involved applies to the assertion of authority on the part of the State to exact a license tax *for the privilege of doing acts which lie beyond the sphere of local control.* It follows that the quality of the acts with respect to which the State exercises the taxing power must be considered when the constitutional protection against the transgression of jurisdictional limits is invoked."

In *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, a Connecticut surety company doing business in Mississippi, made a contract in Tennessee, under which it agreed to indemnify the plaintiff company, a Mississippi corporation. The loss occurred in Mississippi and the suit was brought there. A Mississippi statute declared that all contracts insuring any interest in the State "shall be deemed made therein." The State court held that the contract in question was a Mississippi contract, although made elsewhere, and that consequently the provision for a one-year limitation period was void under the Mississippi law although in conformity with Tennessee law. This Court held that law invalid.

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, the defendants took out an insurance policy with a New York company on their cotton which was shipped from Louisiana.

A Louisiana Statute which provided that any person doing any act within the State to effect insurance on property in that State, and not complying with the State Insurance Law, was subject to a fine of $1,000 for each offense, was held violative of a citizen's liberty to contract. The Court said at page 589:

> "The liberty mentioned in that amendment means not only the rights of the citizen to be free from the mere physical restraint of his person, as by incarceration but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; *to live and work where he will;* to earn his livelihood by any lawful calling; *to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.*"

It was held in *St. Louis Compress Co.* v. *Arkansas*, 260 U. S. 346, that the imposition of a 5% tax on premiums paid by residents to outside insurers under facts similar

to those of the *Allgeyer* case, was an unconstitutional attempt to regulate extra-territorial activities. This Court there said at page 348:

> "In Louisiana the detriment was $1,000. Here it is five percent upon the premiums—which is three percent more than is charged for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the State. This case is stronger than that of Allgeyer in that here no act was done within the State whereas there a letter constituting a step in the contract was posted within the jurisdiction. *It is true that the State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside.*"

The Nebraska Statute would set up just as effective an economic barrier between States as that condemned in *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511.

VI. The court below properly held that the Statute must fall as a whole, and that its various sections cannot be separated.

The scheme of the State Statute is to destroy the right of public performance for profit in the State of Nebraska, whether the right is licensed individually by the separate owners of the copyright or whether it is licensed collectively through the Society.

The right of public performance for profit of all members of the Society has been transferred to the Society for a period expiring December 31, 1940.[16] Under the circumstances, the sections barring the licensing of performing

[16] These agreements are renewed every five years (R. I, 183).

rights separate and apart from the sale of sheet music are presently applicable. Sales of sheet music are controlled by the members of the Society acting individually. The Society has nothing to do with such sales, nor has it anything to do with the manufacture or sale of records; but the Society owns the right of *public performance for profit*, and it is only that right which is affected by *all* the sections of the Statute. Consequently, the validity of every section of the Statute is before this Court.

Where it is probable that certain provisions of the Statute would not have been enacted but for other provisions which are held bad, all the provisions of the Statute must fall together. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 316; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 243.

To sustain some of these provisions while invalidating others would be to rewrite the Statute and give it an effect altogether different from that sought by the Statute when viewed as a whole. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362.

As this Court said in *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, 87: "the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed."

CONCLUSION.

The decree appealed from should be affirmed.

Respectfully submitted,

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellees.

April, 1941.

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, as Secretary of State of Nebraska, *et al.*,

Appellants,

vs.

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

APPENDIX
TO APPELLEES' BRIEF

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellees.

April, 1941

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Buck v. Gallagher, 307 U. S. 95 (1939).

(Washington Statute printed at p. 76, *infra*.)

Appeal from a decree of the District Court of three judges which dismissed, for want of jurisdiction, a bill to enjoin the enforcement of a statute of the State of Washington affecting the right of the owners of copyrights to combine in licensing performances of their musical compositions.

Mr. Thomas G. Haight, with whom Messrs. Louis D. Frohlich and Herman Finkelstein were on the brief, for appellants.

Mr. Alfred J. Schweppe, with whom Messrs. G. W. Hamilton, Attorney General of Washington, John E. Belcher, Assistant Attorney General, Edwin C. Ewing, Ralph E. Foley, and Sam M. Driver were on the brief, for appellees.

Mr. Justice REED delivered the opinion of the Court.

This is an appeal, under §266 of the Judicial Code, from a decree dismissing appellants' bill to enjoin the enforcement by the appellees of a statute of the State of Washington.[1] The purpose of the statute is to render illegal certain activities carried on by pools of copyright owners in authorizing by blanket licenses the performance of their musical compositions.

The statute declares it unlawful for two or more persons holding separate copyrighted works to pool their interests in order to fix prices for their use, to collect fees or to issue blanket licenses for their commercial production. Joint undertakings for this purpose are permitted if the licenses are issued at rates assessed on a per piece system of usage.

[1] Buck v. Case, 24 F. Supp. 541. Washington Laws 1937, c. 218, p. 1070.

All combinations of owners of separate copyrighted musical works are required to file a complete list of these works once each year with the secretary of state of the State of Washington, together with detailed information as to prices and ownership. There are numerous other provisions unnecessary to detail.

The appellants are the American Society of Composers, Authors and Publishers; Gene Buck, suing in his own name and as the president of the Society; and a number of other members, corporate publishers and authors, composers or their next of kin. This suit was brought by complainants on behalf of themselves and others similarly situated, members of the Society too numerous to make it practicable to join them as plaintiffs in a matter of common and general interest. The bill alleges the organization of the Society as a voluntary, unincorporated, non-profit association under the laws of New York, and sets out that its purpose is to protect the owners of copyrighted musical works against piracies, to grant licenses and to collect royalties for the public performance for profit of the compositions of its members. These are composers, authors and publishers of musical compositions or their successors. The royalties and license fees collected by the Society are distributed from time to time, as ordered by the Board of Directors, among the members of the Society, after the payment of expenses of operation and sums due to foreign affiliated societies and after the deduction of a limited reserve fund.

In addition to the general allegation that the value of the matter in dispute is in excess of $3,000, the bill alleges that the value of each publisher's copyrights exceeds $1,000,000. The bill further shows that each individual complainant has rights to royalties and renewals worth in

excess of $100,000. It is shown by the bill that in the State of Washington there were five hundred twenty-eight contracts outstanding in 1936, all entered into in the name of the Society, from which it received more than $60,000 and that similar sums annually will be collected. Other allegations are discussed later.

On the filing of the bill, a motion was made for an interlocutory injunction and affidavits were filed in support of the request. At the time the motion for a temporary injunction came on for hearing, the defendant state officers and certain intervenors filed motions to dismiss which challenged the bill on various grounds. The district court considered only one ground: whether the value of the subject matter in dispute is more than $3,000, exclusive of interest and costs. Upon the hearing, the district court found that neither the bill nor the record shows the necessary jurisdictional value and dismissed the bill. The basis for this ruling is treated here.

Although this statute of Washington, as that of Florida,[1] is aimed at the power exercised by combinations of copyright owners over the use of musical compositions for profit, the differences between the enactments and the procedural situations require additional consideration. The Florida statute does not permit any combination of copyright owners for the purpose of licensing the use of their compositions. The prohibition is complete. In the Washington statute, on the other hand, such a combination, federation or pool is not prohibited if it issues licenses "on rates assessed on a per piece system of usage." Even upon these permitted transactions there are limitations of

[1] Considered in Gibbs v. Buck, 307 U. S. 66.

price and use, unnecessary to consider here.[3] The statute is directed particularly at the practice of issuing blanket licenses which authorize the performance of all copyrighted material belonging to the licensor. Whether a state statute is regulatory or prohibitory, when a bill is filed against its enforcement under section 266 of the Judicial Code, the matter in controversy is the right to carry on business free of the regulation or prohibition of the statute.[4] Where the statute is regulatory the value of the right to carry on the business, as was said in *McNutt v. General Motors Acceptance Corporation*, may be shown by evidence of the loss that would follow the enforcement of the statute. And this loss may be something other than the difference between the net profit free of regulation and the net profit subject to regulation. The difficulties of determining the value of rights by calculating past profits as compared

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[3] Washington Laws, 1937, sec. 3. c. 218, p. 1071, reads as follows: "It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interest for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: *Provided, however,* Such persons may join together if they issue licenses on rates assessed on a per piece system of usage; *Provided, further,* This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: *Provided, further,* Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group or persons affected by this act does business, and all groups and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher and more inequitable rates per piece for music licenses in this state than in other states: *Provided, further,* Where the owner, holder or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works."

[4] Prohibitory statutes—Gibbs v. Buck, *supra;* regulatory statutes—McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 181; Kroger Grocery Co. v. Lutz, 299 U. S. 300, 301.

with possible future profits, influenced by the single factor of statutory regulation, are obvious. This difference is not the only test of the value of the right in question. The value of the matter in controversy may be at least as accurately shown by proving the additional cost of complying with the regulation. This factor was not offered in evidence in the *McNutt* case.

In *Packard* v. *Banton*[5] the existence of the jurisdictional amount was partly determined by consideration of the cost of providing liability insurance required by a regulatory statute. Where a state railroad commission required the construction and service of an industrial spur which did not increase earning capacity, the cost was held to measure the jurisdictional amount.[6] The expense of producing the information required by a challenged order in a utility investigation was considered sufficient to establish the value of the matter in controversy.[7] The cost of complying with the challenged statute as a test of the value of the amount in controversy has been applied in effect in suits to enjoin the collection of taxes as unconstitutional interferences with the right to do business. In such cases "the sum due or demanded is the matter in controversy and the amount of the tax, not its capitalized value, is the measure of the jurisdictional amount."[8]

By section four of the Washington statute every combination of two or more copyright owners must file, once a year, with the secretary of state, a complete list of their

[5] 264 U. S. 140.

[6] Western & A. R. R. v. Comm'n, 261 U. S. 264, 267.

[7] Petroleum Exploration, Inc. v. Pub. S. Comm'n, 304 U. S. 209, 215.

[8] Healy v. Ratta, 292 U. S. 263, 271, and cases there cited; Grosjean v. Am. Press Co., 297 U. S. 233, 241; Henneford v. No. Pacific Ry., 303 U. S. 17, 19.

copyrighted works, under oath.[9] By section three, individuals are forbidden from joining together "for the purpose of collecting fees in this state" unless their licenses are on a per piece system of rates. In addition to the general allegation that the value of the matter in controversy exceeds $3,000, the bill alleges that the cost of compliance by the Society, the combination of members, with section four would exceed $300,000.[10] For the individual members who now have the benefits of the services performed by the Society, additional allegations set out the cost imposed upon them by the statutory regulation as being "in excess of $10,000" to each for carrying on for themselves the functions now performed for them by the Society. The motions to dismiss deny the general allegation of value, deny that there would be any cost to the Society by compliance with section four as the required list is already compiled and the expense, since the Society is non-profit, would be borne by members, and deny that the individual complainants would be put to a cost of $10,000 each. There was no allegation of the loss or cost to the Society or members occasioned by the requirement that the licenses from pooled copyrights should be issued at per piece rates.

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[9] The list must state that it "is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work."

[10] Specifically the allegation is that "The cost to the Society of attempting to compile the lists and information required to be furnished under the State Statute would be far in excess of $300,000., which sum would have to be expended for research work with reference to the past history of each and every copyright owner, by every one of the 44,000 members of the Society and its affiliated societies, lawyers' fees for opinions as to the rights of parties involved with respect to the ownership, grants, licenses and other interests in the respective copyrights, clerical help and other incidental expenses; even with such an expenditure, it would be utterly impossible to furnish an accurate or complete list of all the respective copyrights of the members of the Society and of its affiliated societies with all of the data required by the State Statute."

On submission of the motion to dismiss for want of the jurisdictional value, the burden of proof was upon complainants.[11] Although the trial court called specific attention to the jurisdictional matters three months before it filed its opinion denying jurisdiction, by request for additional briefs, no evidence was offered. After the filing of the opinion and before the entry of the decree, on complainants' motion an order was entered to show cause why witnesses should not be heard on the value of the matter in controversy. The complainants furnished an uncontroverted affidavit stating that their failure to offer evidence was due to the fact that there was no denial of the facts pleaded. The offer of proof showed that it was desired "to offer the testimony of expert witnesses concerning the cost of complying with the requirements of Section 4 of the Act, and concerning the value of the property rights in question which will be affected by this Statute." The court did not reject the evidence as a matter of discretion because tardily presented. On the hearing on the rule the court made it quite clear that the proffered evidence was deemed immaterial because it showed only cost of compliance, not the value of the right to do business free of the compulsion of the statute.[12] The application to take further testimony was denied and the motion to dismiss granted "in that this cause is not within the jurisdiction of this court as a federal court." We conclude that the refusal to permit additional evidence in these circumstances was error.

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[11] McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 189.

[12] E. g., this statement was made by the court: "Perhaps we are somewhat in the fog with respect to the matter you are trying to present but from our viewpoint it seems to us that you are urging that the value of the thing in controversy is to be measured by the cost of doing business or complying with the statute. From our standpoint we think the cost of doing business has nothing to do with the method of doing business. It is true the statute may necessitate a large expenditure but that would not mean anything because by a large expenditure you might make a much larger profit. Perhaps we don't understand each other but I think that is the basis of measuring the value of the matter in controversy."

The complainants in this case are the same as those *Gibbs* v. *Buck, supra.* In the *Gibbs* case we pointed o that the members share directly in the earnings of t Society and have a common and undivided interest in t right to license in association through the Society free the provisions of the state statute. The allegations as relationship between the Society and its members sh the same status in this case. The fact that "neither pra tice nor rule of the committee concerning the apportioni among the Society's members of the pooled license fe realized is shown,"[13] does not affect the rights membe have in the apportionment of the royalties from licen fees. These rights are granted by the articles of associ tion which are a part of the bill. *KVOS, Inc.* v. *Associat Press,*[14] relied upon below, is distinguished in the *Gib* case.

The cause will be remanded to the District Court wi directions to permit the introduction of evidence and f further proceedings not inconsistent herewith.

Reversed.

Mr. Justice BLACK dissents.

Mr. Justice FRANKFURTER took no part in the consider tion or decision of this case.

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[13] Buck v. Case, 24 F. Supp. 541, 549.

[14] 299 U. S. 269.

Opinion in Gibbs v. Buck, 307 U. S. 66 (1939).

(Florida 1937 Statute printed at p. 91, *infra*.)

APPEAL from an order of the District Court, of three judges, overruling a motion to dismiss the bill and granting an interlocutory injunction, in a suit to restrain enforcement of a Florida statute forbidding combinations of owners of copyrighted musical compositions.

Messrs. Tyrus A. Norwood, Assistant Attorney General of Florida, and Lucien H. Boggs, with whom Messrs. George Couper Gibbs, Attorney General, and Andrew W. Bennett were on the brief, for appellants.

Mr. Thomas G. Haight, with whom Messrs. Frank J. Wideman, Louis D. Frohlich, Herman Finkelstein, and Manley P. Caldwell were on the brief, for appellees.

Mr. Justice REED delivered the opinion of the Court.

This is an appeal from the order of a three-judge court refusing to dismiss a bill of complaint on motion for failure to set out facts sufficient to show Federal or equity jurisdiction, or to constitute a cause of action, and granting an interlocutory injunction against the enforcement of a Florida statute aimed at combinations fixing the price for the privilege of rendering privately or publicly for profit copyrighted musical compositions. Sec. 266, Jud. Code.

The appellant, the state Attorney General and various State Attorneys, are officers of the State of Florida charged with the enforcement of the act. The appellees, complainants below, are the American Society of Composers, Authors and Publishers, an unincorporated association organized under the laws of the State of New York; Gene Buck as president of the Society; various corporations publishing musical compositions; a number of authors and composers of copyrighted music; and several next of kin

of deceased composers and authors. This suit was brought by complainants on behalf of themselves and others similarly situated, members of the Society, too numerous to make it practicable to join them as plaintiffs in a matter of common and general interest.[1]

One of the rights given by the Copyright Act is the exclusive right to perform copyrighted musical compositions in public for profit.[2] The bill of complaint alleges that users of musical compositions had refused to recognize this statutory right and to pay royalties for public performances for profit, and that authors, composers and publishers were unable, individually, to enforce their exclusive right because of the expense of detecting and suing for infringement throughout the United States. The Society was founded in 1914 to license performance of copyrighted music for profit and otherwise protect the copyrights. The state statute was directed at organizations like the Society and became effective on June 9, 1937.[3] So far as is important here, the statute makes it unlawful for owners of copyrighted musical compositions to combine into any corporation, association or other entity to fix license fees "for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit," when the members of the combination constitute "a substantial number of the persons, firms or corporations within the United States" owning musical copyrights. It declares the combination an unlawful monopoly, the price-fixing in restraint of trade, and the collection of license fees and all contracts by the combination illegal.

The bill attacked the statute as contrary to the Constitution and laws of the United States and the constitution

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[1] Equity Rule 38.

[2] Act of March 4, 1909, Sec. 1(e), c. 320, 35 Stat. 1075, 17 U. S. C. Sec. 1(e).

[3] Fla. Gen. Laws 1937, Vol. I, c. 17807.

of Florida. More specifically, it urged that the law impinged upon rights given by the Copyright Act of 1909, deprived complainants of rights without due process of law and without the equal protection of the laws, impaired the obligation of contracts already executed, and operated as an ex post facto law.

There was a formal allegation that the matter in controversy exceeded $3,000, exclusive of interest and costs. In addition, the bill alleged that the three publishers owned copyrights of a value in excess of $1,000,000 while each of the individual complainants owned copyrights worth in excess of $100,000; that it would cost each individual more than $10,000 to create an agency in Florida to protect himself against infringement by unauthorized public performances for profit, to issue licenses and to check on the accuracy of uses reported; that fees collected in 1936 in Florida amounted to $59,306.81 and that similar sums were expected in the future; and that in 1936 each of the three publishers received more than $50,000 from the Society and each individual more than $5,000.

A motion for a temporary injunction was made on February 7, 1938, the same day the bill was filed. Voluminous affidavits were presented in support of the motion. They tend to substantiate the allegations of the complaint on the value of the copyrights and the income from the Society. Each publisher deposed that it had received more than $50,000 from the Society in 1936, that its contract with the Society had a value in excess of $200,000, and that to fix prices on each composition for each use in Florida would require an expenditure of more than $25,000. The affidavits of the individuals showed annual incomes to them from the Society of from $3,000 to $9,000; contracts with the Society which the affiants valued in the thousands of dollars and an expense, in one instance, as high as $5,000 to comply with the requirements of the Florida statute.

On March 3, 1938, the appellants moved to dismiss on several grounds: (1) absence of jurisdictional amount; (2) failure to state a cause of action; (3) want of equity and other objections not strongly pressed at this time.

The district court granted an interlocutory injunction and denied the motion to dismiss the bill. It thought that great damage would result unless the injunction issued and that there was grave doubt of the constitutionality of the act. Its findings of fact and conclusions of law were filed about a month and a half after the per curiam decision. It found that "the matter in controversy exceeds $3,000 exclusive of interest and costs."

Federal Jurisdiction.—The issue was raised in the lower court by a motion to dismiss on the ground that it affirmatively appears "from the allegations of the bill . . . that the jurisdictional amount of $3,000.00 . . . is not involved . . . in that it appears that the suit is brought for the benefit of the members of the American Society of Composers, Authors and Publishers . . . and it does not affirmatively appear that the loss of any member of said society due to the enforcement of [the challenged act] would amount to the . . . necessary jurisdictional amount." Other jurisdictional averments of the motion state that the Society cannot suffer any loss from the legislation because it affirmatively appears that the Society divides all its proceeds from licensing between its members and affiliates and "therefore, the loss, if any, sustained due to the enforcement of said Florida laws would fall on the members of the Society, and not on the Society itself." Finally the motion sets out the lack of jurisdiction because it affirmatively appears from the allegations of the bill that the jurisdictional amount is not involved "because the plaintiffs have not shown the extent of loss or damage they would suffer by reason of the enforcement of said State law, as compared with the amount of profit they would

make by the non-enforcement of said law." As the form of the motion on the jurisdiction admitted the bill's statements, it was submitted on the allegations without the production of any evidence.

This method of testing the jurisdiction properly raises the question. No issue is made as to the standing of the Society or its members to sue. The basis of the attack is that there is a lack of the essential allegations as to the value of the matter in controversy. As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court.[4] Both complainants and defendants were content to rest upon the bill and motion.

The bill alleges that the value of the matter in dispute exceeds the jurisdictional amount. Such a general allegation when not traversed is sufficient, unless it is qualified by others which so detract from it that the court must dismiss *sua sponte* or on defendants' motion.[5] In this instance, the allegation is, in effect, traversed by the language of the motion which asserts that no plaintiff has shown loss from enforcement equal to the jurisdictional amount. No other allegations are denied. By this method of attack the facts set out in the bill are left unchallenged for the court to accept as true without further proof. The burden of showing by the admitted facts that the federal court has jurisdiction rests upon the complainants. If there were any doubt of the good faith of the allegations, the court might have called for their justification by evidence.[6] In view of the unchallenged facts, federal jurisdiction will be adequately established, if it appears that for

[4] Wetmore v. Rymer, 169 U. S. 115, 120, 121; McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 184; KVOS, Inc. v. Associated Press, 299 U. S. 269, 278.

[5] KVOS, Inc. v. Associated Press, 299 U. S. 269, 277; McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 189.

[6] McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 189.

any member, who is a party, the matter in controversy is of the value of the jurisdictional amount,[7] or, if to the aggregate of all the members in this representative suit, the matter in controversy is of that value.

This Society, an unincorporated association with a membership of more than a thousand of the leading authors, composers and publishers of music, has received by assignment and possesses, for a five-year period which covers the time here involved, the "exclusive right to publicly perform for profit" musical compositions owned by its members. Licenses are issued by the Society to users in Florida "for the public performance for profit" of these compositions. After payment of expenses and royalties for similar rights to foreign associates, and retention of certain reserves, the receipts from licenses are divided among the members in amounts and by classifications fixed by the articles of association and the Board of Directors. The Society undertakes to protect itself and its members from piracies of the rights assigned to it. The Society has, in the absence of the challenged legislation and without now giving consideration to other objections as to the legality of its organization, a right to license which may be injuriously affected by the Florida statute. Whether this right to license flows from its limited ownership of the copyrights or by authority of its members is immaterial here. We find it unnecessary to decide whether this unincorporated association has standing to sue and confine our decision to the amount in controversy between the members of the Society and the defendants. Members, both corporate copyright owners and individual composers of music and lyrics, are plaintiffs. They represent all other members. As the members own the copyrights, less the limited assignment to the Society of the right of public performance for profit, and share in the earnings through

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[7] Grosjean v. American Press Co., 297 U. S. 233, 241-242. Clark v. Paul Gray, Inc., 306 U. S. 583.

mandatory distribution under the articles of association and not by way of dividends, they are proper parties to the action.[8] These members are real parties in interest. Because of the interposition of the statute they cannot in combination license production and collect fees in Florida. Unless the relief sought, the invalidation of the statute, is obtained, the members cannot conduct their business through the medium of the Society. They have a common and undivided interest in the matter in controversy in this class suit.[9]

The essential matter in controversy here is the right of the members, in association through the Society, to conduct the business of licensing the public performance for profit of their copyrights. This method of combining for contracts is interdicted by the Florida statute. It is not a question of taxation or regulation but prohibition. Under such circumstances, the issue on jurisdiction is the value of this right to conduct the business free of the prohibition of the statute.[10] To determine the value of this right the District Court had the admitted facts that more than three hundred contracts expiring in 1940 were in existence be-

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[8] Article XV, section 1, of the articles of association, reads as follows:

"Apportionment of Royalties—

"Section 1. All royalties and license fees collected by the Society shall be from time to time as ordered by the Board of Directors distributed among its members, provided, however:

"(a) That all expenses of operation of the Society and sums payable to foreign affiliated Societies shall be deducted therefrom and duly paid; and

"(b) That the Board of Directors, by two-thirds vote of those present at any regular meeting may add to the Reserve Fund any portion not exceeding 10% of the total amount available for distribution; and

"(c) That the net amount remaining after such deduction for distribution shall be apportioned as follows: one-half (½) thereof to be distributed among the 'Music Publisher' members, and one-half (½) among the 'Composer and Author' members respectively."

[9] Cf. Troy Bank v. Whitehead & Co., 222 U. S. 39; Shields v. Thomas, 17 How. 3.

[10] Scott v. Donald, 165 U. S. 107, 114; cf. Hunt v. N. Y. Cotton Exchange, 205 U. S. 322, 334; McNeil v. So. Ry. Co., 202 U. S. 543; Bitterman v. Louisville & N. R. R., 207 U. S. 205; Packard v. Banton, 264 U. S. 140.

tween the Society and the Florida users; that in 1936 alone almost sixty thousand dollars was collected from the users, and that similar sums were expected for the remainder of the term. While the net profits of the business in Florida is not shown, the business of the Society, as a whole, is profitable. The three publisher parties receive more than $150,000 yearly and individuals more than $5,000 per year each. The cost of compliance with its requirements is evidence also of the value of the right of freedom from the act.[11] The complainants, other than the Society, allege without traverse that the cost to each one of providing individually in Florida the services now provided by the Society for each member would exceed $10,000. Whether this is annually, for the length of the agreement or for some other term is not shown. From these facts, the finding of the District Court that the matter in controversy—the value of the aggregate rights of all members to conduct their business through the Society—exceeds $3,000 in value is fully supported.

McNutt v. *General Motors Acceptance Corporation*[12] differs. There the State of Indiana had passed an act regulating, not prohibiting, the business of the Acceptance Corporation. The right for which protection was sought was the right to be free of regulation. It was to be measured by the loss, if any, following enforcement of regulation. This was not alleged or proved. In *KVOS, Inc.* v. *Associated Press*,[13] relief was sought to enjoin alleged pirating, by radio, of news furnished by the Associated Press to its members. The right for which protection was sought was "the right to conduct those enterprises free of" interference. On the issue of the value of this right, it was deposed

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[11] Packard v. Banton, 264 U. S. 140; Petroleum Exploration, Inc. v. Comm'n, 304 U. S. 209, 215; Healy v. Ratta, 292 U. S. 263; Buck v. Gallagher, 307 U. S. 95.

[12] 298 U. S. 178.

[13] 299 U. S. 269.

only that the Associated Press received more than $8,000 per month for news in the territory served by the broadcasting station and was in danger of losing the payments. The Associated Press was a non-profit corporation, operated without the purpose of profiting from its services to members and equitably dividing the expenses among them. The damage in the *Associated Press* case was to its members and this was not shown. Neither was it alleged or proved that any member threatened to withdraw or to reduce its payments.

Failure to State a Cause of Action.—The motion to dismiss also presents generally the issue whether the bill states facts sufficient to constitute a cause of action. By the submission of the motion this issue was left to the Court on the facts alleged in the bill. The elaboration of these facts, contained in the affidavits supporting and objecting to the motion for temporary injunction, is not available for consideration, as these affidavits are a part of the record only for the purpose of determining the propriety of a temporary injunction.[14] Whether to grant or refuse a motion to dismiss before answer, is largely a matter of discretion for the court below.[15] Where the bill makes an attack upon the constitutionality of a state statute, supported by factual allegations sufficiently strong, as here, to raise "grave doubts of the constitutionality of the Act" in the mind of the trial court, the motion to dismiss for failure to state a cause of action should be denied. This bill sets out that the exercise of rights granted by the Federal Copyright Act to control the performance of compositions for profit is prohibited by the statute; that existing contracts are impaired; property taken without compensation; recovery on extra state contracts denied and the equal pro-

[14] Polk Company v. Glover, 305 U. S. 5, 9.

[15] O'Keefe v. New Orleans, 273 F. 570; Wright v. Barnard, 233 F. 329; Doherty v. McDowell, 276 F. 728; Ralston Steel Car Co. v. National Dump Car Co., 222 F. 590, 592. Compare Kansas v. Colorado, 185 U. S. 125, 144-145; Wisconsin v. Illinois, 270 U. S. 634. Wilshire Oil Co. v. United States, 295 U. S. 100, 102-103.

tection and due process clauses of the 14th Amendment violated in manners specifically pleaded. Drastic penalties for violation of the act are provided.[16] The manner in and extent to which the challenged statute offends or complies with the applicable provisions of the Constitution will be clearer after final hearing and findings.[17] The findings here were on the motion for interlocutory injunction and on the issue of jurisdiction.

Other Assignments.—The other material assignments of error to the interlocutory order specified on the appeal are addressed (1) to the lack of equity in the bill, (2) to the exercise of discretion in ordering a temporary injunction, (3) to the lack of findings before the order of temporary injunction and (4) to the failure to strike from the bill allegations as to certain sections which deal with contract relations between the Society and users of the musical compositions because these sections are not enforced by the state officers. We treat of them briefly: (1) It is clear that there is equitable jurisdiction to prevent irreparable injury, if the sections of the state statute outlawing the Society raise issues of constitutionality. The heavy penalties for violation and the prohibition of the issue of licenses or collection of fees show the need to protect complainants.[18] (2) Upon the conclusion that the motion to dismiss should be overruled, there was no abuse of discretion in granting an interlocutory injunction.[19] The damage before final judgment from the enforcement of the act as shown by the affidavits would be irreparable. The allegations in the bill of threats of enforcement and the declaration in the affidavit of the Attorney General of the State, the officer

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[16] Fine $50 to $5,000 and imprisonment one to ten years or either. Section 8, Fla. Gen. Laws, 1937, c. 17807.

[17] Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 211-213. Polk Co. v. Glover, 305 U. S. 5.

[18] Ex parte Young, 209 U. S. 123, 165; Terrace v. Thompson, 263 U. S. 197, 215.

[19] Alabama v. United States, 279 U. S. 229, 231; Ohio Oil Co. v. Conway, 279 U. S. 813.

charged with supervision of enforcement,[20] of readiness and willingness "to prosecute any violations of said act," sufficiently establish the immediate danger from enforcement.[21] No objection appears as to the adequacy of the bond or the other terms of the injunction. These remain under the control of the lower court. Ordinarily it would be expected that where a temporary injunction is considered necessary to protect the rights of complainants against the allegedly unconstitutional action of state officers, under a statute, a final order would follow with all convenient speed. (3) The order of the trial court was entered April 5, 1938. The findings of fact and conclusions of law were not filed until May 17, 1938, after the first assignment of errors had pointed out the omission and after the appeal was allowed. The original assignment of error, which had relied upon the failure to comply with Equity Rule 70½, was amended to show subsequent compliance but no assignment of error was made on account of the fact that the findings were out of time. The objection was taken in the statement of points to be relied upon on the appeal and in appellants' brief in the specification of errors to be urged. Better practice dictates the filing of the finding of facts and conclusions of law before or contemporaneously with the order or decree. It would be useless, however, to reverse the order granting the temporary injunction and remand the cause. The temporary injunction would now be in order. (4) In answer to the fourth objection it may be said that the issue like that of constitutionality can be more satisfactorily disposed of upon final hearing.

Affirmed.

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

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[20] Sec. 10, Fla. Gen. Laws, 1937, c. 17807.

[21] Terrace v. Thompson, 263 U. S. 197, 214-16; Cline v. Frink Dairy Co., 274 U. S. 445, 451-52.

Mr. Justice BLACK, Dissenting.

I believe the decree enjoining and suspending Florida's law prohibiting monopolistic price fixing should be reversed because

(1) No showing has been made that casts any doubt upon a State's power to prohibit monopolistic price fixing.

(2) Complainants (appellees here) failed to sustain their burden of showing $3,000.00 in controversy, as required by statute.

(3) The court below failed to require a bond or other conditions adequate to protect the people in Florida who might be injured by the injunction.

First. Do general allegations of unconstitutionality,[1] similarly general affidavits and general findings by the trial court show that the Florida statute against monopolistic price fixing is "novel, if not unique"[2] State legislation, and raise such "grave constitutional questions" that a Federal court should suspend the statute to permit complainants to continue exacting monopoly tribute from the public until the court hears evidence?

The enjoined Attorney General and prosecuting attorneys of Florida do not have, and expressly disclaim any duty to enforce the statute against appellees unless they combine to fix monopolistic prices. Therefore, this injunction cannot rest upon the alleged unconstitutionality of any provisions of the statute other than those prohibiting monopolistic price fixing. And allegations of the bill attacking other provisions of the statute raise only moot questions. If this record can be said to raise any "grave",

[1] Cf. Borden's Co. v. Baldwin, 293 U. S. 194, 203; Aetna Ins. Co. v. Hyde, 275 U. S. 440, 447; Public Service Commission v. Great Northern Utilities Co., 289 U. S. 130, 136, 137.

[2] Borden's Co. v. Baldwin, *supra*, 203.

"novel", or "unique" question at all, that question is whether a State has power to prohibit price fixing by monopolies in restraint of trade.

If the issue is not narrowed to this single point, approval is given to the enjoining of State officials from action which they have no duty to perform and have solemnly disclaimed both here and in the District Court.[3] In the absence of an interpretation by the Florida Supreme Court, to what more authoritative source or evidence may a Federal court turn for the meaning of the statute, than to the decision of the highest State official charged with its enforcement? He has determined that, so far as he and the prosecutng attorneys under him are concerned, appellees may license their compositions as they please, may combine to detect and punish infringers and may operate in Florida at will, provided only that they abandon monopolistic price fixing. Even as to the statutory prohibition against price fixing, all that is before us, a practice more desirable and more in keeping with our dual form of government, previous decisions,[4] and the trend of Congressional legislation,[5] would be to refrain from Federal judicial interference until the State courts are presented with an opportunity to define the statutory duties of appellants. "And . . . the presumption is in all cases that the state courts will do what the Constitution and laws of the United States require."[6] Judicially restraining these Florida officials from action which they declare they cannot and will not take, denies to Florida

[3] Cf., Carroll v. Greenwich Insurance Co., 199 U. S. 401, 412.

[4] Gilchrist v. Interborough Co., 279 U. S. 159, 207; Fenner v. Boykin, 271 U. S. 240, 243-4; cf., Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 43; and see Clark, Brandeis, JJ., dissenting, Cincinnati v. Cincinnati and H. Traction Co., 245 U. S. 446, 461.

[5] 28 U. S. C. 41; c. 726, 50 Stat. 738, 48 Stat. 775, 47 Stat. 70, 43 Stat. 938, 36 Stat. 1162, amended 37 Stat. 1013.

[6] Defiance Water Co. v. Defiance, 191 U. S. 184, 194.

the traditional respect that has been accorded State officials by this Court.[7]

Even according to the comparatively new judicial formula here applied, the only issue is whether "novel . . . unique" or "grave constitutional questions" are raised by the charge that these state officials will perform their sole duty under the Florida statute of prosecuting appellees for violations of the prohibitions against monopolistic price fixing. Paraphrasing this formula, the question here actually becomes: When complainants charge in a Federal Court of Equity that a State has passed, and its officers are about to enforce, a law against monopolistic price fixing, is there so much doubt about the power of the State to prohibit monopolistic price fixing that operation of the law must be enjoined and effect denied to it until evidence is heard by the Court?

Here, both the very bill upon which the injunction now approved was granted and affidavits of record establish beyond dispute appellees' flagrant violation of the Florida law by combining to fix prices. This combination apparently includes practically all (probably 95%) American and foreign copyright owners controlling rendition of copyrighted music for profit in the United States. Not only does this combination fix prices through a self-perpetuating board of twenty-four directors, but its power over the business of musical rendition is so great that it can refuse to sell rights to single compositions, and can, and does require purchasers to take, at a monopolistically

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[7] See Spielman Motor Co. v. Dodge, 295 U. S. 89, 96; Cincinnati v. Cincinnati and H. Traction Co., *supra*, 454, 455; Virginia v. West Virginia, 231 U. S. 89, 91; cf. Des Moines v. City Ry. Co., 214 U. S. 179, 184. This injunction makes strikingly pertinent the question of Justice Harlan, dissenting, in Ex parte Young, 209 U. S. 123, 179 (1908): "If the Federal court could thus prohibit the law officer of the State from representing it in a suit brought in the state court, why might not the bill in the Federal court be so amended that that court could reach all the district attorneys in Minnesota and forbid them from bringing to the attention of grand juries and the state courts violations of the state act . . . ?" His apprehensive prophecy has more than come true in the present case.

fixed annual fee, the entire repertory of all numbers controlled by the combination. And these fees are not the same for like purchasers even in the same locality. Evidence shows that competing radio stations in the same city, operating on the same power and serving the same audience, are charged widely variant fees for identical performance rights, not because of competition, but by the exercise of monopoly power. Since it appears that music is an essential part of public entertainment for profit, radio stations or other businesses arbitrarily compelled to pay discriminatory fees are faced with price fixing practices that could destroy them, because the Society has a monopoly of practically all—if not completely all—available music. When consideration is also given to the fact that an arbitrarily fixed lower rate is granted to a favored station itself controlled by another instrument of public communication—a newspaper—the ultimate possibilities for control of the channels of public communication and information are apparent.

We have here a price fixing combination that actually wields the power of life and death over every business in Florida, and elsewhere, dependent upon copyrighted musical compositions for existence. Such a monopolistic combination's power to fix prices is the power to destroy. Should a court of equity grant this combination the privilege of violating a State anti-monopoly law?[8] Does a State law prohibiting such a combination present "grave constitutional questions"?

It is my position that a State law prohibiting monopolistic price fixing in restraint of trade is not "novel" and "unique" and raises no "grave constitutional questions." The constitutional right of the States to pass laws against

[8] Cf., Cont'l Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 262, affirming 148 Fed. 939; Gibbs v. Baltimore Gas Co., 130 U. S. 396, 412. McConnell v. Camors-M'Connell Co., 152 Fed. 321; Pacific Postal Telegraph Cable Co. v. Western Union Tel. Co., 50 Fed. 493; American Biscuit & Mfg. Co. v. Klotz, 44 Fed. 721; 1 Pom. Equity Juris. (3rd Ed.) § 402.

monopolies should now be beyond possibility of controversy. "That state legislatures have the right . . . to prevent unlawful combinations to prevent competition and in restraint of trade, and to prohibit and punish monopolies, is not open to question",[9] and few have challenged the power of State legislatures to ordain that "competition not combination, should be the law of trade."[10] Surely, there is presently no basis to doubt this power and to assert that its exercise raises "grave constitutional questions." As recently as 1937, this Court held that Porto Rico, with legislative powers not equal to, but "nearly as extensive as those exercised by any state legislature," could prohibit monopolistic price fixing as one of the "rightful subjects of legislation" upon which legislatures act.[11]

If the States have somehow lost their historic power to prohibit monopolistic price fixing combinations before presentation of evidence to a Federal court, at what point in our history and in what manner did they lose it? The people have not exercised their exclusive authority, by Constitutional amendment, to strip the States of their power over price fixing combinations and thus raise monopoly above the traditional power of legislative bodies.

It was expressly conceded at the bar that Florida had the Constitutional power to prohibit price fixing combinations unless the copyright laws limited this power. And, since argument of the present case, a decision rendered by us February 13, this year, made clear the principle that

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[9] Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86, 107. "There is nothing in the Constitution of the United States which precludes a State from adopting and enforcing [statutes which secure competition and preclude combinations which tend to defeat it] . . . To so decide would be stepping backwards." International Harvester Co. v. Missouri, 234 U. S. 199, 209. See, Atl. & Pac. Tea Co. v. Grosjean, 301 U. S. 412, 425-6; Nebbia v. New York, 291 U. S. 502, 529; Rast v. Van Deman & Lewis, 240 U. S. 342, 366-7.

[10] National Cotton Oil Co. v. Texas, 197 U. S. 115, 129; Carroll v. Greenwich Ins. Co., *supra*, 411

[11] Puerto Rico v. Shell Co., 302 U. S. 253, 260, 261.

the copyright laws grant no immunity to copyright owners from statutes prohibiting monopolistic practices and agreements. We there declared that "An agreement illegal [by statute] because it suppresses competition is not any less so because the competitive article is copyrighted."[12]

"Due process" has been judicially endowed with great elasticity in relation to property rights, but it is inconceivable that it would afford refuge for monopolies deemed undesirable by the people's representatives. When a legislature as a matter of public policy determines to prohibit monopolistic combinations, we cannot, under any doctrine of "due process", rightfully "review their economics or their facts."[13] And, although "due process" is invoked, can evidence either add to or take from the legislative power to permit, regulate or prohibit monopolies in the public interest?

Several of the general allegations in the bill are relied upon to justify suspension of the Florida statute until evidence is heard by a court. It is said the court should hear evidence because the "bill sets out that the exercise of rights granted by the Federal Copyright Act to control the performance of compositions for profit is prohibited by the statute . . ." But what evidence can the court hear that will assist it in comparing the statute with the copyright laws? The Florida statute does not even purport to prohibit the "performance of compositions for profit," and the enjoined officials have neither threatened, nor do they intend, to prohibit such performance. It is said the bill alleges "that existing contracts are impaired" by the statute. But no contracts can be affected unless involving prohibited monopolistic price fixing. That the Florida law prohibits the continuation and execution of monopoly practices in pursuance of price fixing

[12] Interstate Circuit, Inc. v. United States, 306 U. S. 208, 230.

[13] Central Lumber Co. v. South Dakota, 226 U. S. 157, 161.

agreements made before the law was passed, can be no basis for constitutional objection.[14]

It is said the bill alleges "property taken without compensation." If the statute, of itself, takes property, (and no charge of unconstitutional application of the statute is made) is evidence required to show the manner of the taking? It is said the bill alleges that the statute violates "equal protection." But the sole thing threatened is prosecution of an admitted price fixing combination—comprised of practically all the musical copyright owners and publishers in the nation. " . . . if an evil [of monopoly] is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation."[15] It is said a drastic penalty is provided for practicing price fixing. What evidence will serve to enlighten the Court on the statutory penalty? That penalty is set out clearly in the statute. If it invalidates the statute, that determination should be made now.

The present case illustrates how the recently fashioned judicial formula under which state laws must be enjoined if "grave constitutional questions" are presented in a complaint, actually results in an automatic judicial suspension of state statutes upon any general complaint to a federal court. The apparently inevitable operation of this formula runs counter to the Tenth Amendment intended to preserve the control of the States over their own local legislation, and opens the door to further evasions of the Eleventh Amendment protecting the States

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[14] Waters-Pierce Oil Co. v. Texas (No. 1), *supra*, 108.

[15] Carroll v. Greenwich Ins. Co., *supra*, 411; Central Lumber Co. v. South Dakota, *supra*, 160. "A legislature may hit at an abuse which it has found, even though it has failed to strike at another." United States v. Carolene Products Co., 304 U. S. 144, 151.

from suits in federal courts.[16] A lower federal court's refusal in its "discretion" to suspend a State statute was recently reversed because "grave constitutional questions"—requiring evidence—were deemed raised by charges that the statute by requiring citrus fruit cans to be truthfully labeled violated the Constitution.[17] And here, where the District Court enjoined a State law in its "discretion", the injunction is sustained by a holding that evidence should be heard because "grave constitutional questions" are involved. However the lower court's "discretion" may be exercised, the formula apparently achieves but one result—state statutes are suspended.

Careful scrutiny of appellees' bill for injunction reveals no allegations indicating that Florida's power to prohibit monopolistic price fixing would, even under the formula applied, be altered by proof of any "particular economic facts . . . which are . . . properly the subject of evidence and of findings."[18] True, the bill alleges that the statute of Florida and similar legislation enacted by other States were "sponsored by an organized group . . . for their own selfish aggrandizement . . . without an adequate hearing being afforded to complainants and others similarly situated," and that "in truth and in fact, [the statute] was enacted not in the public interest . . . ." Appellees also allege that "unless the enforsement of this State statute is restrained . . . other States, in addition to Florida, Montana, Washington, Nebraska and Tennessee, may enact similar statutes . . . all of which would work undue hardship on complainants and would violate the spirit of the Constitution . . . ." These are some of the strongest—if not the strongest—of the

[16] Cf. Ex parte Young, 209 U. S. 123, Harlan, J., dissenting, 168-204; and see Fitts v. McGhee, 172 U. S. 516, 528, 530; In re Ayers, 123 U. S. 443, 496, 497, 505.

[17] Polk Co. v. Glover, 305 U. S. 5.

[18] Borden's Co. v. Baldwin, *supra*, at 210.

bill's allegations deemed to raise "grave constitutional questions." Is the temporary injunction approved so that the Federal court in Florida may hear evidence on what constitutes the public interest of Florida? Shall the court hear evidence to determine whether or not "unless the enforcement of this statute is restrained" other States, "in addition to Florida", may similarly prohibit appellees' monopoly?

It is difficult to perceive how in the future—under this formula—any state law, directly or indirectly affecting ings have dragged their weary way through federal property, can become effective until injunction proceedings have dragged their weary way through Federal courts. All state statutes might hereafter well substitute for the expression "to take effect within" a certain period of time, the words "to take effect after the Federal courts have heard evidence to determine" their reasonableness (wisdom). And the formula likewise fits Congressional enactments. Had the pronouncement of this formula not been the culmination of gradual judicial advances, it would have been everywhere recognized as a revolutionary departure from our constitutional form of government, under which the wisdom of legislation, within the field of legislative action, was left to the judgment of elected representatives of the people.

Florida can find little comfort in the admonition that "Ordinarily it would be expected that where a temporary injunction is considered necessary . . . a final order would follow with all convenient speed." This law has now already been suspended for a year, and experience demonstrates that injunctive suspension of state laws and state action can hang in the courts for many years before receiving final disposition.[19]

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[19] See dissent, McCart v. Indianapolis Water Co., 302 U. S. 419, 435, and note.

Second. Jurisdictional Amount.

These eleven appellees alleged in their bill for injunction that they sued on behalf of themselves and the more than 1,000 other (American) members of the Society. No determination is made here "that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount"—$3,000. However, while appellees are not aided in establishing the jurisdictional amount by the "allegation that [they] . . . sued on behalf of others similarly situated,"[20] the Court nevertheless holds that the jurisdictional amount is in controversy in "the value of the aggregate rights of all members" (including the more than 1,000 who have not appeared in person) to combine and fix prices in Florida.

"Assuming that such a case as this will be called a class action, and . . . could be maintained as such . . . yet that it may be properly a class action does not affect the rule against aggregation [of claims for making up the jurisdictional amount], because [such aggregation] . . . is necessarily only applicable to those class actions in which several claimants to a fund are joined as plaintiffs asserting common and undivided rights therein."[21] Appellees assert no common and undivided rights in any fund[22] or property;[23] "the amount payable to each [by the Society] depends upon his contract alone."[24] Neither does appellees' bill seek, as would the traditional class or representative bill in equity, to protect group rights all claimed under and traceable to a single decree,[25] or rights "which . . . [no one plaintiff] can enforce in the absence

[20] Lion Bonding Co. v. Karatz, 262 U. S. 77, 86.

[21] Eberhard v. Northwestern Mut. Life Ins. Co., 241 Fed. 353, 356, referred to with apparent approval in Lion Bonding Co. v. Karatz, *supra*.

[22] Smith v. Swormstedt, 16 How. 288.

[23] Beatty v. Kurtz, 2 Pet. 566.

[24] Eberhard case, *supra*, 356.

[25] Shield v. Thomas, 17 How. 3, but see Chapman v. Handley, 151 U. S. 443.

of the'' others because derived from a single security instrument.[26] In this proceeding, all that members of the Society have in common is their alleged right to violate with impunity the Florida statute against price fixing. Unless opposition to and violation of the statute can be their bond of unity, appellees have "separate and distinct demands . . . [united] for convenience and economy in a single suit, [and] it is essential that the demand of each be of the requisite jurisdictional amount."[27]

Permissible joinder of many plaintiffs as a matter of convenience and economy is not a means of enlarging the jurisdiction of the District Court. Rule 38, under which this class or representative suit was brought, did not, in fact could not, extend that jurisdiction which depends solely upon Acts of Congress.[28]

A common desire to disregard a state law cannot serve as a common and undivided interest for purposes of federal jurisdiction;[29] otherwise, all who oppose such a law can aggregate the values of their alleged individual rights so to disregard the law, in order that they may escape the courts of a State and bring its law before a Federal court. And the fact that a State law inflicts pecuniary loss upon members of a non-profit association because of their membership does not permit aggregation of the members' pecuniary interests as a basis for attack upon the law in a federal court by some members "on behalf and with the authority of all."[30] Here, the individual members

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[26] Troy Bank v. Whitehead & Co., 222 U. S. 39, 41.

[27] *Id.* 40.

[28] Alaska Packers v. Pillsbury, 301 U. S. 174, 177; Christopher et al. v. Brusselback, 302 U. S. 500, 505; see, KVOS, Inc. v. Associated Press, 299 U. S. 269, 279.

[29] Pope v. Blanton, 10 F. Supp. 15, 18, dismissed per curiam for lack of requisite jurisdictional amount in controversy, 299 U. S. 521; Gavica v. Donaugh, 93 Fed. (2d) 173.

[30] Rogers v. Hennepin County, 239 U. S. 621. The complaint appears in the original records of this Court, No. 411, Oct. Term 1915. Cf. Robbins v. Western Auto Ins. Co., 4 Fed. (2d) 249, cert. den., 268 U. S. 698; Woods v. Thompson, 14 Fed. (2d) 951, and Illinois Bankers' Life Ass'n v. Farris, 21 Fed. (2d) 1014, cert den., 276 U. S. 621.

have made no showing of what they as individuals have at stake—or of what all the members as a class stand to lose by virtue of the Florida law.

The enjoined state officials have only the duty to prosecute appellees if they continue to fix prices (i. e., to issue licenses) through monopolistic combinations, and these officials have expressly disavowed any intention to do more.[31] Appellees are left free to form such combinations as they please in Florida for the purpose of protecting against copyright infringements. They are here deprived by the Florida statute only of the right to combine to fix prices, and the value of that right must determine the amount in controversy.[32] That right was the object which appellees' bill for injunction sought to protect from allegedly unconstitutional interference.[33] Yet, there is no evidence at all in the record from which even an inference can be drawn as to the amount, if any, individual appellees or other members might lose in Florida by selling or licensing their copyrighted articles individually (which the law permits) instead of fixing prices by monopolistic combination (which the law prohibits). No showing was made that appellees ever have made or ever will make any profit from the operations of the Society in Florida. As stated by the majority opinion, the record discloses that the business of the Society in the entire United States and sixteen foreign countries is a profitable one. But we cannot assume from this that its Florida operations are as a unit profitable. In fact, the record shows only that the entire Society had sixty thousand dollars worth of contracts in Florida in 1936. We are not told what ratable share of this sixty thousand dollars would come to any individual in the division of the entire amount among the

[31] Cf., Carroll v. Greenwich Ins. Co., *supra*, 412.

[32] Scott v. Donald, 165 U. S. 107, 114, 115.

[33] Cf., Glenwood Lt. Co. v. Mutual Lt. Co., 239 U. S. 121, 125, 126; KVOS, Inc. v. Associated Press, 299 U. S. 269, 277.

forty-five thousand odd members affiliated with the Society (in America and abroad). Each individual member's gross income from Florida might be less than $1.50 per year.

The loss of a right to an annual gross income of $1.50 cannot amount to the loss of a right valued at ten thousand dollars—as appellees allege—on the theory that it would cost ten thousand dollars to collect the $1.50 income individually. And it is, of course, possible that if the Society in fact has no net income from Florida but operates there at a loss, each member's ratable share of income from the Society will actually be increased when the unprofitable Florida operations cease because of the statute. Measuring the amount in controversy on the above theory, jurisdiction might be obtained by a Federal court to enforce rights of a value far less than the jurisdictional $3,000 required by Congress. For illustration, a statute might prohibit parking of automobiles on certain city streets; an automobile owner assailing the law might be admitted to the jurisdiction of the Federal court by alleging that it would cost him more than three thousand dollars to purchase a parking lot in which to park off the streets of the prohibited area. He would thus "comply" with the statute and abandon the streets in obedience to it.[34] I do not believe that jurisdiction of a Federal court can be rested on measurements of the imagined cost of what a complainant conceivably could, but certainly would never do as an alternative to action forbidden by statute.

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[34] "Cost of compliance" with an assailed legislative act may be considered the measure of the amount in controversy when a right of complainant is regulated, or where he is required to take affirmative action. Cf., Kroger Gro. Co. v. Lutz, 299 U. S. 300, 301; McNutt v. Gen. Motors Etc. Corp., 298 U. S. 178, 181. But appellees have not been required to take any affirmative steps, nor are they permitted to fix prices on condition that they "comply" with regulations. The fixing of prices through combinations has been prohibited. Obviously, appellees cannot be prohibited from doing that which they may also do by "complying" with the statute.

The statutory monetary standard is precise and the amount in controversy therefore cannot be conjectural. "It is impossible to foresee into what mazes of speculation and conjecture we may not be led by a departure from the simplicity of the statutory provision.

"Accordingly this Court has uniformly been strict to adhere to and enforce it."[35]

Without proof of the amount each appellee or member has in issue, how can the "aggregate amount" be fixed at any figure?

Rigid enforcement of the jurisdictional requirement will limit the interference of Federal courts in State legislation and will accord with the policy of Congress in narrowing the jurisdiction of Federal courts by successive increases in the jurisdictional amount.[36] "The policy of the statute calls for its strict construction."[37] Since no individual complainant has established that he has the statutory jurisdictional amount in controversy, to rest jurisdiction of a Federal court on no more than the unified desire of many complainants to violate a State statute prohibiting monopolistic price fixing, does constitute a "novel, if not unique," and "grave" judicial departure from the jurisdictional requirement fixed by Congress.

Third. The otherwise complete suspension of Florida's law was limited only by the condition that appellees make bond of five thousand dollars payable to the Attorney General of Florida and the District Attorneys of the State. Manifestly, these officials have no individual interest in the monopoly prohibited by the Florida law. The major injuries accruing from the suspension of the law will not be inflicted upon them, but upon the People of Florida who are required to pay monopoly prices while the law remains

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[35] Elgin v. Marshall, 106 U. S. 578, 581.

[36] See Healy v. Ratta, 292 U. S. 263, 270.

[37] *Id.*

enjoined. Thus, while the law is suspended, these nonresident appellees can carry on a monopolistic business in Florida contrary to its prohibitions, and the people of Florida who must pay monopoly prices are granted no protection. We have recently declared the governing principal that "it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interest the injunction may affect.[38] The injunction here was not granted upon conditions that would protect the interests of all who might be affected by it. It neither ordered the monopoly tribute exacted by appellees to be paid into court during suspension of the Florida statute, nor required a bond for the benefit of, and adequate to indemnify those who must pay this tribute until the court permits the statute to go into effect.

Nevertheless, this Court now refuses to correct the grossly unjust failure to protect those who may suffer irreparable injury from the suspension of the Florida law on the ground that "No objection appears as to the adequacy of the bond or the other terms of the injunction. These remain under the control of the lower court." However, the lower court has already exercised its control resulting in manifestly injurious error apparent on the record.[39] And as "upon this appeal in equity the whole case is before us, we can render such decree as under all the circumstances may be proper."[40] Litigation is not a game in which justice can be awarded only to the alert

[38] Inland Steel Co. v. United States, 306 U. S. 153, 157.

[39] See, Lamb v. Cramer, 285 U. S. 217, 222; United States v. Tennessee & Coosa R'd, 176 U. S. 242, 256; Revised Rules of the Supreme Court of the United States, 27, paragraph 6; cf., Mahler v. Eby, 264 U. S. 32, 45.

[40] United States v. Rio Grande Irrigation Co., 184 U. S. 416, 423; Cincinnati v. Cincinnati & H. Trac. Co., *supra*, 454; Ridings v. Johnson, 128 U. S. 212, 218; cf., Patterson v. Alabama, 294 U. S. 600, 607.

and fastidious objector, particularly when—as here—a court suspends statutory rights of members of the public who, not being in court, have no opportunity to object. The injustice to the public apparent on this record violates the rudimentary principles of equity and fair play. We should neither condone nor permit it.

They who attack the constitutionality of a law, obtain its judicial suspension, and then continue to violate its terms, should not benefit by the suspension, in the event the law is later held constitutional. Otherwise, a judicially granted period of immunity will reward litigants who unsuccessfully assail the constitutionality of legislation. Seemingly, the time has arrived when despite our constitutional system of government no State law can become effective until a federal court hears evidence on its constitutionality. The courts—responsible for this fundamental change—should at least protect citizens of an enacting State from disobedience to a state law permitted by an erroneous or improvident interlocutory injunction.

The interlocutory injunction should be vacated.

Opinion in
Buck v. Gibbs, 34 F. Supp. 510 (N. D. Fla. 1940).

(Florida 1937 Statute printed at p. 91, *infra*.)
(Florida 1939 Statute printed at p. 104, *infra*.)

In Equity. Action by Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, and others against George Couper Gibbs, individually and as Attorney General of the State of Florida, and others to enjoin enforcement of Florida statutes relating to copyrighted musical compositions.

Injunction granted against enforcement of one statute and certain sections of another statute and denied as to remainder of the latter statute.

Frank J. Wideman, of Washington, D. C., and Manley P. Caldwell, of West Palm Beach, Fla. (Louis D. Frohlich and Herman Finkelstein, both of New York City, of counsel), for plaintiffs.

George Couper Gibbs, Atty. Gen., of Florida (Thomas J. Ellis, Asst. Atty. Gen., Lucien H. Boggs, Sp. Asst. Atty. Gen., and Andrew W. Bennett, of Washington, D. C., of counsel), for defendants.

Before HUTCHESON, Circuit Judge, and LONG and BARKER, District Judges.

HUTCHESON, Circuit Judge.

Plaintiffs are owners of musical copyrights or rights of renewal therein, which have been pooled with the American Society of Composers, Authors and Publishers, hereafter called ASCAP. Defendants are the state officers charged with enforcement of the two statutes the suit brings in question. As originally brought, the suit was to enjoin

the enforcement of Chap. 17807, Laws of Florida, 1937.[1] There was a temporary injunction, an appeal and an affirmance.[2] After the enactment of Chapter 19653, Florida Laws, 1939,[3] it was extended by a supplemental bill to include that chapter in its scope and to obtain injunctive relief, temporary and permanent as to it.

The claim of the original and the supplemental bills in general was: that the statutes were confessedly aimed at ASCAP and its constituent members and were class legislation of the most indefensible kind and that in

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[1] 1937 Act, Chapter 17807.

Section 1. Prohibits combinations of authors, composers, publishers, owners of copyrighted vocal or instrumental musical compositions from forming any society, association, partnership, corporation or other group or entity, when the members therein constitute a substantial number of those owning or controlling copyrighted vocal or instrumental musical compositions and when one of the objects of such combination is the determination and fixation of license fees, required by such combination for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit, declares the association so formed unlawful, prohibits the collection of license fees so fixed and makes persons collecting or attempting to collect them subject to the penalties of the Act.

Section 2-A. Requires selling prices to be stated on sheet music or records and gives purchaser general public performance rights to use for all purposes on paying such price.

Section 2-B. Provides if selling price not so fixed, purchaser of the composition may use the composition privately or publicly without further license fee and exempts such purchaser from accountability to the copyright owner.

Section 2-C. Declares against purpose to give a purchaser general right to resell or distribute; or to prevent copyright holders from determining prices not in combinations forbidden in Section 1.

Section 3. Declares void existing contracts contrary to the Act and makes their attempted enforcement illegal.

Section 4-A. Relieves Florida broadcasting stations from payment of license fee for re-broadcast of copyrighted music controlled by a combination prohibited by Section 1.

Section 4-B. Similarly forbids collection by outside station of license fees to unlawful combination.

Sections 5-A and 5-B. Counterparts of Section 4-A and 4-B, except relating to theatres, etc.

Section 6. Concerning music broadcast or emanating from without the state, makes outside source of emanation solely liable for compensation to copyright owner and deprives owner of right to collect from Florida user.

Section 7-A. Provides for service of process on agent of outside combination.

Section 7-B. Declares such an agent a part of the combination for which he acts and as such, subject to all the penalties of the Act.

addition to violating the equal protection, liberty of contract and due process clauses of the Fourteenth Amendment, they violated various other constitutional provisions, Federal[4] and State.[5]

In particular the claim as to ASCAP was that it had been organized not to increase, or obtain unfair, prices for the performing rights of copyrighted musical compositions, but to protect authors, owners and publishers from the systematic piracy of their performing rights which, acting alone, they were powerless to prevent. And there was the further claim as to it that by fair and reasonable contracts and arrangements, it had at the same time afforded full public use of and access to copyrighted musical compositions at fair and reasonable prices, and secured to copyright owners, the benefits of the copyright law. While the claim as to the statutes in question was that they

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Section 8. Penalty clause for violation of Act.

Section 9. Confers jurisdiction on circuit courts and designates state attorneys under Attorney General to enforce public rights and penal provisions, particularly to dissolve unlawful combinations and otherwise enforce Section 1.

Sections 10-A and 10-B. Confers jurisdiction on circuit courts in private suits under the Act.

Sections 11-A and 11-B. Provides for discovery of documentary evidence and penalty for failure to produce same.

Section 12. Severability clause.

Section 13. Makes act and rights thereunder cumulative to rights and remedies under existing law.

Section 14. Effective date. (Approved and effective June 9, 1937.)

[4] Gibbs v. Buck, 307 U. S. 66, 59 S. Ct. 725, 83 L. Ed. 1111.

[5] 1939 Act, Chapter 19653.

Section 1. Definitions. Defines blanket license as including any device whereby public performance for profit is authorized of the combined copyright of two or more owners. The term blanket royalty or fee includes any device whereby prices for performing rights are not based on the public performance of individual copyrights.

Section 2. (Disclosure section.) Requires seller of public performance rights in copyrighted music to file with Comptroller a list showing name and title of composition, date and number of copyright, names of author, publisher and present owner and owner of performance rights, with provision for filing additional lists and filing fee of two cents per composition; also for filing affidavit describing rights intended to be sold and verifying the statements in the listing or registration, with name, agent, occupation, residence and authority of affiant.

had been enacted, not in response to a public need, to make effective the general will of the people of Florida, but at the instigation of an organized group or band of radio broadcasters and other users of music in order that, the association stricken down and outlawed in Florida, they might with complete impunity again pirate the performing rights to copyrighted musical compositions without making payment to the owners therefor. As to the 1937 statute, the claim in general was that, though put forward as an anti-monopoly statute, it was really a statute designed and enacted, in the interest and at the behest of this anti-copyright group, to deprive the members of the society of the protection, in Florida, of the copyright laws. In particular it was that, by at once outlawing ASCAP and providing for the performance, without compensation to them, of the copyrighted vocal or instrumental

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Section 3. Makes such lists available for public inspection and taking copies "in order that any user . . . may be fully advised concerning the performing rights . . . and avoid being overreached . . . and avoid committing innocent infringement." Comptroller may publish lists and must give certified copies and anyone selling, licensing or otherwise disposing of performing rights, must exhibit them.

Section 4-A. Makes it unlawful "for two or more owners" of musical or dramatics musical copyrights to associate or combine together for purposes of issuing blanket public performance licenses upon a blanket royalty or fee unless each owner or such combination shall make available to each user of such composition within the state the right to perform each at a price established for each separate performance by filing with the Comptroller either as part of the list under Section 2 or separately a schedule or prices for the performing rights to each separate performance with affidavit that such price was fixed by the copyright owner alone and not in combination with other owners—with provision for reasonable classification by uses if without unreasonable discrimination; and for filing new schedules at any time effective seven days from filing, and for public inspection of publication of schedules.

Section 4-B. Provides any person issuing a blanket license shall file verified copies of blanket performance license with Comptroller within thirty days after issuance and fixes filing fee.

Section 4-C. Prohibits the sale or license of performing rights to any musical composition for a compensation based "in whole or in part on any program not containing any such composition," and makes illegal and invalid any charge for compensation so based.

Section 4-D. Makes sale of public performance rights or collection of compensation unlawful if composition not listed as provided in Section 2.

Section 5. Performing rights owner must authorize Secretary of State to accept service of process and copy shall be mailed him by Secretary.

musical compositions of its members, the statute undertook in effect to nullify the copyright laws and to take plaintiffs' properties in their copyrighted compositions without compensation and without due process.

As to the 1939 statute, the claim was that its rigorous provisions for registration, its prohibitions against and restriction on blanket licensing, its prohibitions against collection of compensation when based in whole or in part on any program not containing such composition and its general provisions for filing fees, taxes, etc., are so in derogation of the rights of owners under the copyright

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Section 6. No action to be brought without prior compliance with Act. Comptroller to furnish copies of any papers at same fees as clerk of circuit court.

Section 7. Imposes three per cent tax on gross receipts, provides for annual tax return, inspection and audit of books by Comptroller and provides for means of collection.

Section 8. Makes unlawful public performance of compositions without authority of owner if he has complied with the statute.

Section 9. Makes violations misdemeanors under general law.

Section 10. Makes agents of owners subject to the statute.

Section 11. Confers on circuit courts jurisdiction of private suits.

Section 12. Confers on circuit courts jurisdiction of enforcement of public rights by state attorneys under Attorney General upon complaint of a person aggrieved.

Section 13. If prosecuting officers fail to act, aggrieved party may bring such civil action as state officers might have brought.

Section 14. Appropriates taxes above expenses to general revenue fund.

Section 15. Supersedes inconsistent laws with express saving clause as to prior lawful contracts and "any of the statutes of the State of Florida pertaining to monopoly or restraint of trade" including but not limiting the generalities of the foregoing sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14, Chap. 17807, Laws of Florida, 1937. Provides for filing copies of existing contracts within thirty days and for compliance otherwise with Act within thirty days.

Section 16. Severability clause.

Section 17. Effective date. (Filed and effective June 12, 1939.)

[4] The Copyright Clause (Art. 1, Sec. 8, Cl. 8) and the Federal Laws enacted pursuant thereto; the Impairment of Contract Clause (Art. 1, Sec. 10); the Privileges and Immunities Clause (Art. 4, Sec. 2); the Interstate Commerce Clause (Art. 1, Sec. 8, Cl. 3).

[5] The privilege against self incrimination (Sec. 12, Declaration of Rights); the prohibition of cruel and unusual punishment (Sec. 8, Declaration of Rights); the Equal Protection and Liberty of Contract Clauses (Sec. 1, Declaration of Rights).

law, and so onerous, that they amount to an illegal taking for private use, that is, for the benefit of broadcasters and other users, of plaintiffs' rights in and under their copyrights.

The defense in general was: a denial that the legislation was oppressively or partisanly conceived and that it operated in violation of any constitutional protection, and an assertion that it aimed at and constitutionally reached, the evils of a combination, to fix prices and in restraint of trade. A combination, organized and operating to fix the prices to be paid for, and to restrain freedom of trade in, the public performance of individual copyrighted musical compositions at a fair price per use, by blanketing them together under general licenses covering many compositions of many owners, authors and composers, and refusing to license or permit the licensing individually and per use of particular compositions. In particular the defense as to the 1937 Act was: that it was an anti-monopoly Act and that taken as such it was valid; that sections 2-A and 2-B and 6, which purport to authorize the performance within the state of copyrighted musical compositions without payment by the users therefor, have been repealed by the 1939 Act; and that the remaining sections are valid and the Act as to them must stand as an anti-monopoly Act condemning and making illegal, combinations like those of ASCAP and the other plaintiffs.

As to the 1939 Act, the defense was: that it is in general an Act for disclosure, and as such is valid under Allen v. Riley, 203 U.S. 347, 27 S.Ct. 95, 51 L.Ed. 216, 8 Ann.Cas. 137; and that its other provisions requiring blanket licenses by two or more persons and prohibiting sales or licenses at a price, based other than on a use in a program of the particular music sold or licensed, are mere regulatory measures to reach and do away with the evils of blanket licensing in all its forms.

With their contentions thus put forward, plaintiffs and defendants ring the changes on their respective arguments. Plaintiffs urge upon us that ASCAP is a beneficial, defendants that it is an evil institution; plaintiffs that the copyright laws protect them from the legislation; defendants that copyright owners may not, any more than others, form combinations to monopolize or restrain trade. If the case were as simple in its issues as each contender thinks it is, if it turned, on the one hand, simply on whether plaintiffs had rights and, on the other, as simply on whether these rights were subject to regulation, we could and would end it quite simply by saying to defendants, "The plaintiffs certainly do have rights in their copyrighted musical compositions", and to plaintiffs, "These rights are certainly not beyond reasonable state regulation."

But the answer to the questions the suit raises is not so simply found. For conceding both plaintiffs' rights and the State's power to subject them to reasonable regulation, the difficulty remains of determining whether the statutes in question are unreasonable prohibitions masking under the guise of regulation, or if regulations, whether, unduly and beyond the legitimate purpose to be served, they hamper and restrict plaintiffs' undoubted rights. In short, the question for decision comes down at last to, and is to be decided by, not a general statement of principles, for as to them there is no real dispute,[6] but a construction

[6] They are sufficiently stated for our purpose in Buck v. Swanson, D. C., 33 F. Supp. 377, dealing with a Nebraska statute of the same purport as the Fla. 1937 Act, and we need not restate them here. Other authorities not cited in Buck's case, which may be consulted are: For the plaintiffs: Lawton v. Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385; Hale v. Bimco Trading, 306 U. S. 375, 59 S. Ct. 526, 83 L. Ed. 771; State ex rel. Fulton v. Ives, 123 Fla. 401, 167 So. 394; People's Petroleum Producers v. Sterling, D. C., 60 F. 2d 1041, at page 1047; McLeaish & Co. v. Binford, D. C., 52 F. 2d 151; Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, at page 539, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280; Smith v. St. Louis & S. W. R. Co., 181 U. S. at page 255, 21 S. Ct. 603, 45 L. Ed. 847; McFarland

and interpretation of the statutes under attack, as to what they purport to do and whether they may constitutionally do that.

Both plaintiffs and defendants see plainly enough that this is so and by an analysis both of the statutes as a whole and of each section thereof, plaintiffs undertake to show their invalidity, defendants their validity. Plaintiffs pointing to the confiscatory provisions of Sections 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6, by which the 1937 Act undertakes to permit performance, in Florida, of copyrighted music without compensation, urge upon us that not only these sections but the statute as a whole is invalid because, not a reasonable regulation of, but a repressive prohibition of, dealings in copyrighted music, it breathes and attempts to make effective throughout the unconstitutional spirit of repression and reprisal. Outlawing ASCAP and those in association with it, and expropriating their property for the use, without compensation, of radio broadcasters and others, it, they say in violation of every constitutional principle, operates as a kind of Bill of Attainder.

Defendants concede the invalidity of Sections 2-A, 2-B and 6. Indeed at one stage of the proceedings before us they offered to submit to a permanent injunction as to

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v. American Sugar Refining Co., 241 U. S. 79, 36 S. Ct. 498, 60 L. Ed. 899; Herbert v. Shanley Co., 242 U. S. 591, 37 S. Ct. 232, 61 L. Ed. 511; Buck v. Jewell-La Salle Realty Co., 283 U. S. 191, 51 S. Ct. 410, 75 L. Ed. 971; Remick & Co. v. American Automobile Accessories Co., 6 Cir., 5 F. 2d 411, 40 A. L. R. 1511.

For the defendants: Allen v. Riley, 203 U. S. 347, 27 S. Ct. 95, 51 L. Ed. 216, 8 Ann. Cas. 137; Fox Film Corp. v. Doyal, 286 U. S. 123, 52 S. Ct. 546, 76 L. Ed. 1010; Carbice Corp. v. Amer. Patents Corp., 283 U. S. 27, 51 S. Ct. 334, 75 L. Ed. 819; Straus v. American Publishers Ass'n, 231 U. S. 222, 34 S. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369; Interstate Circuit v. United States, 306 U. S. 208, 59 S. Ct. 467, 83 L. Ed. 610; Strassheim v. Daily, 221 U. S. 280, 31 S. Ct. 558, 55 L. Ed. 735; Ford v. United States, 273 U. S. 593, 47 S. Ct. 531, 71 L. Ed. 793; Stephenson v. Binford, 287 U. S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A. L. R. 721; Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 60 S. Ct. 618-625, 84 L. Ed. —; Tigner v. State of Texas, 60 S. Ct. 879, 84 L. Ed. —; United States v. Socony-Vacuum Oil Co., 60 S. Ct. 811, 84 L. Ed. —.

For both: Standard Oil Co. v. United States, 283 U. S. 163, 51 S. Ct. 421, 75 L. Ed. 926.

them. They insist, however, that the vice of these sections is peculiar and confined to them and does not pervade the Act, and that because this is so and particularly because the Act contains a separability clause, Sec. 12, and because, in the reference in the 1939 Act to sections of the 1937 Act as unrepealed, these sections were not included, these invalid sections should, by a kind of judicial surgery, be excised from the Act, leaving it to stand in its other provisions as an anti-monopoly statute.

[1] We do not think so. In complete agreement with what was said in Buck's case as to the invalidity of Sections 2-A and 2-B of the Nebraska law, we find invalid the similar sections of the Florida 1937 Law. For the same reasons, that they unreasonably interfere with and in effect deprive the owners of their copyright protection, by imposing unlawful conditions, in effect a servitude, in favor of those desiring to use them, upon the performing rights in their copyrighted musical compositions, and even under named conditions completely take the copyright, by permitting use without compensation, we find Sections 3, 4-A, 4-B, 5-A, 5-B and 6, also invalid.

There remain: Sections 1, 2-C and 3, in effect declaring ASCAP and similar societies illegal associations, outlawing its arrangements for license fees, and proscribing and making an offense, attempts to collect them; Section 7-B making persons, acting for such a combination, agents for it and liable to the penalties of the Act; Section 8 fixing the penalties; Section 9 giving the state courts jurisdiction to enforce the Act, civilly and criminally; and Sections 10-A, 10-B, 11-A and 11-B, prescribing procedure under it.

[2-6] It is, of course, the duty of a Court, if reasonably possible, consistent with the protection of constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality, sustaining it, if it can be

done as a whole, or if that cannot be done, as to the part of it that is constitutional. But legislation, even though containing a separability clause, is not the enactment of isolated sections, but of a law as a whole. And the function of the Court, if there are invalid sections in a statute, is to search out, not isolated valid ones, but the valid law as a whole. To do this, a Court may, especially where the Act contains a separability clause, cut and pare and trim away its diseased parts, if, when this has been done, the live spirit of the law as enacted still remains, the living tree still stands. But, law making at last, is a legislative and not a judicial function and the search of the Court in the end is not for a law the legislature could or might have validly enacted but for the valid law it did enact. When, therefore, the vice of a statute runs through the whole of it, Courts may not, by lopping and paring away, create a statute which the structure and context of the Act as a whole shows the legislature did not intend to, indeed did not, enact. Williams v. Standard Oil Co., 278 U.S. 235, 241, 49 S.Ct. 115, 73 L.Ed. 287, 60 A.L.R. 596; Sage v. Baldwin, D.C., 55 F.2d 968, and cited cases. Looked at in this light when the whole purpose of the 1937 Act to outlaw ASCAP and its contracts and to permit users in Florida to perform compositions, dealt with in them, without pay, is kept in mind, we think it clear that the Act, in spite of its separability provision, is so far indivisible that with all the "without pay" sections stricken as invalid, the whole Act must fall. For, it may not be supposed that the legislature intended to strike down the contracts and leave both ASCAP and its members, and the users in Florida who had been dealing with ASCAP, up in the air, with contracts already entered into and a considerable part of the compensation already paid, with no right in ASCAP or its members to collect

the balance due, and none in the Florida users, without paying again under separate arrangements, to use the music they had contracted and partly paid for. We, therefore, conclude as the Court did in Buck v. Swanson, supra, that the whole Act is invalid and must fall. We are the more inclined to this view because of the inconsistent provisions in the 1939 Act, and because, while specifically providing that nothing in it shall be construed to repeal any of the statutes of the state of Florida, pertaining to monopoly or restraint of trade "including . . . Sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 of Chapter 17807, Laws of Florida, 1937", that Act by grouping all of these sections together makes it clear that they are regarded by the legislature as forming a harmonious whole and not as isolated and independent separate laws and as a whole, they must stand or fall together. In this view it is not necessary for us to determine whether as plaintiffs claim, Section 1 is invalid, for indefiniteness and uncertainty in its provision that it shall apply to combinations only where "a substantial number" of owners are concerned. Nor is it necessary to determine whether defendants are right in their counter to this claim of plaintiffs, that if the statute might be regarded as indefinite in its application as to some, it is certainly not so in its application to plaintiffs, for they admit that they own or control substantially all of the playable copyrighted musical compositions and they may complain of the statute, not as it applies to others but only as it applies to themselves.

[7] When it comes, however, to the 1939 Act we think the matter stands differently, for, having a valid purpose to compel disclosure to protect music users against imposition in the matter of copyrighted music and, except as to Sections 4-A and 4-C, which are not germane to that

purpose, having gone about effecting that purpose in a reasonable way, the Act as a whole is valid and may stand with those sections stricken from it. These sections constitute clear invasions of plaintiffs' rights under federal laws for which no warrant or justification can be found in the exercise of the state's police power. They may not stand.

[8, 9] As to 4-A, it seriously invades the rights of copyright owners to sell or license or refuse to sell or license as they please and by its compulsion, opens to the public the unlimited right to use copyrighted material upon terms the owner must fix generally in advance, and under conditions which are not only unreasonable in fact but are in their nature beyond the power of the state to impose. A copyright owner has a right to sell or withhold from sale the matter of and the rights under the copyright. He cannot be made to sell his product unless he wishes to. He can make one price to one user and an entirely different price to another. The effort of this section is to compel copyright owners, if they sell to one by a blanket license, to furnish schedules giving prices of the compositions so licensed, and to permit anyone desiring to do so, to perform any piece at the price so fixed. This is a taking of plaintiffs' property in its copyright without due process, and is beyond the power of the state.

The defendants seem to recognize that this would be so if the condemned provision were not coupled in the statute with a provision permitting dealing in copyrighted music under blanket licenses. They seem to think that the permission of the statute for two or more owners to combine in a blanket license authorizes the state to impose unreasonable restrictions upon that joining.

[10, 11] This will not at all do. It is not unlawful for one or more copyright owners merely to pool their com-

positions for one royalty for them as pooled. Standard Oil Co. v. United States, 283 U.S. 163, 51 S.Ct. 421, 75 L.Ed. 926. Section 4-A does not concern itself with price fixing or with combinations for price fixing; it deals only with the Act of pooling copyrighted pieces to sell them for one royalty, that is, with the selling of two or more pieces under one license. There is no conceivable public policy against such action by two or more owners and therefore no valid exercise of police power involved in a statute putting limitations on such trading. So long as persons do not unlawfully combine to fix prices, and the section in question does not deal with such unlawful combinations, there is no offense in mere pooling. And the mere fact that the statute permits to be done what without the statute it was already lawful to do, does not authorize it to impose unconstitutional restrictions upon that doing. "But a state may not impose any condition which requires the relinquishment of a right guaranteed by the National Constitution". Sage v. Baldwin, D.C., 55 F.2d 968, at page 969. The copyright laws guarantee to owners of musical compositions, protection against the use thereof without their consent. The state of Florida may not, therefore, as a condition to their being allowed to sell in Florida, a right they already have under the Federal constitution and laws, compel them to throw open to general public use the performing rights to their compositions at a price fixed in advance.

[12-15] Section 4-C is for the same reason invalid. It undertakes to impose unreasonable restrictions on copyright owners, restrictions having no reasonable relation to the public policy the Act is designed to further, that of disclosure for the protection of the public against fraud and imposition. In attempting to prevent individuals from contracting for the use of their copyrighted music upon any

price bases they and their customers may select, the Act goes clearly beyond and is wholly outside the reasonable exercise of the police power. People's Petroleum Producers v. Sterling, note 6, supra. The prohibition of the section, against basing the price upon programs in which a particular piece of music is not performed, is a completely arbitrary one and as such, it could not stand if the subject of the prohibition were uses unprotected by copyright. For, the end and aim of the prohibition is to limit the right to sell or license copyrighted musical compositions to contracts based solely upon performances per piece of each particular piece of music and to prohibit contracts arrived at on any other basis, however reasonable and well adapted to the needs of, and acceptable in, the business generally, of selling and licensing performing rights in copyrighted musical compositions. If the statute dealt with contracts for the hiring of the work and labor or the personal services, of animals or things and by its prohibition prevented, wages and salaries from being fixed except on the basis of piece work, the hire of horse, car or boat from being fixed, except upon the basis of each particular use, or journey, we think it would be admitted that such a statute would be invalid as an invasion of the right and liberty of contract, and not at all a reasonable exercise of the police power of the state. Certainly the state is in no better, the owner of a copyright in no worse position as to rights protected by copyright, "While the Copyright Act [17 U.S.C.A. § 1 et seq.] may not enhance the right of proprietorship, it certainly does not lessen that right. As said by the Supreme Court in Caliga v. Inter Ocean Newspaper Co., supra (215 U.S. 182, 30 S.Ct. [38], 39, 54 L.Ed. 150), 'The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period.'

"The right of an author in his intellectual production is similar to any other personal property right. It is assignable and it may be sold and transferred in its entirety, or a limited interest therein, less than the whole property, may be sold and assigned, and the various rights included in the entire ownership may be split up and assigned to different persons. Sales may be absolute or conditional and they may be with or without qualifications, limitations or restrictions. Atlantic Monthly Co. v. Post Pub. Co., D.C.Mass., 27 F.2d 556; American Tobacco Co. v. Werckmeister, supra [207 U.S. 284, 28 S.Ct. 72, 52 L.Ed. 208, 12 Ann.Cas. 595]"; Buck v. Swanson, note 6, supra [33 F. Supp. 387].

For the reasons herein stated, the injunction prayed for will be granted against the enforcement of the 1937 Act and as to Sections 4-A and 4-C in the 1939 Act; as to the remainder of the 1939 Act, it will be denied.

Opinion in

Buck v. Swanson, 33 F. Supp. 377 (D. C. Neb. 1939).

(Nebraska Statute printed at p. 115, *infra.*)

In Equity. Action by Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers against Harry R. Swanson, as Secretary of the State of Nebraska, and others to enjoin the enforcement of a Nebraska statute relating to monopolies in the field of musical compositions.

Judgment for plaintiff.

Louis D. Frohlich and Herman Finkelstein, both of New York City, and L. J. TePoel, of Omaha, Neb., for plaintiffs.

William J. Hotz, Sp. Asst. to the Atty. Gen., of Nebraska, John Riddell, Asst. to the Atty. Gen. of Nebraska, Gordon Diesing, of Omaha, Neb., and Andrew Bennett, of Washington, D. C., for defendants.

Before GARDNER, Circuit Judge and MUNGER and DONOHUE, District Judge.

GARDNER, Circuit Judge.

This is a suit in equity in which plaintiffs seek to enjoin the enforcement of Legislative Bill 478 of the State of Nebraska, Laws, 1937, c. 138, and which by its terms became effective May 17, 1937.

The American Society of Composers, Authors and Publishers, a voluntary unincorporated association under the General Associations Law of New York, consisting of a large number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions, as authors, composers and publishers, through Gene Buck its president, and certain individuals and corporations interested in copyrighted musical compositions are the plaintiffs. The secretary of state, the state treas-

urer, the auditor of public accounts, and the attorney general, all of the State of Nebraska, as well as the county attorneys of various counties of Nebraska, are the Defendants.

The statute, the enforcement of which is sought to be enjoined, is too voluminous to be set out herein *in haec verba,* but it will be found in the subjoined note. [The Statute is printed at p. 91, *infra.*]

There are approximately 1,000 composer-members of the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, in the United States, and 123. publisher-members who constitute the principal publishers of the country. Each member has assigned to the Society the exclusive right of public performance for profit of his copyrighted musical compositions for periods of five years at a time, the present contracts between the Society and its members expiring December 31, 1940. The Society has issued blanket licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the Society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the Society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing such licenses.

In Nebraska there are some 350 dance pavilions and ballrooms of a class that are independent of taverns where dancing is carried on incidentally. There are ten radio stations operating within the state, of which one is affiliated with the Columbia Broadcasting Network and one with the National Broadcasting Network. The other stations initiate their own vocal and instrumental musical programs. A

large number of theatres are users of music. There are 284,000 radio receiving sets in private homes, and about one-third of the population of the state at some time during the year attend dances and balls where music is played. In 1938 approximately $12,000.00 was collected by ASCAP from the theatres in the state. The largest radio station in Nebraska pays about $26,000.00 to the Society annually. Another group of stations paid the Society about $27,000.00 in 1938. There were 391 signed contracts with users of music in Nebraska introduced in evidence upon which an aggregate of approximately $20,000.00 was paid ASCAP during 1938. The Society is given, by its members, the exclusive right to make collections, fix prices, and otherwise carry on the public performance of all the musical compositions it controls. Some $6,000,000.00 was taken in for public performance rights by the Society in the United States during 1938. Fifty per cent of its net commissions was divided among the composer members and the other fifty per cent was divided among the publisher members. These groups are classified, but the classification does not seem to have any material bearing upon the issues presented. Of the popular music necessary for the successful operation of radio stations, dance-halls, hotels and theatres, the Society has control of about 85% or 90% and also has control of from 50% to 75% of the standard or older music that is played occasionally. All of the large and more influential publishers of music in the United States are members of the Society. The users of music in Nebraska cannot successfully carry on their business except they deal with the plaintiff Society because there is no place where nor person or agency to whom users of music in Nebraska may go in order to deal for public performance rights and negotiate for music in any substantial amount sufficient to meet the ordinary needs of music users in the state, except the Society.

All the contentions of plaintiffs, as well as those of th Defendants, go to the constitutional validity of the statu involved. Whether or not, under the common law of N braska the contracts between ASCAP and its members, an between it and the users of music in Nebraska, are valid o not, we need not consider. That issue is not before us, bu the single question is the constitutional validity of the cha lenged statute.

It appears from the evidence that prior to the organiz tion of the Plaintiff Society, an author or composer wh had obtained a copyright for his production had no pract cal means of enforcing the exclusive right given him b the Copyright Act. He was not so equipped nor organize to discover violations of his rights, and it would requir much time and a large amount of money to enforce hi rights by means of litigation. Users of music, on the othe hand, who wished to buy the rights of public performanc for profit, were unable to ascertain who the copyright owne was and to whom to go. It was for the purpose of pro tecting the legal rights of its members in their copyrighte musical compositions against infringement by public per formance for profit that the Society was organized.

[1-3] The control or prohibition of combinations in re straint of trade and the prohibition of monopolistic practice is recognized as a proper exercise of the police power of th state. Nebbia v. New York 291 U. S. 502, 54 S. Ct. 505 Waters-Pierce Oil Co. v. Texas 112 U. S. 115, 29 S. Ct. 227 Bayside Fish Flour Co. v. Gentry 297 U. S. 422, 56 S. Ct 513; Crescent Cotton Oil Co. v. Mississippi 257 U. S. 129 42 S. Ct. 42; Central Lumber Co. v. South Dakota 226 U. S 157, 33 S. Ct. 66; Paramount Pictures v. Langer 23 Fed Supp. 890. While regulation of such public practices as ar deemed to be contrary to the public policy of the state is a proper exercise of its police power, yet the exercising of such power is subject to the restrictions imposed by the Federal Constitution, which must of course be recognized as the supreme law of the land. A state statute, though

enacted in pursuance of the police power, is void if in contravention of any express provision of the Federal Constitution or of a valid federal statute, or if it constitutes an interference with matters that are within the exclusive scope of federal power.

[4-6] The Act of March 4, 1909, Chap. 320, Sec. 1 (e) 35 Stat. 1073, Title 17, U. S. C. A., Secs. 1-63, enacted pursuant to the grant of power in Article 1, Section 8 of the Constitution, was intended to grant valuable enforcible rights to authors and publishers without burdensome requirements, in order to afford greater encouragement to the production of literary works of lasting benefit to the world. Washingtonian Pub. Co. v. Pearson 306 U. S. 30, 59 S. Ct. 397. The policy and purpose of the statute is to grant to the individual the right to control the use of the production covered by the copyright. Of course, the Act gives him no right to combine with others to insure control of prices and the consequent power of monopoly of an entire field by combination. Plaintiffs urge necessity as a justification or warrant for their organization. It is urged that without some such means of protection, the individual copyright owner is helpless to protect his rights, but if the statute violates no rights guaranteed to the plaintiffs by the Constitution or laws of the United States, the motive for the organization or acts of ASCAP, however impelling, is not material.

[7-8] It is contended that the state statute deprives copyright owners of the right to control public performances for profit of their copyrighted musical compositions, apart from the sale of sheet music. The copyright is distinct from the material object copyrighted. It is an intangible incorporeal right in the nature of a privilege or franchise quite independent of any material substance such as the manuscript or the plate used for printing. King Features Syndicate v. Fleischer (CCA2) 299 Fed. 533. The owner of the copyright has the right to dispose of it on such terms as he may see fit, or he may decline to dispose of it on any terms. He

has an individual right of exclusive enjoyment similar to that of a patentee of an invention. United States v. Dubilier Condenser Corp. 289 U. S. 178, 53 S. Ct. 554; United States v. American Bell Telephone Co. 167 U. S. 224, 17 S. Ct. 809; Burrow-Giles Lithograph Co. v. Sarony 111 U. S. 53, 4 S. Ct. 279; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 S. Ct. 72; Caliga v. Inter Ocean Newspaper Co. 215 U. S. 182, 30 S. Ct. 38; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. (CCA7) 154 Fed. 358. The Society as an assignee of the rights of each author is a representative of that individual right. There are, too, individual plaintiffs before the courts, and they are interested individually in the public performance rights of particular musical compositions.

In American Tobacco Co. v. Werckmeister, *supra,* it is said [207 U. S. 284]:

> " . . . the law recognized the artistic or literary productions of intellect or genius, not only to the extent which is involved in dominion over and ownership of the thing created, but also the intangible estate in such property which arises from the privilege of publishing and selling to others copies of the thing produced."

While the Copyright Act may not enhance the right of proprietorship, it certainly does not lessen that right. As said by the Supreme Court in Caliga v. Inter Ocean Newspaper Co., *supra* [215 U. S. 182],

> "The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period."

[9-10] The right of an author in his intellectual production is similar to any other personal property right. It is assignable and it may be sold and transferred in its entirety, or a limited interest therein, less than the whole property,

may be sold and assigned, and the various rights included in the entire ownership may be split up and assigned to different persons. Sales may be absolute or conditional and they may be with or without qualifications, limitations or restrictions. Atlantic Monthly Co. v. Post Pub. Co. (D. C. Mass.) 27 Fed. (2D) 556; American Tobacco Co. v. Werckmeister, *supra.*

Section 2 (A) of the state statute requires the author, composer or publisher to specify legibly upon the musical composition, in whatever form it may be published, "the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes."

[11] The right of public performance in connection with the composition includes separate and distinct rights, among them being: (1) the right of publication; (2) the motion picture rights; (3) the stage rights; (4) the recording rights; and (5) the radio reproduction rights. The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing.

Section 2 (B) of the statute provides that,

> "In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private and public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation, so using or rendering the same shall

> be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state."

Under this subsection, the copyright owner in effect must offer the public performance rights of his copyrighted composition for sale and use in Nebraska, and if he does not choose so to do any person purchasing the composition may use it in the state for public performance without any liability to the copyright owner. This provision, we think, clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act. As observed, his rights of ownership entitle him to sell or offer to sell, or to withhold from sale, as he may choose.

[12-13] The state statute can not be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use. Panhandle Eastern Pipe Line Co. v. State Highway Commission 294 U. S. 613, 55 S. Ct. 563.

[14] While the power reasonably to restrain unlawful monopolistic trade-restraining combinations from exercising any rights in the state may be conceded, an act which compels the owner of a copyright to offer it for sale in a certain way, and if he fails so to do to take it from him without compensation, violates the due process and equal protection clauses of the Constitution, and it is also violative of the Federal Copyright Act.

The state statute contains a separability provision (Section 12), which provides that,

> "If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or non-enforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act."

[15] The Supreme Court of Nebraska has held that a statutory expression of the separability of various sections or provisions of a statute is an aid merely to judicial interpretation. First Trust Co. v. Smith 134 Neb. 84, 277 N. W. 762; Laverty v. Cochran 132 Neb. 118, 271 N. W. 354; Hubble Bank v. Bryan 124 Neb. 51, 245 N. W. 20. In Laverty v. Cochran, *supra,* the court in speaking of a severance clause contained in a statute said:

> "The rule is that, although a statute may be invalid or unconstitutional in part, the other parts will be sustained where they can be separated from the part which is void. Muldoon v. Levi, 25 Neb. 457, 41 N. W. 280. But the parts of the statute which are valid must be capable of being executed independently of the invalid parts in order to be operative. State v. Ure, 91 Neb. 31, 135 N. W. 224. The statutory provision expressing legislative intent as to the separability of the various parts of a statute is merely an aid to judicial interpretation."

[16] But where the connection between the invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative. The provision of the statute which we are here considering is such an essential part of the statute as not to be separable.

[17] In view of our conclusion on this phase of the case, it is unnecessary to consider the other contentions that have been ably argued and elaborately briefed by counsel for the respective parties.

We conclude that permanent injunction restraining the enforcement of this statute must be granted. Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion.

Buck v. Harton, 33 F. Supp. 1014 (1940, M. D. Tenn.).

(Tennessee Statute printed at p. 132, *infra.*)

In Equity. Action by Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, and others against John W. Harton, as State Treasurer of Tennessee, and others to restrain the defendants from bringing any proceeding for purpose of enforcing a certain statute of the state of Tennessee against the complainants and others similarly situated, their representatives, employees or agents, and for other relief.

Judgment for the complainants in accordance with opinion.

Cornelius, McKinney & Gilbert, of Nashville, Tenn., and Schwartz & Frolich, of New York City (Charles L. Cornelius and William Neel McKinney, both of Nashville, Tenn., and Louis D. Frohlich and Herman Finkelstein, both of New York City, of counsel), for complainants.

Roy H. Beeler, Atty. Gen., for Tennessee, and W. F. Barry, Jr., Asst. Atty. Gen., for defendants.

Before HICKS, Circuit Judge, and DAVIES and TAYLOR, District Judges.

PER CURIAM.

This suit having been duly commenced on April 18, 1938 by filing a subpoena and bill of complaint in this Court, and personal service of copies thereof having been made on said date upon the defendants originally named in this action, and the defendants John W. Harton, John J. Jewell, Marion S. Boyd and Glenn Woodlee (said last named defendants having been substituted by stipulation in place and stead of Grover Keaton, W. B. Knott, W. T. McLain and A. T. Stewart), and this Court having duly granted a temporary injunction on December 1, 1938, and

this cause having come on for hearing on the 19th day of February, 1940 at the Courthouse of the District Court of the United States, Eastern District of Tennessee, at Knoxville, Tennessee, and complainants having appeared by Cornelius, McKinney & Gilbert, Esqs. (Charles L. Cornelius, William Neel McKinney, Louis D. Frohlich and Herman Finkelstein, of Counsel), and defendants having appeared by Honorable Roy H. Beeler, Attorney-General of the State of Tennessee, and Honorable P. W. Barry, Assistant Attorney-General, and this cause having been submitted upon all the papers and proceedings heretofore filed and had herein, and counsel for defendants having consented in writing to the entry of a final decree in favor of complainants upon said papers, and due deliberation having been had, the Court hereby makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. The State of Tennessee enacted a Statute entitled Chapter 212 of the Tennessee Laws of 1937 on May 21, 1937 which Statute became effective immediately. Said Statute is hereinafter referred to as the "Statute".

2. The plaintiff, American Society of Composers, Authors and Publishers, is a voluntary unincorporated association organized in 1914 under the General Associations Law of New York. Its membership consists of a substantial number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions, as authors, composers and publishers. It brings this suit through Gene Buck, its President, who has been duly authorized to bring this suit on behalf of the Society and all its members. Other plaintiffs are certain individuals and corporations who are

members of the Society and are interested in copyrighted musical compositions. They are all citizens and residents of States other than Tennessee.

3. The State Treasurer, the Secretary of State and the Attorney-General all of the State of Tennessee, as well as the District Attorneys-General of various circuits of Tennessee, all citizens and residents of Tennessee, are the defendants.

4. There are approximately 1,000 composer-members of the American Society of Composers, Authors and Publishers (hereinafter referred to as "ASCAP"), in the United States, and 123 publisher-members who constitute some of the principal publishers of the country. Each member has assigned to the Society the exclusive right of public performance for profit of his copyrighted musical compositions for periods of five years at a time, the present contracts between ASCAP and its members expiring December 31, 1940. ASCAP has issued blanket licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the Society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the Society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing ASCAP to grant such licenses.

5. At the time the Statute was enacted, there were in existence 217 signed contracts between ASCAP and establishments in the State of Tennessee, engaged in the business of publicly performing copyrighted musical compo-

sitions for profit. During the year 1936, these licensees paid ASCAP $69,073.19 pursuant to such contracts. Among such licensees of ASCAP were the owners of 166 motion picture theatres, 38 dance halls, hotels and miscellaneous establishments and 13 radio broadcasting stations. Among the 13 radio stations in Tennessee licensed by ASCAP, five are affiliated with the Columbia Broadcasting System, four with the National Broadcasting Corporation, three with the Mutual Broadcasting System and four with the Dixie Network. Part of the programs broadcast by the affiliated stations emanate from points outside of the State and the remaining part initiate in the studios of such Tennessee broadcasters or elsewhere within the State. There are 459,900 radio receiving sets in private homes in the State of Tennessee. No license fees are paid by the owners of these receiving sets inasmuch as they do not engage in public performance for profit. The cost of operation of ASCAP is approximately 17% of the gross amount received.

6. ASCAP is given by its members the exclusive right to make collections, fix prices for blanket licenses, and otherwise carry on the licensing of the right of public performance for profit of all the musical compositions copyrighted by its members. Fifty percent of such net income was divided among the composer- and author-members and the other fifty percent was divided among the publisher-members in accordance with a method of classification defined in the Articles of Association of ASCAP.

7. Prior to the organization of ASCAP, authors, composers and publishers who had obtained copyrights for their productions had no practical means of enforcing the exclusive right given them by the Copyright Act. They were not so equipped nor organized to discover violations of their rights, and it would require much time and a large

amount of money to detect infringement and to enforce their rights by means of litigation. None of them secured any revenue from the public performance for profit of their copyrighted musical compositions. Users of music, on the other hand, who wished to obtain the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go and could not economically obtain individual licenses for the separate performance of the large numbers of works required by them daily. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit and to give users ready access to a substantial repertoire of music for such purposes that ASCAP was organized.

8. ASCAP and its members, including the other complainants, come within the purview, terms, conditions, penalties, forfeitures, prohibitions, restrictions and regulative provisions of the Statute, and the members of ASCAP including complainants are affected in their rights by the terms and provisions thereof.

9. Complainants are jointly interested in the subject of the action and in obtaining the relief demanded; the questions raised by the Bill of Complaint are of common and general interest to all the members of ASCAP who constitute a class so numerous as to make it impracticable to bring them before the Court; complainants herein are suing on their own behalf and on behalf of all the members of ASCAP.

10. The value of the matter in dispute herein between each of complainants and defendants is in excess of the sum of $3,000, exclusive of interest and costs.

11. The copyrights of musical compositions owned by each of the corporate plaintiffs are worth in excess of $1,000,000, and the interests in copyrights of the individual plaintiffs, including the value of their renewal rights, are in excess of $100,000 as to each of them.

12. The contracts between the individual composer- and author-members of ASCAP, including the individual plaintiffs, and their respective publishers do not give the publisher the right to dispose of the right of public performance for profit, nor do they have any provision for payment by the publisher to the writers of any royalties secured from issuing such licenses. Before ASCAP was formed, there were no royalties from this source and since the formation of ASCAP, both writers and publishers have relied upon ASCAP to collect royalties from this field on behalf of both and to distribute it equitably for the equal benefit of writers and publishers.

13. Users of music, including users in Tennessee, have uniformly objected to dealing with individual copyright owners for the licensing of the public performance for profit of musical compositions. ASCAP's practice has been to grant blanket licenses to theatres according to their seating capacity, to radio broadcasting stations according to their income, power and coverage, and to hotels, cabarets and dance halls according to their respective size, business done, number and size of orchestras, methods of performance, income and standing. Many of such users have for many years consistently refused to pay license fees to ASCAP or its members, until investigations were made by ASCAP, infringements ascertained and suits brought.

14. The radio broadcasting stations in the State of Tennessee are members of the National Association of

Broadcasters, which association on behalf of its members, for many years last past, has acted and presently acts collectively in dealing with ASCAP.

15. Under the contracts between ASCAP and said foreign societies, the latter are not required to, and never have, filed with ASCAP or with any State Authority, copies of the respective compositions copyrighted by their respective members, or lists of such compositions.

16. Many thousands of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded under the compulsory license provision of Section 1(e) of the Copyright Act by manufacturers of phonograph records, music rolls and electrical transcriptions. Such manufacturers have paid to copyright owners not more than two cents for each record and said copyright owners have no right to demand any further sums from such manufacturers; complainants and others similarly situated have no control over the sale or disposition of such phonograph records, music rolls or electrical transcriptions and they cannot compel the manufacturers thereof to affix any price upon them or to collect a price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected respectively for the public performance for profit thereof. Such manufacturers have no right, title or interest in the public performance for profit of such copyrighted compositions.

17. Complainants and others similarly situated are not willing to permit their musical compositions to be performed within the State of Tennessee publicly for profit on any basis wherein the price for such performance would be fixed upon a so-called per piece basis. Licensing on such basis would not be feasible and would be tantamount

to depriving complainants of their exclusive right of public performance for profit.

18. The musical compositions of ASCAP's members and complainants have been for many years last past, and are presently being performed within the State of Tennessee in hotels, dance halls, taverns, motion picture theatres and broadcasting stations.

19. If the members of ASCAP including complainants tried to comply with the Statute they would each have to ascertain separately the nature of each establishment in the State of Tennessee, size of each orchestra, fame or celebrity of each artist, size of each establishment, its volume of business, its probable profits, elaborateness of the production, and size of its audience; they would each have to employ a corps of clerical assistants for the purpose of ascertaining the above information, investigators to detect infringement and competent counsel to obtain redress for the same; they would have to attempt to fix a separate price for each such establishment and to file a list with all the information required by the Statute; this would add substantially to the cost of the sheet music sold within the State of Tennessee, and would make it so great as to encourage infringement and interfere with, if not destroy, the sale of copyrighted sheet music in the State of Tennessee.

20. The Statute cannot possibly be complied with because:

(a) the public performance rights for profit fluctuate in value over the years; it is impossible for individual members of ASCAP, including the complainants, to specify at the time of publication of their musical compositions in the State of Tennessee what the price should be for various public performances for profit of their respective musical compositions;

(b) the members of ASCAP, acting singly, do not have the financial resources, experience or ability to obtain the information necessary to enable them to designate a fair price of the public performance for profit of their musical compositions in the State of Tennessee, or to detect or redress infringement of their compositions in that State;

(c) it would be impossible under the Statute to protect large investments made in motion pictures and dramatico-musical productions which contain individual musical compositions, the separate and unrestricted public performance of which would destroy the value of such motion pictures and dramatico-musical productions; complainants would be compelled by the Statute to refrain from copyrighting the compositions embraced in such motion pictures and dramatico-musical productions in order to protect their investment therein; this would materially reduce the number of works copyrighted annually;

(d) it would cost complainants approximately $300,000 to attempt to compile and file the list required by the Statute and $50,000 additional each year to supplement such list annually.

(e) the Statute cannot be complied with unless all complainants surrender their membership in ASCAP; this would entail a loss to each of the complainants in excess of $5,000 annually, representing the amounts which they normally receive annually from ASCAP; in some cases, such loss would be in excess of $50,000 annually; if not for the revenue received from ASCAP, complainant-publishers would be unable to continue in business.

21. The constant use of music by radio has shortened the life of a song resulting in a diminution ranging from 70% to 80% in the income to authors and composers from sales of sheet music and books of music. Sales of "hit"

songs have fallen from an average in excess of 1,000,000 copies prior to 1927, to an average of 30,000 to 150,000 today. The income from mechanical royalties diminished ninety-seven percent.

22. A system of blanket licensing is necessary in the field of public performance of musical compositions for profit because:

(a) Many request numbers are played as spontaneous encores in the course of an evening's entertainment in dance halls, cabarets, hotels and radio. This is possible only under some form of blanket license, which allows users to make last minute substitutions made necessary by operating difficulties, failure of artists to show up, etc.; except in rare instances, radio broadcasters in the State of Tennessee and elsewhere have always taken blanket licenses for the right of public performance for profit whether such licenses were obtained from ASCAP or from others; if the Statute were upheld, the broadcasters in Tennessee would attempt to obtain the benefit of blanket licenses by purchasing from publishers entire catalogues; such users would not and do not propose to deal with individual copyright owners for specified compositions; users in Tennessee have no intention of dealing with individual composers or authors.

(b) It is difficult for users to report accurately the music performed by them. Large establishments with expert staffs keep no logs or records of such performances; it is inevitable that small stations would have greater difficulty because of lack of facilities and would be required to spend as much for this purpose as larger stations with substantially larger income; the clerical expense alone would be greater than the license fees now paid to ASCAP; by the use of the reservoir of available music, under a blanket license, users are saved expendi-

tures that would be entailed if each musical composition had to be separately applied for, cleared and reported;

(c) Dance halls and taverns utilizing the services of orchestras habitually permit their orchestra leaders to choose the music played; such orchestra leaders buy a considerable part of their own copies of music although some of it is obtained in the form of professional copies; orchestra leaders cannot tell when they purchase the music, at what establishments the same will be played or where the same will be performed, or under what circumstances; the purchase of music is an important item which must be taken into consideration by them and orchestra leaders cannot afford to pay any sums in excess of the sums which they now pay for sheet music.

23. Compliance with the Statute would require ASCAP and its licensees to abandon the contracts between them and would also compel each complainant as well as all the members of ASCAP to rescind their respective contracts with ASCAP.

24. Although complainants will be able to license users of their music in the State of Tennessee without doing any act in said State, the Statute prohibits complainants from so doing without incurring the penalties of said Statute.

25. Said Statute is class legislation; it is aimed only at proprietors of music copyrights and no other copyrights, and it exempts the performance of musical works which are protected only at common law. A great many forms and varieties of copyrighted works other than musical compositions are presently and constantly dealt in, licensed, sold and otherwise made available within the State of Tennessee.

26. Said Statute is not a reasonable exercise of the police power of the State of Tennessee; it was enacted, not in the public interest, but rather for the private benefit and gain of a group of users of music in an organized effort to enable such users to have free access to the copyrighted works of complainants and others similarly situated.

27. The system of licensing provided for in said Statute would deprive complainants and others similarly situated of their exclusive rights under the Copyright Act.

28. Defendants have threatened to and will enforce such Statute against these complainants and others similarly situated in the event that such complainants and others similarly situated refuse to comply with said Statute or do any of the acts made unlawful by said Statute.

29. Said Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great, that complainants have no adequate means of testing the validity of the Statute by violating the same and defending against a criminal or civil prosecution in the Courts of the State of Tennessee; if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in the 65 counties of the State of Tennessee where their works are being publicly performed for profit, they will be subjected to a multiplicity of suits and prosecutions; unless defendants are restrained, complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions within the State of Tennessee.

30. Unless this Court determines the invalidity of the Statute, complainants and others similarly situated will

be deprived of the exclusive rights granted to them under the United States Constitution and the Copyright Act, and will be without any remedy for the enforcement of such rights within the State of Tennessee, therefore deprived of their property and liberty without due process of law, and denied the equal protection of the laws, in contravention of Article I, Sections 8, 9 and 10, Article III, Section 2, Article IV, Section 2, and Article VI, Section 2 of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, and are deprived of their rights in their respective copyrights under the Copyright Act of March 4, 1909 as amended.

31. Complainants have no adequate remedy at law and are relievable only in this Court of equity.

Conclusions of Law

I. The Statute makes it impossible for complainants to issue licenses in the State of Tennessee for the public performance for profit of their copyrighted musical compositions, except at the risk of incurring prohibitive civil and criminal penalties of said Statute, and the confiscation of their copyrights.

II. The Statute destroys, nullifies and repudiates copyrights granted by the United States Government to complainants and their predecessors in interest.

III. The said Statute violates the treaties made between the United States and foreign countries, under which the nationals of such foreign countries are given reciprocal rights with American citizens with respect to American copyright, and in reliance upon the continued effectiveness of which ASCAP entered into various con-

tracts with similar societies in said foreign countries, particularly with societies of the following countries: Argentina, Austria, Belgium, Brazil, Bulgaria, Czecho Slovakia, Denmark, England, Finland, France, Germany, Hungary, Italy, Jugoslavia, Norway, Portugal, Rumania, Spain, Sweden and Switzerland.

IV. The Statute cannot be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use, as is done by this Statute.

V. Said Statute denies to complainants equal protection of the laws, and denies to the complainants due process of law.

VI. Said Statute impairs obligations of contracts entered into between complainants and 217 users of music within the State of Tennessee; and contracts between members of ASCAP and ASCAP; and contracts between ASCAP and similar societies operating in foreign countries; and contracts between writers and composers and their respective publishers.

VII. Said Statute interferes with complainants' liberty of contract in the State of Tennessee and elsewhere.

VIII. Said Statute deprives complainants of their right of free access to the Federal Courts to maintain suits for infringement for the unlawful public performance for profit of their copyrighted musical compositions.

IX. Said Statute is vague, uncertain and indefinite and fails to apprise complainants and others similarly situated, of what acts they may omit or commit which would constitute a crime under said Statute.

X. Said Statute subjects complainants to a multiplicity of suits by each of the 217 users within the State of Tennessee with whom they have contracts, by each of the District Attorneys-General in the State of Tennessee and by the Attorney-General of said State.

XI. The said Statute violates Article I, Sections 8, 9 and 10, Article III, Section 2, Article IV, Section 2 and Article VI, Section 2 of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States.

XII. Complainants have no adequate remedy at law and are relievable only in this Court of equity, and if complainants are not afforded the equitable relief prayed for in the Bill of Complaint, but are required to resist, when criminal prosecutions and other suits or proceedings are instituted under said Statute, it will result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate; the penalties for violation of the Statute are so drastic that complainants have no adequate means of testing the validity of the Statute by violating the same and defending against a criminal or civil prosecution in the Courts of the State of Tennessee.

XIII. Complainants are entitled to a decree granting a permanent injunction restraining defendants, and each of them, from bringing or permitting to be brought, directly or indirectly, any proceedings at law or in equity for the purpose of enforcing said Statute against complainants and others similarly situated, their representatives, employees, agents or any of them; from demanding that lists of complainants' musical compositions and other data be filed; from taking any steps to adjudicate the

ownership of complainants' copyrights; from attempting to appoint a receiver; from interfering with existing contracts between complainants and others, including the Society and citizens and residents of the State of Tennessee; from enforcing or threatening to enforce against citizens or residents of the State of Tennessee, the penalties of said Statute in the event such citizens and residents desire to carry out their contracts with the Society; from prosecuting criminally the members of the Society including complainants and their representatives or agents, or any of them, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act; and generally from doing any act or thing to carry out or enforce any of the provisions of said Statute.

XIV. Complainants are jointly interested in the subject of the action and in obtaining the relief demanded; the questions raised by the Bill of Complaint are of common and general interest to all the members of ASCAP who constitute a class so numerous as to make it impracticable to bring them before the Court; complainants herein are suing on their own behalf and on behalf of all the members of ASCAP; Gene Buck, as President of ASCAP, is authorized to bring this suit on its behalf.

XV. Said Statute and each and every part and section thereof is invalid and is hereby declared to be unconstitutional, illegal and void, and a decree may be entered making such declaration and granting the relief hereinabove provided for, and denying any relief to the defendants.

The Washington State Statute.

(Considered in Buck v. Gallagher, 307 U. S. 95.)

Chapter 218, Washington Laws, 1937, page 1070, reads as follows:

AN ACT in aid of the Federal Copyright Laws, to assist in effectuating their true intent and their enforcement in the State of Washington by removing and declaring illegal certain monopolistic abuses and activities wrongfully practiced under the guise of copyrights within the state by price fixing combinations, monopolies, and pools; to enforce the Washington constitutional provisions prohibiting price fixing monopolies and combinations in restraint of commerce and trade; providing penalties for combining rights granted by the copyright laws where the effect of such combination results in the use of copyright privileges as instrumentalities of oppression and extortion within the state in violation of constitutional provisions; and encouraging the rendition, creation and production of copyrighted works among the school children and citizens of this state; repealing certain acts; creating a State Anti-Monopoly Board for a particular function to be exercised only in the event of abuses and violations hereof; defining its duties, and the jurisdiction and duties of courts of record, the duties of the prosecuting attorneys, county auditors, the state treasurer and the secretary of state; and providing for the appointment of a receiver in certain instances; defining certain terms; providing for service of process on nonresidents, prohibiting certain acts; and providing penalties for violation hereof and repealing section 2690 of Remington's Revised Statutes.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 2690 of Remington's Revised Statutes is hereby repealed.

Section 2. It shall be unlawful for any person who, without the consent of the owner thereof, shall cause to be publicly performed for profit any dramatic composition, or dramatic musical composition commonly called an opera, or other copyrighted works, or any substantial part thereof, which has been copyrighted under the laws of the United States, or for any person to knowingly participate in the performance or representation of any substantial part thereof, or by knowingly selling a substantial copy of any substantial part thereof.

Section 3. It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interest for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: Provided, however, Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: Provided, further, This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: Provided, further, Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group or persons affected by this act does business, and all groups

and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher and more inequitable rates per piece for music licenses in this state than in other states: Provided, further, Where the owner, holder, or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works.

Section 4. In the event two or more persons holding separate copyrighted musical works, or any rights flowing therefrom, whether by assignment, agency agreements, or by any form of agreement, pool their interests, or combine, or conspire, federate, or join together in any way, whether for a lawful purpose or otherwise, a complete list of their copyrighted works or compositions shall be filed once each year in the office of the secretary of state of the State of Washington, together with a list of the prices charged or demanded for their various copyrighted works; no payment or filing fee shall be required by the secretary of state, and said persons, corporations, or association, foreign or domestic, shall state therein under oath, that said list is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work. The secretary of state shall require two copies of said list, one of

which he shall keep on file, the other shall be forwarded to the offices of the state treasurer at Olympia.

Section 5. The foregoing list of names and titles, provided for in the preceding section, shall be made available by the secretary of state to all persons for examination, in order that any user of copyrighted works in this state may know the rights and the titles to such copyrighted works as may be claimed by any of said combinations, pools, associations, or persons as aforesaid; said lists shall be prepared so that all persons may avoid using said copyrighted compositions, if they so desire, and may avoid conflict therewith, and avoid committing innocent infringements of said works; and in order to further effectuate the copyright laws of the United States, the secretary of state shall, if he deems it necessary to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, publish such list once each year in a newspaper of general circulation, in order that all citizens of the state may respect any and all individual rights granted by the United States copyright laws.

Section 6. No person, corporation, or association, domestic or foreign, whether doing business in this state as hereinafter defined or not, shall be absolved from the foregoing duty of filing said list of holdings as required in the preceding sections of this act, if their music or copyrighted works are used commercially in this state, or have been used herein, whether originating from a point within the state or from without, and as long as any rendition thereof is received or heard within the state, or is intended to be so received by the originator of any musical program: Provided, however, Any individual owner of a copyrighted work or works, not a party to or not connected in any way with any pool, conspiracy, combination, or groups, or association of persons, as prohibited by this act, need not file any such list.

Section 7. It is hereby declared that the production and creation of music and the commercial use of music and of copyrighted works within this state, whether originating at a point from within or without the state, as long as the same shall be rendered and publicly received within the confines of this state, whether mechanically or by radio communication, is a business clothed and affected with the public interest, and the adult educational advantages engendered by the public use of music and in its creation, makes this business one of public necessity, and necessary for the education and training of the youth of this state; that many abuses are practiced under a false guise of federal protection which only the state with its police power can easily and lawfully restrain, and in order to prohibit, discourage, and prevent monopolistic practices, and to prevent extortion, to encourage free bargaining between the citizens of this state with each other and with those without the state, and in order to give greater effect to the constitutional provisions relating to monopoly and price-fixing, and in the general interest of the public, therefore, the legislature in the interest of the peace and dignity of the state, in the interest of good morals and the general welfare of the people of this state, and for greater educational advantages to the public, declares that said business shall be subject to the police power and reasonable regulation of the state government, and such police and regulating power shall be administered by the courts and other officials of this state in a manner consistent with, in aid of, and never in conflict with, the copyright laws of the United States. The provisions of this act, and the administration thereof, shall at all times effectuate the enforcement, the true intent, and meaning of the United States copyright laws in order to prevent abuses from being practiced within this state from points within or from points without the state, by any individual, corporation, or organizations, who attempt to use the federal courts as innocent instrumentali-

ties in the furtherance of any systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based in threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this act and of the state constitution; it is further declared that any person or persons, or combines, as aforesaid, who shall violate this act shall be deemed to have used their property within this state in such a way that the same shall have acquired a legal situs, analogous to the situs of other personal tangible property within the state, even though separate from the domicile and residence of the owner: Provided, further, The legal situs of any copyrighted work is co-extensive about the state, and a copyrighted work used or sold for public use or public performance for profit, if intended to be heard from a point without the state or from a point within the state, is hereby declared to be a commercial commodity, and its legal situs is hereby declared to be within the State of Washington.

Section 8. All persons, groups, corporations, associations, foreign or domestic, violating this chapter, shall be deemed to have been doing business within this state and amenable to the process of the state courts, when any such persons, combinations, or groups shall have issued licenses, either from within or from without the state, for the privilege of using commercially and publicly any copyrighted work or works pooled in a common group or entity, or when any of the functions of said entity, organization, pool, or combine, is or has been performed in this state; and the business of spying upon and the warning of users of the copyrighted works of such combinations, in addition to the presence within the state of such persons, and the activities of such persons or their agents at any time or occasion for the detection of infringements within this state, shall be conclusive evidence that such combinations and persons,

even though non-residents, have accepted the privileges of doing business within this state, and such persons, if they abide by the provisions of this act, shall be granted the privilege of conducting business within this state in a legal manner, and may invoke the benefits of the state government and its political subdivisons in their behalf, as they may use all of the privileges available to the citizens of this state in general, and the use at any time of any general privilege available to any citizen of this state, by any of such agents, their attorneys, or representative, or investigator, or by any aider and abettor, or any non-resident person, group, entity, or combination as aforesaid, shall be deemed to be an acceptance of the provisions of this act; and all licensees of any violator of this act shall be deemed as aiders and abettors of said persons and subject to the provisions of this act unless they forthwith indicate their obedience herewith; and the acceptance of the general privileges of the State of Washington by any non-resident copyright holder or owner, or combination, defendant, or person, or organization of any kind, or entity, through an investigator, attorney, agent, representative, or through any aider and abettor as herein defined, and the acceptance by such persons of the rights, police protection, or of any general privilege conferred by the law of this state to any of its citizens, including the use of the roads and highways, or the privileges of any of its political subdivisions, as evidenced by their presence ~~within the state~~ at any time, shall be deemed equivalent to and construed to be an appointment by such non-resident or non-residents, as the case may be, of the secretary of state of the State of Washington to be his or their true and lawful attorney upon whom may be served all summons and processes against him or them and growing out of a violation of this act, in which said non-resident may be involved, and said acceptance of the privileges of this state, as aforesaid, shall be a signification of his or their agreement that any summons or process against him or them which is so served shall be of the same legal

force and validity as if served on him or them personally within the State of Washington. Service of such summons or process shall be made by leaving a copy thereof with a fee of two dollars ($2) with the secretary of the State of Washington, or in his office, and such service shall be sufficient and valid personal service upon any such non-resident defendant, copyright holder or owner, persons, or defendants, combination, entity, or organization, as aforesaid: Provided, That notice of such service and a copy of the summons or process shall be forthwith sent by registered mail requiring personal delivery, by the prosecutor bringing any action under this act, to any defendant at his last known address, and the defendants return receipt and the prosecutor's affidavit of compliance herewith are appended to the process and entered as a part of the return thereof: Provided, further, The court in which any action is brought may order such continuances as may be necessary to afford any non-resident defendant or groups, or entity, a reasonable opportunity to defend the action: Provided, further, The secretary of state shall keep a record of all such summons and process which shall show the day and time of service; and valid personal service shall thus be had on non-resident persons or individuals, entities, firms, or corporations violating this act.

Section 9. In the event any person, or groups of persons, or any combination or pool as aforesaid, whether a non-resident corporation, person, or an association, or domestic, refuse to abide by the provisions hereof, or attempt to evade or render ineffectual the true enforcement of any provision of this act, then the prosecuting attorney of any county where complaint is made of any violation, shall institute injunction proceedings against said persons in the superior court, and valid personal service may be had upon any non-resident defendant as set forth in the preceding section; and the court shall enjoin all persons

from violating the provisions of this act and the constitutional provisions prohibiting price fixing, monopolies, and combinations, and all copyrighted works and the public performance rights thereto when sold or used for profit are hereby declared to be a commercial commodity, and all persons, aiders and abettors, and agents, shall be enjoined by the court from aiding or furthering in any way a continuation of any violation of this act, either by the payment of money to said defendants or in any way; and if any defendant or defendants persist in defying the judgment of the court, the court shall, in order to effectuate its judgment and orders, order three (3) days' notice be given said defendant or defendants, as the case may be, by having a copy of such notice served on the secretary of state as heretofore provided if defendants are without the state, or served personally if within the state, and have the same published in some daily paper in the state of general circulation, and at the end of said period, if any defendant or defendants refuse to obey the order of the court, then the court shall appoint the county auditor as receiver for the copyrighted works and property of defendants, tangible or intangible, and all other effects and monies derived therefrom, and the receiver shall take over and preserve the commercial rights to all of said copyrighted works, together with such other property of any defendant, combination, pool, corporation, or entity through which they are acting, that he can locate within the state, and the receiver shall administer the same under the direction of the court, and said receivership shall be considered only as an incident to the main injunction suit of the prosecutor, and for the purpose of enforcing the court's orders; the said receiver shall seize the copyrighted works of all of the copyright holders and owners in said defendant combination, including all of the rights to suits for infringement and damages in both state and federal courts, and all

choses of action and all sums due on contracts and licenses, and hold the same subject to the order of the court; and all persons holding licenses or contracts with any defendant combination or entity, shall pay the fees and sums due thereon to the receiver for such time as the court may need to effectuate the provisions of this act, and to compel any defendant to abide herewith: Provided, Any sums paid on licenses violating this act shall only be continued in the court's discretion or until such time as the court can award defendants complete and full due process of law before entering a final order thereon, or until such time as a legal and equitable system of licensing can be determined according to the subsequent provisions of this act: Provided further, In the event any defendant or defendants attempt to withdraw their said copyright works or property from the state in order to violate and render this act or the court's orders ineffectual, or to deprive the citizens of this state of such commodity, or to hamper the enforcement of any provision of this act, or to injure any citizen or user of music in any way, then the court shall immediately order the receiver to compile a complete list of all of the copyrighted works of said defendants which have been used in this state, and the court shall then convene the State Anti-Monopoly Board, as herein now created, consisting of the state treasurer and the state auditor, and said board shall meet in the county where the suit is filed, and the superior judge hearing the cause shall be an advisory member of said board; and said board, of which the state treasurer shall be chairman, shall have only one function, the discouragement of price-fixing and monopolies, and the court shall then submit to said board the single question of the establishment of license rates for the use of those copyrighted works controlled by the defendants so proceeded against; and for the purpose of aiding in the abolition of monopolies and

price-fixing, and preventing violations of this act, the board shall determine a fair and just rate that the receiver should charge for the single and separate public performance for profit of each copyrighted work or works of said defendants, on a per piece system and basis of licensing, and the court shall not be deemed thereby to have divested itself of any of its jurisdiction by so doing; after determining such rate, the said Anti-Monopoly Board shall immediately advise the receiver of its findings, and of its fair rate, and the same shall be filed of record in the cause, and the receiver may then, if said finding is approved by the court, issue licenses for the use of said music at such approved rate on a basis of so much money per each time a piece of music is played or used in a public performance for profit; that said property shall be thus administered by the receiver for a period of one year, or until such time as the defendants, or the individual copyright owners of any combination so proceeded against take oath that they will abide by the ruling of the court and the provisions of this act; and all fees and funds collected by the receiver shall be turned over to the state treasurer, and no receiver's fees or attorney's fees shall be allowed, and the prosecuting attorney shall be attorney for the receiver, and the state treasurer shall keep said money in a separate and special fund, subject to the order of the court only for whatever portion thereof that the court may order used to defray the actual expenses of the board and the receivership; at the end of one year, if the defendants and copyright owners or holders in any combination thus proceeded against, continue to wilfully disobey the court's orders, then the court shall issue an order, which shall be published in three public places, to the effect that unless the defendants obey all of the orders of the court within ten days from the date of said order, that the court will proceed to permanently deprive said defendants and each of them of their property; and the court shall then order said

defendants to show cause within ten days why they should not be involuntarily compelled to assign all of their copyrighted works to the receiver forthwith, and to show cause why all of the funds as collected in the manner aforesaid from licenses, together with all of the copyrighted works including the performing rights thereto of said defendants and members of said combine, should not escheat and be forfeited forever to the State of Washington, and be subject thereafter to administration by the state in the same manner as all other personal property belonging to the State of Washington; if any of said defendants and copyright holders, or owners, do appear before the end of said ten day perod, and take oath that they will abide by the future orders of the court and the provisions of this act, then the court shall release their copyrighted works and order the state treasurer to return any and all of their money which has been received or seized: Provided, however, The court shall retain such jurisdiction over their persons for such time as the court may deem necessary to insure strict compliance with the terms of the court's judgment and the provisions of this act; if any of said defendants or copyright owners or holders shall ignore or refuse to obey the show cause order, aforesaid, or fail to appear at the end of ten days as ordered and abide by the court's judgment, then the court shall make an order and enter judgment to the effect that all of the copyrighted works, including the performing rights thereto, of said defendants and the members of any defendant combination, shall be construed as having been escheated and forfeited to the State of Washington, and the court shall thereupon appoint some officer of the court to execute an involuntary assignment of all the legal and equitable titles to all of the copyrighted works of each of said defendants and members of any defendant combination to the receiver, in the event the defendants or any of their members fail to execute a voluntary assign-

ment, and the receiver shall immediately file said involuntary assignment at the United States Copyright Office at Washington, D. C.; and the court shall then order the receiver to close the estate, and turn the titles to said copyrighted works over by proper assignment from the receiver to the state treasurer of the State of Washington, who shall thereafter administer, issue licenses for the use of the same in a manner consistent with this act, and conserve the same as state personal property in his possession, and according to law; and any funds left in the state treasury from said receivership shall escheat and be forfeited to the state and become part of the general fund: Provided, further, The state treasurer shall make a report to the legislature on each biennium of the amount of money received from such licensing and the amount of property he has on hand through the enforcement of this act.

Section 10. That in the event any person, or any of the defendants, or non-residents, or non-resident copyright owners or holders, are proceeded against as herein outlined, and are served with process according to law, or any non-resident is served with process as outlined in the preceding sections of this act, and if any of said defendants, or persons, or aiders and abettors named as defendants, appear in any such proceeding by counsel or otherwise, or institute any special proceeding attacking such proceeding, or make any motion therein, either special or general, or if any of them appear to obtain the judgment of the court solely upon the sufficiency of the service of the process upon them, or upon any phase or particularity of said injunction proceedings, such special proceeding or appearance, or motion, or appearance, as the case may be, shall nevertheless be deemed as a general appearance even though the process may have been insufficient, and said parties and defendants as may thus appear in the action,

for any reason or cause, whether they seek special or affirmative relief, shall thereafter be subject to the general orders and jurisdiction of the court for all purposes, and if any of said defendants or persons appear in any court proceeding instituted to effectuate this act solely for the purpose of challenging the validity of service of process upon them they shall be deemed to have surrendered themselves and as having submitted to the general jurisdiction of the court: Provided, however, This section shall not be construed as denying, and no attempt shall be made at any time in any proceeding in connection with the enforcement of this act, to restrain or deny any of said defendants, resident or non-resident, copyright holders or owners, or any person, or members of any defendant combination, entity, pool, or monopoly of their rights or property without full and complete due process of law.

Section 11. Every person, in addition to the other penalties provided in this act, who violates or who procures, or aids or abets in the violating of any provision of this act, or who conspires to render ineffectual any valid order or decision of any court in the enforcement of this act, or who procures, conspires with, or aids or abets any person or persons in his or their failure to obey the provisions of this act, or to render ineffectual any valid order of any court in connection with the enforcement of this act shall be deemed guilty of a gross misdemeanor, and upon conviction, shall be punished by a fine not exceeding five hundred dollars ($500), or imprisonment in the county jail for not more than six months, or both such fine and imprisonment.

Section 12. In case any part or portion of this act shall be held unconstitutional, such holding shall not affect the validity of this act as a whole or any other part or portion of this act, and if any clause, sentence, paragraph, sub-

division, section or part of this act shall for any reason be adjudged invalid, such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be strictly confined in its operation and holding to the specific clause, sentence, paragraph, subdivision, section, or part thereof, directly involved in the controversy in which such judgment shall have been rendered; and all other acts and laws in conflict herewith are hereby repealed.

Section 13. In the event more than one injunction suit provided for in this act is instituted in this state, in different counties by different prosecuting attorneys, but against the same defendants, the respective superior judges hearing the causes may issue orders against said defendants in any county, but in the event any of the various county proceedings enter into the stage of receivership, as herein provided, then the judges hearing the respective causes shall order those causes where the defendants are the same, to be consolidated in one action in one particular county, and in such county as the judges may decide, to the end that only one receiver may be appointed for the entire state for the property of the same defendant or defendants.

1937 Florida Statute.

(Ch. 17807, Laws, 1937)

(Considered in Gibbs v. Buck, 307 U. S. 66; Buck v. Gibbs, 34 F. Supp. 510)

AN ACT declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which determine the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composers, copyright owners, or their heirs, successors, or assigns, to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of any combination as herein declared unlawful in determining license fees and other rights; to require the author, composer and publisher to specify upon the musical composition the selling price thereof, including public performance for profit; to declare that any purchaser thereof, who pays such price therefor shall have the right to render such music privately or publicly for profit; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit, made with any combination, firm or corporation herein declared unlawful, to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit without interference by such unlawful combination; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting

and radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside of the State of Florida, against the collection of license fees or other exactions by such out of the State affiliates for or on account of any combination herein declared unlawful; to provide all liability for any infringement of copyrighted musical compositions conveyed by radio broadcasting, air, wire, electrical transcription or sound producing apparatus, or by personal performance coming outside of the State of Florida and used herein to rest exclusively on the out of the State person, firm or corporation originally sending the same into this State for use herein; to provide penalties for the violation hereof; to empower the State's Attorney, under the direction of the Attorney General, upon the complaint of any party aggrieved by any violation hereof to proceed to enforce the penalties hereof against such combination and any of its members, agents or representatives; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions herein; to provide for the recovery of costs, expenses and attorney's fees; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof.

Be It Enacted by the Legislature of the State of Florida:

Section 1. It shall be unlawful for authors, composers, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, partnership, corporation or other group or entity, called herein a combination, when the members therein constitute a substantial number of the persons, firms or corporations within the United States

who own or control copyrighted vocal or instrumental musical compositions, and when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself or its members or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit; and the collection or attempted collection of such license fee or other exaction so fixed and determined by any member, agent, or representative of such combination herein declared unlawful, from any person, firm or corporation within this State, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, hotels, restaurants, clubs, dance halls, recreation rooms, pavilions, colleges, universities, churches, or any one who uses music in the conduct of his business, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered or permit to be rendered such copyrighted vocal or instrumental musical compositions privately or publicly for profit through personal performance, or through radio or any instrumentality or sound producing apparatus, shall be and the same are hereby declared unlawful and illegal; and such license fees or other exactions by such combination or its agents, members, or interested parties shall not be collected in any Court within the boundaries of this State; and such collection or attempted collection of such license fee or other exaction by such combination or its agents, members or interested parties, shall be a separate offense hereunder; and any such combination of authors, composers or publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this State; and the fixing of prices or exactions for use or rendition of copyrighted musical compositions and the collecting or attempting to

collect such license fees or other exactions by it or for its members or other interested parties, is hereby declared illegal and in restraint of trade; and such collection or attempted collection is declared to be an intra-state transaction within this State, and shall be subject to the terms and penalties of this Act.

Section 2-A. All authors, composers or publishers, and their heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this State and pays the selling price so specified thereon to the seller or publisher of such musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radio loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise, and the same may be so rendered either privately or publicly for profit without further license fees or other exactions; and such copyright owner or proprietor in such event shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private and public performance for profit.

Section 2-B. In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails to affix on the musical composition the selling price, and collect the same, for private or public performances for profit,

at the time and in the manner specified in this Act, then any person, firm or corporation in this State who may have purchased and paid for such copyrighted musical composition, may use the same for private or public performance for profit without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages instituted by such copyright proprietor or owner in any Court within this State.

Section 2-C. Nothing in this Section or this Act shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish or vend the same; nor to prevent authors and composers from determining and fixing the price to be charged for the use or rendition of their copyrighted musical compositions provided such authors and composers act independently of any such combination as in Section 1 hereof declared unlawful.

Section 3. All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any Court within this State, and are hereby declared to have been entered into as intra-state transactions with such unlawful combinations and in restraint of trade. And all such contracts, agreements, licenses and the attempted enforcement thereof may be enjoined by any person, firm or corporation sought to be bound thereby; and any agent, member or representative of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, agreement or license, shall be guilty of a violation of the terms of this Act; and for any

collection or attempted collection of moneys set out in the illegal contract, agreement or license, shall be subject to the penalties of this Act.

Section 4-A. Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

Section 4-B. When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this State from whence copyrighted vocal or instrumental compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this State, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this State, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this State to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm

or corporation, collecting or attempting to collect such license fee or other exaction against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 5-A. Any person, firm or corporation who owns, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this State, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

Section 5-B. When such theatre or theatres, moving picture house or houses, or other places for amusement or performance is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this State, or supplying such

persons, firms or corporations in this State with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this State shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this State, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this State against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner

of copyrighted vocal or instrumental musical compositions, and which radio stations and theatres, and other persons, firms or corporations aforementioned, are affiliated with persons, firms or corporations outside this State from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this State, then the responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this State shall rest with and be upon such affiliated person, firm or corporation from outside this State who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this State; and the owner or proprietor of the copyrighted vocal or instrumental musical compositions shall be and is hereby prohibited from suing for infringement, loss or damage within the boundaries of this State, for the use or rendition of such copyrighted vocal or instrumental musical compositions because such persons, firms or corporations used, rendered or performed the same within the State; and said copyright owner or proprietor shall make his collection therefor from the person, firm or corporation from outside this State from whence the use of said copyrighted vocal or instrumental musical compositions originally emanated; the use or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this State, or otherwise, of such copyrighted musical compositions within this State in the manmen set forth in this section, shall be considered for the purpose of this Act, as intra-state business of this State and subject to the control, regulation and prohibition set

forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State.

Section 7-A. Any person, firm or corporation within this State who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative or the agent of such representative as herein defined; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this State.

Section 7-B. Furthermore, any person or persons who negotiates for, or collects, or attempts to collect license fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Section 8. Any combination as in Section 1 hereof declared to be unlawful, and any other person, firm or corporation acting or attempting to act within this State in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination as defined in Section 1 hereof, in the violation of any of the terms of this Act, in any manner whatsoever, shall be punished by a

fine of not less than $50.00 or more than $5,000.00, and by imprisonment in the penitentiary not less than one or more than ten years, or by either such fine or imprisonment.

Section 9. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's Attorneys in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both, under the terms hereof, against any combination as defined in Section 1 hereof, and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof. In civil actions such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

Section 10-A. Any person, firm or corporation in this State aggrieved by reason of anything forbidden in this Act may sue therefor in any Circuit Court in the circuit in which the violation or a part thereof took place, to recover any damages assessed as a result of the violation of the terms of this Act, and shall be entitled to recover his or its costs, including reasonable attorney's fees to be fixed by the Court in such action.

Section 10-B. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

Section 11-A. In any proceeding brought under the terms of this Act, any attorney of record for the Plaintiff may file with the Clerk of the Court in which such action is pending, a petition praying that the defendant or defendants be required to file with the Clerk of said Court exact copies of all documentary evidence, records or data in the possession or under the control of said Defendant or Defendants pertaining to the issues as alleged by the Plaintiff in the cause; and the Circuit Court, upon the presentation to it of such petition, shall determine what part, or all, or any of such evidence shall be produced, and enter an order to that effect. A copy of such order shall be mailed to each Defendant at his, her or its last known address, which shall be deemed sufficient notice and service upon such Defendant or Defendants. Or, the same may be served by mail in the same manner upon the attorneys of record for the Defendant or Defendants, and this shall be deemed sufficient notice and service upon said Defendant or Defendants.

Section 11-B. If said Defendant or Defendants shall fail to file with the Clerk of the Court in which such action is pending said copy or copies of documentary evidence, records or data, and within the time provided in said order, the Court shall adjudge such Defendant or Defendants guilty of contempt and shall assess a fine of $100.00 against such of the Defendants for each and every day that such Defendant or Defendants fail to comply with said order,

and judgment shall be entered accordingly. And the Plaintiff may collect the same against the Defendant or Defendants with interest thereon and costs, including a reasonable attorney's fee. And the Court shall determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs and attorney's fees.

Section 12. If any section, sub-section, sentence, clause or any part of this Act, is for any reason, held or declared to be unconstitutional, inoperative or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been included herein.

Section 13. Nothing in this Act shall be construed as repealing any other laws or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Florida.

Section 14. This Act shall become effective immediately upon its becoming a law.

Approved by the Governor June 9, 1937.

Filed in Office Secretary of State, June 10, 1937.

1939 Florida Statute.

(CHAPTER 19653, FLORIDA LAWS, 1939)

(Considered in Buck v. Gibbs, 34 F. Supp. 510)

AN ACT relating to public performing rights in copyrighted musical compositions and dramatico-musical compositions; defining the same; regulating licensing of same; prescribing filing fees; making provisions for a resident agent in the state; levying a tax on the gross receipts from the licensing of such rights within the State of Florida; providing for the enforcement of this Act; the promulgation of rules and regulations, governing the enforcement of this Act; appropriating the proceeds of the tax and fees levied herein and repealing certain laws in conflict herewith.

Be It Enacted by the Legislature of the State of Florida:

Section 1. As used in this Act, "person" means any individual, resident or non-resident, of this state, and every domestic or foreign or alien partnership, society, association or corporation; the words "performing rights" refer to "public performance for profit"; the word "user" means any person who directly or indirectly performs or causes to be performed musical compositions for profit; the term "blanket license" includes any device whereby public performance for profit is authorized of the combined copyrights of two or more owners; the term "blanket royalty or fee" includes any device whereby prices for performing rights are not based on the separate performance of individual copyrights.

Section 2. It shall be unlawful for any person to sell, license the use of, or in any manner whatsoever dispose of, in this state, the performing rights in or to any musical

composition or dramatico-musical composition which has been copyrighted, and is the subject of a valid existing copyright, under the laws of the United States, or to collect any compensation on account of any such sale, license, or other disposition, unless such person:

(a) Shall first have filed with the Comptroller on forms prescribed by the Comptroller a list describing each such musical composition and dramatico-musical composition, the performing rights in which said person intends to sell, license or otherwise dispose of in this state, which description shall include the following: The name and title of the copyrighted composition, the date of the copyright, the number or other identifying symbol given thereto in the United States copyright office, the name of the author, the name of the publisher, the name of the present owner of the copyright to said composition, and the name of the present owner of the performing rights thereto. Additional lists of such copyrighted compositions may be filed by any such person from time to time, and shall be subject to all the provisions of this Act. A filing fee of two cents a composition shall be required by the Comptroller for filing any list under this Act.

(b) Shall simultaneously file an affidavit which shall describe the performance rights to be sold, licensed or otherwise disposed of and shall state that the compositions so listed are copyrighted under the laws of the United States, that the facts contained in the list to which said affidavit relates are true, that affiant has full authority to sell, license or otherwise dispose of the performing rights in such composition; and the affidavit shall set forth the name, age, occupation and residence of the affiant; and if an agent, the name, occupation and residence of his principal.

Section 3. The list provided for in the preceding section shall be made available by the Comptroller to all persons for examination, and taking of copies, in order that any user of such compositions in this state may be fully advised concerning the performing rights therein, and avoid being overreached by false claims of ownership of said performing rights, and also avoid committing innocent infringements of said works. The Comptroller may, if in his discretion he deems it necessary, in order to prevent such overreaching and to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, cause a list of all such copyrighted material filed with him to be published once a year or oftener in a form and medium which he shall deem suitable for said purpose. A duplicate of any list so filed by any such person shall at his request be certified by the Comptroller and shall by the Comptroller be given or delivered to such person, who shall exhibit the same on demand of anyone to whom such person seeks to sell, license or otherwise dispose of said performing rights.

Section 4-A. It shall be unlawful for two or more owners of the copyrights of musical compositions or dramatico-musical compositions to associate or combine together in any manner, directly or indirectly, for the purpose of issuing blanket licenses for the public performance for profit of their compositions upon a blanket royalty or fee covering more than one, or all, of such compositions owned or controlled by the members of such association unless each individual copyright owner included in such association, or such association in behalf of each individual copyright owner, also shall make available to each user of such compositions within the state, at the option of the user, the right to perform publicly for profit each such copyrighted musical composition owned by him or it at a price established for each separate performance of each such

composition. To this end, there shall be filed with the Comptroller, either as a part of the list required by Section 2 hereof or as a separate document by such copyright owner, or by such association in behalf of such owner, a schedule of prices for the performing rights to each separate performance for profit of each such composition contained in such list, together with an affidavit of the copyright owner of such compositions that the price so stated has been determined by such copyright owner acting for himself and not either directly or indirectly in concert or by agreement with the owner or owners of any other copyrights. Such schedule of prices may contain reasonable classifications determined by use and function, or either, of the users of said compositions, with separate price for each classification, provided that there is equal treatment of all persons within each classification and that there is no unreasonable discrimination between classifications. Any copyright owner may at his election fix one price which shall be applicable to each rendition of each of such compositions owned by him except to the extent that he elects to name specific compositions and to fix other prices for each rendition thereof, and said prices shall remain in force and effect until a new schedule of prices with respect to the performing rights to such compositions has been similarly filed in the office of the Comptroller, at any time, at the election of such owner, changes in prices to become effective seven days from the date of filing thereof. The schedule of prices provided for herein shall be made available by the Comptroller to all persons for examination and the taking of copies and may be published by him in the same manner as provided in Section 3 hereof.

Section 4-B. Any person issuing a blanket license for performance rights shall file with the Comptroller within thirty days from the date such blanket license is issued a true and complete copy of each such license issued or sold

with respect to performance within this state, together with the affidavit of such person that such copy is a true and complete copy of the original and that it sets forth each and every agreement between the parties thereto with respect to such performing rights. The Comptroller shall charge for filing such contracts the same fee allowed clerks of the circuit court for similar services.

Section 4-C. It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing of or contracting to dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition, to make any charge or to contract for or collect any compensation as a condition of using said performing rights based in whole or in part on any program not containing any such composition, and any such charge or contract for compensation shall be valid and enforceable only to the extent that it is based and computed upon a program in which such composition is rendered.

Section 4-D. It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing of or contracting to dispose of in this state public performing rights in or to any musical composition or dramatico-musical composition to make any charge or to contract for or collect any compensation for the use or performance of any such composition that has not been listed with the Comptroller as provided in Section 2.

Section 5. At the time of filing the information required in Sections 2 and 3, the owner of said performing rights shall execute and deliver to the Secretary of State on a form to be furnished by the Secretary of State, an authorization empowering the Secretary of State to accept service of process on such person in any action or proceeding, whether cognizable at law or in equity, arising under this

Act, and designating the address of such person until the same shall be changed by a new form similarly filed; and service of process may thereafter be effected in this state on such person in any such action or proceeding by serving the Secretary of State with duplicate copies of such process; and immediately upon receipt thereof the Secretary of State shall mail one of the duplicate copies by registered mail to the address of such person as stated on authorization last filed by him. A filing fee of $5.00 shall accompany this notice and the Secretary of State shall deposit same in the General Revenue Fund of the State of Florida.

Section 6. No person shall be entitled to commence or maintain any action or proceeding in any court with respect to such performing rights, or to collect any compensation on account of any sale, license or other disposition of such performing rights, in this state, except upon pleading and proving compliance with the provisions of this Act.

Copies, certified by the Comptroller as such, of each or all of the lists, license agreements, affidavits and other documents filed with the Comptroller pursuant to the requirements of this Act, shall be furnished by the Comptroller to any person upon request at the prices regularly charged by a clerk of the circuit court for such work. Such certified copies shall be admitted in evidence in any action or proceeding in any court to the same extent as the original thereof.

Section 7. From and after the effective date of this Act there is hereby levied, and there shall be collected, a tax for the act or privilege of selling, licensing, or otherwise disposing of performing rights in such compositions in this state, in an amount equal to three per cent of the gross receipts of all such sales, licenses or other dispositions of performing rights in this State, payable to the State Comptroller on or before the fifteenth day of March, 1940, with

respect to all such gross receipts for the portion of the calendar year 1939 after the effective date of this Act, and annually thereafter, on or before the fifteenth day of March of each succeeding year, with respect to the gross receipts of the preceding calendar year. A return on a form prescribed by the Comptroller shall be made by all persons subject to this tax on or before the 15th day of March of every year which shall accompany a remittance of the tax due.

The Comptroller shall have authority through his authorized agents to examine and audit the books and records of any person he may deem subject to the tax or fees under this Act and may require such persons to appear before him at his office in the Capitol, in the City of Tallahassee, Florida, with such records and papers as may be necessary after giving thirty days' notice to such person through said person's authorized agent, the Secretary of State.

The Comptroller shall also have authority through his authorized agents to examine and audit the books, records and accounts of any licensee or user making payments for use of public performing rights in the State of Florida to any person in order that the Comptroller may determine or check on gross receipts of those selling or licensing public performing rights in the State of Florida. Any person refusing the Comptroller or his duly authorized agents access to such books, records and accounts shall be subject to penalties prescribed in Section 9 hereof and may be required to appear in person with all books, papers and accounts required by the Comptroller at the Comptroller's office in the Capitol, Tallahassee, Florida, within ten days after receipt of notice which the Comptroller shall send by "registered mail, return receipt requested."

Should the Comptroller determine that any person liable for any tax or fees under this Act has made an incorrect return or has made no return at all, or has failed to pay

any tax or fees due, the Comptroller shall after determining the amount of such tax or fees due the State of Florida, from the best information at his command, certify such claim for delinquent taxes to said person through his duly designated agent, the Secretary of State, and unless payment of such delinquent tax is received within thirty days of delivery of said notice to the Secretary of State the Comptroller shall apply to a Circuit Judge in Leon County for the appointment of a receiver to take over and administer all assets of said delinquent taxpayer in the State of Florida.

The Circuit Judge, upon the Comptroller's application properly authenticated, shall appoint some agent of the Comptroller as receiver, to serve without further compensation, but who shall be allowed all actual expenses. After posting such bond as the judge may determine proper, the said receiver shall take over and administer the affairs of said delinquent taxpayer within the State of Florida, collect accounts and do all things necessary to protect the interests of both the State of Florida and the said delinquent taxpayer from such collections as he may make, he shall first pay the expenses of the receivership and any litigation incident thereto and the tax plus interest at the rate of 2% per month or fraction thereof from the last day of the year for which the tax was due.

After having satisfied the claims of the State and paid all costs of the receivership, the receiver shall make a return to the court, which shall order all assets returned to the taxpayer.

Section 8. It shall be unlawful for any person, without the consent of the owner thereof, if said owner shall have complied with the provisions of this Act, publicly to perform for profit, in this state, any such commission, or for any person knowingly to participate in the public performance for profit of such composition, or any part thereof.

Section 9. Any violation of this Act shall constitute a misdemeanor, to be punished as provided elsewhere in the laws of this state.

Section 10. Any person or persons who negotiates or collects or attempts to collect license fees or other exactions or acts in any capacity whatsoever as a representative or agent for any person owning public performing rights of any copyrighted composition shall be subject to all the penalties in this Act provided for violations thereof.

Section 11. Any person in this State aggrieved by reason of any violation of this Act may sue thereof in the circuit court in which he resides or in the circuit in which the violation took place to recover any damages as the result of the violation of the terms of the Act or to require specific performance under the provisions of this Act and shall be entitled to recover his costs, including reasonable attorneys' fees to be fixed by the court.

Section 12. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act, anywhere within this state, it shall be the duty of the State's attorney in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both under the terms hereof, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided. In civil actions such proceeding may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such

petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

Section 13. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

Secion 14. After the costs and expenses of enforcing this act and the collection of the taxes and fees herein levied and imposed are deducted, the amount of which costs and expenses are hereby appropriated to be paid from the proceeds of this act, there is hereby appropriated the entire balance paid into the Comptroller under and by virtue of this act to the General Revenue Fund of the State of Florida.

Section 15. All laws or portions thereof whether general, special or local, which relate to the same subject matter as this Act and which are inconsistent with the provisions of this Act, are hereby superseded by the provisions of this Act to the extent that such inconsistency exists.

Nothing contained in this Act shall be so construed as to impair or affect the obligation of any contract or license which was lawfully entered into prior to the effective date of this Act.

Provided, however, nothing in this Act shall be construed to repeal, supersede or modify any of the statutes of the State of Florida pertaining to monopoly or restraint of trade, including but not limiting the generalities of the foregoing Sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 of Chapter 17807, Laws of Florida, 1937. Provided, further, the revenue provisions of this Act shall take effect

immediately it becomes a law and persons having contracts to sell public performing rights to users in the State of Florida shall file copies of such contracts with the Comptroller within thirty days of the date this act becomes a law and shall within ninety days of the time this Act becomes a law comply with other provisions of this Act that require filing of any date.

Section 16. Any section in this Act, or any part of any section that shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions hereof.

Section 17. This Act shall take effect immediately upon its becoming a law.

The Nebraska Statute.

(Considered in Buck v. Swanson, 33 F. Supp. 377)

Chapter 138, Nebraska Laws, 1937, reads as follows:

AN ACT relating to monopolies, declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which fixes and determines the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit within this state copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composition copyright owners or their heirs, successors or assigns; to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of each other and of any combination as herein declared unlawful in determining license fees and other rights within this state; to require the author, composer, printer and publisher to specify upon the musical composition the selling price thereof for all uses that may be made thereof including public performance for profit within this state; to declare that any purchaser thereof, who pays such price therefor, shall have the right to render such music privately or publicly for profit within this state; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit within this state with any combination of persons, firms or corporations herein declared unlawful to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit within this state without interference by such unlawful combination; to provide for the appoint-

ment of a receiver and injunctive relief and the dissolution of such combination as here declared unlawful; to determine in such action the legal owner of such copyrighted musical compositions; to adjust and fix in such action the license fee to be paid, if any, and the terms for the use of such musical compositions in this state; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting, radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside the State of Nebraska against the collection of license fees or other exactions by such out-of-the-state affiliates for or on account of any combination declared unlawful under Section 1 hereof; to provide that the responsibility and all liability for any infringement of copyrighted musical compositions conveyed by radio broadcast, air, wire, electrical transcription, or sound production apparatus, or by personal performance coming from outside this state, and used herein, to rest entirely with the out-of-the-state person, firm or corporation originally emanating or sending the same into this state for use herein; to provide penalties for the violation hereof; to empower the County Attorneys and the Attorney General, upon complaint of any party aggrieved by any violation hereof, to proceed to enforce the penalties hereof against such combination and any of its representatives, members or agents, and against the property of such unlawful combination within this state; to define the method of service of process upon such combination as herein declared illegal; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions hereof; to provide for the recovery of costs, expenses and attorney's fees; to provide for the filing of each said composition in the office of the Secretary of State before sell-

ing or disposing of the same, together with the amount of filing fee therefor; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof; and to declare an emergency.

Introduced and read first time February 15, 1937.
Final Form Sent to Printer May 12, 1937.

Be It Enacted By The People of The State of Nebraska:

Section 1. It shall be unlawful for authors, composers, proprietors, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, club, firm, partnership, corporation, or other group or entity, called herein a combination, either within this state or outside thereof, when the members, stockholders, or interested parties therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when at least one of the objects of any such combination is the determination and the fixation of license fees or other exactions required by such combination for itself or its members, stockholders or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit within this state for the purpose of preventing free competition among or with different and competing copyright owners or among or with persons, firms, corporations or associations in this state using or rendering such copyrighted matter by public performance for profit; or for the purpose of dividing among them the proceeds of the earnings of such copyright owners; or for the purpose of fixing the exactions and fees for the rendition or use of copyrighted matter which any copyright

owner must charge; and the collection or attempted collection within this state of such license fee or other exaction so fixed and determined, by any member, agent or representative of any such combination herein declared unlawful, from any person, firm, corporation or association within this state, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, athletic associations, hotels, cafes, restaurants, clubs, dance halls, recreation rooms, amusement parks, pavilions, churches, colleges, schools, universities, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered, or permit to be rendered, such copyrighted vocal or instrumental musical compositions privately or publicly for profit within this state through personal performance, or through radio, or any instrumentality or sound producing apparatus, shall be and the same is hereby declared unlawful and illegal; and such license fees or other exactions shall not be collected in any court within the boundaries of this state; and each collection or attempted collection of such license fee or other exaction by such combination or its agents, representatives, members, stockholders or interested parties shall be a separate offense hereunder; and any such combination of authors, composers, publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this state; and such fixing of prices for use or rendition of copyrighted musical compositions within this state by such unlawful combination and the collecting or attempting to collect such license fees or other exactions by it or for its stockholders, members or other interested parties within this state is hereby declared illegal and in restraint of trade, and such collection or attempted collection thereof is declared to be an illegal intrastate transaction within this state and shall be subject to the terms and penalties of this Act. In any action, civil or criminal, instituted

under the provisions of this Act, it shall be *prima facie* evidence against any party to such action of the existence of such unlawful combination for the purposes in this Act enumerated, if a substantial number of all authors, composers, proprietors, publishers, owners or their heirs, successors or assigns of copyrighted vocal or instrumental musical compositions in the United States, are shown to be members of any society, association, club, firm, partnership, corporation, group or entity.

Section 2. (A). All authors and composers, and their heirs and assigns, shall have within this state all the benefits conferred by the Copyright Laws of the United States, being the act of March 4, 1909, c. 320, Section 1 (e), 35 Stat. 1073, Title 17, U. S. C. A. Each author, composer and publisher shall act independently of any and all substantial number or numbers of other authors, composers and publishers, and also independently of any such combination as in Section 1 hereof declared unlawful, in determining and fixing the price to be charged for the use or rendition of his copyrighted musical compositions within this state, and the author, composer or publisher, or his, her, or its heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition within this state, the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this state and pays the selling price so specified thereon to the seller or publisher of said copyrighted musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered within this state, the said copyrighted musical composition by persons individually

or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radios, loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise within this state, and the same may be so rendered either privately or publicly for profit when so purchased and paid for without further license fees or other exactions; and such copyright owner or proprietor, in the event of such payment, shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private purposes or for public performance for profit by such purchaser within this state.

(B.) In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private or public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state.

(C.) Nothing in this section, or this Act, shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish, or vend the same.

(D.) Any composer, author or publisher of vocal or instrumental copyrighted musical compositions, or any person, firm or corporation controlling the sale or distribution

of said compositions, whether or not within the purview of the combination described in Section 1 of this Act, shall, before selling or disposing of any such composition in this state, file in the office of the Secretary of State a copy of each said composition upon which shall be written, printed or typed over his or its signature a statement to the effect that he or it controls the sale or disposition of such composition; and provided further, said person, firm or corporation who shall make such filing shall accompany the same with a fee of Twenty-five Cents (25¢) with each copy of said composition so filed to reimburse the Secretary of State for keeping in current and convenient form, easily accessible to the public, the titles of said compositions and the names of the persons, firms or corporations who shall file said copies from time to time; and provided further, said Secretary of State shall deposit all the fees received hereunder weekly with the State Treasurer who shall credit said fees to the general fund of the state.

Section 3. All existing contracts, agreements, licenses or arrangements now existing within this state made by any person, firm or corporation with any combination, declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any court within the boundaries of this state, and are hereby declared to have been entered into as intrastate transactions with such unlawful combination and in restraint of trade; and further, all such contracts, agreements, licenses, arrangements and the attempted enforcement thereof within this state, may be enjoined by any person, firm or corporation sought to be found thereby; and any member, representative or agent of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, license or arrangement within this state shall be guilty of a violation of the terms of this Act, and for each such collection or attempted collection shall be subject to the penalties hereinafter provided.

Section 4. (A). Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this state, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions within this state, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

(B.) When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this state, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this state, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this state, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this state to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible within this

state, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 5. (A.) Any person, firm or corporation who owns, leases, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this state, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered within this state, by the personal performance of artists, singers musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever within this state, by the personal performance of artists, singers, musicians, copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

(B.) When such theatre or theatres, moving picture house or houses, or other places for amusement or performance within this state is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this state, or supplying such persons, firms, or corporations in this state with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly ren-

dered for profit, then such person, firm or corporation outside this state shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect within this state, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this state, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions within this state; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this state against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions within this state, and which radio stations and theatres, and other persons, firms or corporations, aforementioned, are affiliated with persons, firms or corporations outside this state from where said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or

by furnishing a person or persons to play or sing such music within this state, then any responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this state and thus rendered in this state shall rest with and be upon such affiliated person, firm or corporation from outside this state who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this state; and, if the owner of any copyrighted musical composition commences any action within this state on account of any use or rendition thereof in this state through such affiliate or affiliates, then any defendant in such action may interplead such affiliate or affiliates in such action; and any judgment which may be rendered in favor of the copyright owner shall be paid and satisfied by such affiliate or affiliates; and, if paid or satisfied by the defendant user in this state, such defendant shall be subrogated in said action or otherwise to all rights of the plaintiff in said judgment as against said affiliate or affiliates, whether the latter is or are a party or parties in said action or not; and in any event such affiliate or affiliates shall be liable to such user to the full extent of his liability to such copyright owner, in the absence of any agreement to the contrary; and any combination declared unlawful by Section 1 of this Act which is the owner or proprietor of or controls the copyrighted vocal or instrumental musical compositions, its agents or representatives shall be and are hereby prohibited from suing for infringement, loss or damage within the boundaries of this state, for the use or rendition of such copyrighted vocal or instrumental musical compositions so originating or emanating because such persons, firms or corporations used, rendered or performed the same within this state; the use or renditions by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers,

players and musicians sent into this state, or otherwise, of such copyrighted musical compositions within this state in the manner set forth in this section, shall be considered, for the purpose of this Act, as intrastate business of this state and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this state.

Section 7. (A.) Any person, firm or corporation within this state who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this state, and service of any process against such combination may be had upon such representative or the agent of any such representative as herein defined within this state; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this state.

(B.) Furthermore, any person or persons who negotiates for, or collects within this state, or attempts to collect license fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Section 8. Any combination as in Section 1 hereof declared unlawful and any other person, firm or corporation, acting or attempting to act, within this state in violation of the terms of this Act, or any representative or agent of any

person, firm or corporation who aids or attempts to aid any such unlawful combination, as defined in Section 1 hereof, in the violation of any of the terms of this Act in any manner whatsoever within this state, shall be deemed guilty of a misdemeanor and shall be fined in any sum not more than $5,000.00 or imprisoned for not more than one (1) year, or both, such fine and imprisonment for each and every violation of the terms hereof.

Section 9. (A). The County Attorney in each county in this state wherein a violation of any of the terms of this Act takes place, in whole or in part, is hereby authorized upon the complaint of any party aggrieved to institute a civil or criminal action, or both, under the terms hereof against any combination declared unlawful as defined in Section 1 hereof, and against any of its members, stockholders or other interested parties, and its agents or representatives as herein defined, and to enforce any of the rights herein conferred, and to impose any of the penalties herein provided.

(B). The Attorney General of the State of Nebraska is hereby empowered to proceed upon the request of any County Attorney to aid and assist, or to take charge of, any prosecution or suit for any violations of any of the terms hereof.

(C). Or, the Attorney General, on the complaint of any party aggrieved, because of the violation of any of the terms of this Act anywhere within this state, shall proceed in the District Court in any county in which all or any part of the offense or violation was committed, to institute action against any combination defined as unlawful by Section 1 hereof, and against the representatives or agents of any such combination, either in a criminal action to enforce the penalties hereof, or in a civil action to enforce all rights hereunder, or to dissolve any such combination as declared

unlawful by Section 1 hereof, or he may proceed by both civil and criminal actions; in such action or actions, the plaintiff shall be the State of Nebraska; and any interested party may, upon application, be granted leave to intervene in such a civil action.

(D). The District Court shall, in such dissolution or other civil suit, upon the application and intervention in said action of any member, stockholder or other interested party of said unlawful combination, adjudicate the ownership of any copyrighted vocal or instrumental musical composition theretofore owned or controlled by said unlawful combination; and furthermore, such District Court shall have and is hereby granted the power and authority to appoint a receiver and to issue injunctive and mandatory temporary and permanent orders in reference to any of the issues involved in such action; and any person, firm or corporation within this state who is a user in any manner of any copyrighted vocal or instrumental musical compositions theretofore owned or controlled by such unlawful combination may, upon application, intervene in such action and therein have adjusted, determined and adjudicated all rights for or against the person, firm or corporation whom the Court shall finally determine to be the owner or proprietor of such copyrighted vocal or instrumental musical compositions; and said parties shall be permitted no other remedy in any other court within the boundaries of this State, whether the same be for damages, infringement or otherwise, until final decree has been had in said action determining the ownership and terms for use of such copyrighted musical compositions.

Section 10. (A). Any person, firm or corporation within this state aggrieved by any violation of the terms hereof by any unlawful combination, as defined in Section 1 hereof, or any of its representatives or agents, may proceed in his

or its name and right in the District Court in the county in which the violation, or a part thereof, took place, to recover any right, loss or damage that may have resulted from any violation of the terms hereof; the plaintiff in such action shall be entitled to recover his or its costs and expenses and a reasonable attorney's fee to be fixed by the court in such action.

(B). In the event of the failure or refusal of a County Attorney, or the Attorney General, to promptly act, as herein provided, when requested so to do by any aggrieved party, then such party may institute in his own behalf, or upon behalf of the plaintiff and all others similarly situated, the same civil action as such County Attorney or Attorney General might have instituted under the terms of this Act, and with like procedure, powers, authority, rights, privileges, effect a final decree as the said County Attorney or Attorney General might have done under the terms of this Act.

Section 11. (A). In any action, either civil or criminal, that may be had or instituted under the provisions hereof for any violation of the terms hereof, the plaintiff in any form of action brought hereunder, and in which action any combination declared unlawful, as defined in Section 1 hereof, or the members, stockholders, or other interested parties, or their agents or representatives of such unlawful combination, are defendants, any attorney of record for the plaintiff may file a request in writing with the Clerk of the District Court in which said action is pending, demanding that the defendant or defendants furnish plaintiff, or file with the Clerk of the Court, in which the action is pending, exact copies of all documentary evidence, facts and figures, records or data in the possession or under the control of the defendant or defendants pertaining to the issues as alleged by the plaintiff to establish or refute any issues in the case;

and the District Court, upon the presentation to it of such written demand by the plaintiff, shall thereupon determine that part or all of such evidence which shall be produced, and shall enter an order fixing a time for the defendant or defendants to furnish and file such information as ordered. A copy of said order shall be mailed to each defendant at his or its last known address, which shall be deemed sufficient notice and service upon said defendant or defendants; or the same may be served by mail in the same manner upon each attorney of record for the defendant or defendants, and when so served, the same shall be deemed notice and service upon the defendant or defendants for whom said attorneys appear of record.

(B). If said defendant or defendants shall fail to furnish plaintiff or his or its attorney, or file with the Clerk of the Court in which the action is pending, said copy or copies of said documentary evidence, facts, figures, records, books and data set forth in said order within the time specified in said order, the Court shall adjudge said defendant or defendants guilty of contempt of court, and the Court shall assess a fine of $100.00 against such of the defendants for each and every day that such defendant or defendants fails to comply with said order; and judgment shall from time to time be rendered therefor, and the plaintiff may collect the same against the defendant or defendants with 6% interest thereon and the costs, including expenses and attorney's fees to be fixed by the Court, in the same manner as other judgments are collected in this state. The Court shall find and determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs, expenses and any attorney's fees that may be allowed.

Section 12. If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or non-

enforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act.

Section 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Nebraska.

Section 14. Whereas an emergency exists, this Act shall be in full force and take effect, from and after its passage and approval, according to law.

Tennessee Statute.

(Considered in *Buck* v. *Harton*, 33 F. Supp. 1014. This Statute is substantially identical with Ch. 218, Washington Laws, P. 1070, involved in *Buck* v. *Gallagher*, 307 U. S. 95, and before this Court in the case at bar.)

(CHAPTER 212, TENNESSEE LAWS, 1937)

SENATE BILL No. 1020

AN ACT entitled an Act in aid of the Federal Copyright Laws, to assist in effectuating their true intent and their enforcement in the State of Tennessee by removing and declaring illegal certain monopolistic abuses and activities wrongfully practiced under the guise of copyrights within the state by price fixing combinations, monopolies, and pools; to enforce the laws of the State of Tennessee prohibiting price fixing monopolies and combinations in restraint of commerce and trade; providing penalties for combining rights granted by the copyright laws where the effect of such combination results in the use of copyright privileges as instrumentalities of oppression and extortion within the state in violation of law; and encouraging the rendition, creation and production of copyrighted works among the school children and citizens of the State of Tennessee; encouraging the marketing and acceptance of copyrighted works, created by the citizens of this state; defining the jurisdiction and duties of courts of record, the duties of the district attorneys, receivers, the state treasurer and the secretary of state; providing for the appointment of a receiver in certain instances; defining certain terms; providing for service of process on non-residents; prohibiting certain acts; and providing penalties for violation hereof.

Be it Enacted by the General Assembly of the State of Tennessee:

Section 1. It shall be unlawful for any person without the consent of the owner thereof, to cause to be publicly performed for profit any dramatic composition, or dramatic musical composition commonly called an opera, or other copyrighted works, or any substantial part thereof, which has been copyrighted under the laws of the United States, or for any person to knowingly participate in the performance or representation of any substantial part thereof, or to knowingly sell a substantial copy of any substantial part thereof.

Section 2. It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the State, to band together, or to pool their interests for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: Provided, however, Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: Provided, further, This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicily perform his or her individual copyrighted work or works: Provided, further, Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group of persons affected by this act does business, and all groups and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher

and more inequitable rates per piece for music licenses in this state than in other states: Provided, further, Where the owner, holder, or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works.

Section 3. In the event two or more persons holding separate copyrighted musical works, or any rights flowing therefrom, whether by assignment, agency agreements, or by any form of agreement, pool their interests, or combine, or conspire, federate, or join together in any way, whether for a lawful purpose or otherwise, a complete list of their copyrighted works or compositions shall be filed once each year in the office of the Secretary of State of the State of Tennessee, together with a list of the prices charged or demanded for their various copyrighted works; no payment or filing fee shall be required by the secretary of state, and said persons, corporations, or associations, foreign or domestic shall state therein under oath, that said list is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work. The Secretary of State shall require two copies of said list, one of which he shall keep on file, the other shall be filed in the offices of the state treasurer.

Section 4. The foregoing list of names and titles provided for in the preceding section, shall be made available by the secretary of state to all persons for examination, in order that any user of copyrighted works in this state may know the rights and the titles to such copyrighted works as may be claimed by any of said combinations, pools, associations, or persons as aforesaid; said lists shall be prepared so that all persons may avoid using said copyrighted compositions, if they so desire, and may avoid conflict therewith, and avoid committing innocent infringements of said works; and in order to further effectuate the copyright laws of the United States, the secretary of state shall if he deems it necessary to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, publish such list once each year in a newspaper of general circulation in order that all citizens of the state may respect any and all individual rights granted by the United States copyright laws.

Section 5. No person, corporation, or association, domestic or foreign, whether doing business in this state as hereinafter defined or not, shall be absolved from the foregoing duty of filing said list of holdings as required in the preceding sections of this act, if their music or copyrighted works are used commercially in this state, or have been used herein, whether originating from a point within the state or from without, and as long as any rendition thereof is received or heard within the state, or is intended to be so received by the originator of any musical program: Provided, however, Any individual owner of a copyrighted work or works, not a party to or not connected in any way with any pool, conspiracy, combination, or group, or association of persons, as prohibited by this act, need not file any such list.

Section 6. It is hereby declared that the production and creation of music and the commercial use of music and of copyrighted works within this state, whether originating at a point from within or without the state, as long as the same shall be rendered and publicly received within the confines of this state, whether mechanically or by radio communication, is a business clothed and affected with the public interest, and the adult educational advantages engendered by the public use of music and in its creation, makes this business one of public necessity, and necessary for the education and training of the youth of this state; that many abuses are practiced under a false guise of federal protection which only the state with its police power can easily and lawfully restrain, and in order to prohibit, discourage, and prevent monopolistic practices and to prevent extortion, to encourage free bargaining between the citizens of this state with each other and with those without the state, and in order to give greater effect to the consitutional provisions relating to monopoly and price fixing, and in the general interest of the public, therefore, the legislature in the interest of the peace and dignity of the state, in the interest of good morals and the general welfare of the people of this state, and for greater educational advantages to the public, declares that said business shall be subject to the police power and reasonable regulation of the state government, and such police and regulating power shall be administered by the courts and other officials of this state in a manner consistent with, in aid of, and never in conflict with, the copyright laws of the United States. The provisions of this Act, and the administration thereof, shall at all times effectuate the enforcement, the true intent and meaning of the United States copyright laws within or from points without the state, by any individual, corporation, or organizations, who attempt to use the federal courts as innocent instrumentalities in the furtherance of any systematic campaign or scheme de-

signed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based on threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this act and of the state constitution; it is further declared that any person or persons, or combines, as aforesaid, who shall violate this act shall be deemed to have used their property within this state in such a way that same shall have acquired a legal situs, analogous to the situs of other personal tangible property within the state, even though separate from the domicile and residence of the owner: Provided, further, the legal situs of any copyrighted work is co-extensive about the state, and a copyrighted work used or sold for public use or public performance for profit, if intended to be heard from a point without the state or from a point within the state, is hereby declared to be a commercial commodity, and its legal situs is hereby declared to be within the State of Tennessee.

Section 7. All persons, groups, corporations, associations, foreign or domestic, violating this chapter, shall be deemed to have been doing business within this state and amenable to the process of the state courts, when any such persons, combinations, or groups shall have issued licenses, either from within or from without the state, for the privilege of using commercially and publicly any copyrighted work or works pooled in a common group or entity, or when any of the functions of said entity, organization, pool, or combine, is or has been performed in this state; and the business of spying upon and the warning of users of the copyrighted works of such combinations, in addition to the presence within the state of such persons, and the activities of such persons or their agents at any time or occasion for the detection of infringements within this state, shall be conclusive evidence that such combinations

and persons, even though non-residents, have accepted the privileges of doing business within this state, and such persons, if they abide by the provisions of this act, shall be granted the privilege of conducting business within this state in a legal manner, and may invoke the benefits of the state government and its political subdivisions in their behalf, and they may use all of the privileges available to the citizens of this state, by any of such agents, their attorneys, or representative, or investigator, or by any aider and abettor, or any non-resident person, group, entity, or combination as aforesaid, shall be deemed to be an acceptance of the provisions of this act; and all licensees of any violator of this act shall be deemed as aiders and abettors of said persons and subject to the provisions of this act unless they forthwith indicate their obedience herewith; and the acceptance of the general privileges of the State of Tennessee by any non-resident copyright holder or owner, or combination, defendant, or person, or organization of any kind, or entity, through an investigator, attorney, agent, representative, or through any aider or abettor as herein defined, and the acceptance by such persons of the rights, police protection, or of any general privilege conferred by the law of this state to any of its citizens, including the use of the roads and highways, or the privileges of any of its political subdivisions, as evidenced by their presence within the state at any time, shall be deemed equivalent to and construed to be an appointment by such non-resident or non-residents, as the case may be, of the secretary of state of the State of Tennessee to be his or their true and lawful attorney upon whom may be served all summonses and processes against him or them and growing out of a violation of this act, in which said non-resident may be involved, and said acceptance of the privileges of this state, as aforesaid, shall be a signification of his or their agreement that any summons or process against him or them which is so served shall be

of the same legal force and validity as if served on him or them personally within the State of Tennessee. Service of such summons or process shall be made by leaving a copy thereof with a fee of two dollars ($2.00) with the secretary of the State of Tennessee, or in his office, and such service shall be sufficient and valid personal service upon any such non-resident defendant, copyright holder or owner, persons, or defendants, combinations, entity, or organization, as aforesaid: Provided, That notice of such service and a copy of the summons of process shall be forthwith sent by registered mail requiring personal delivery by the prosecutor bringing any action under this act, to any defendant at his last known address, and the defendant's return receipt and the prosecutor's affidavit of compliance herewith are appended to the process and entered as a part of the return thereof; Provided, further, The court in which any action is brought may order such continuances as may be necessary to afford any non-resident defendant or groups, or entity, a reasonable opportunity to defend the action: Provided, further, The secretary of state shall keep a record of all such summons and process which shall show the day and time of service; and valid personal service shall thus be had on non-resident persons or individuals, entities, firms, or corporations violating this act.

Section 8. In the event any person, or groups of persons, or any combination or pool as aforesaid, whether a non-resident corporation, person or an association, or domestic, refuse to abide by the provisions hereof, or attempt to evade or render ineffectual the true enforcement of any provision of this act, then the district attorney of any county where complaint is made of any violation shall institute injunction proceedings against said persons in the proper court, and valid personal service may be had upon any non-resident defendant as set forth in the preceding

section; and the court shall enjoin all persons from violating any provisions of the act and the constitutional provisions prohibiting price fixing, monopolies, and combinations; and all copyrighted works and the public performance rights thereto when sold or used for profit are hereby declared to be a commercial commodity, and all persons, aiders and abettors, and agents shall be enjoined by the court from aiding and furthering in any way a continuation of any violation of this act, either by the payment of money to said defendants or in any way; and if any defendant or defendants persist in defying the judgment of the court, the court shall, in order to effectuate its judgment and orders, order three (3) days' notice be given said defendant or defendants as the case may be, by having a copy of such notice served on the secretary of state as heretofore provided if defendants are without the state, or served personally if within the state, and have the same published in some daily paper in the state of general circulation, and at the end of said period, if any defendant or defendants refuse to obey the order of the court, then the court shall appoint a receiver for the copyrighted works and property of defendants, tangible or intangible, and of all other effects and monies derived therefrom, and the receiver shall take over and preserve the commercial rights to all of said copyrighted works, together with such other property of any defendant, combination, pool, corporation, or entity through which they are acting, that he can locate within the state, and the receiver shall administer the same under the direction of the court, and said receivership shall be considered only as an incident to the main injunction suit of the prosecutor, and for the purpose of enforcing the court's orders; the said receiver shall seize the copyrighted works of all of the copyright holders and owners in said defendant combination, including all of the rights to suits for infringement and damages in both state and federal courts, and all choses of action and all sums due on contracts and licenses, and

hold the same subject to the order of the court; and all persons holding licenses or contracts with any defendant combination or entity, shall pay the fees and sums due thereon to the receiver for such time as the court may need to effectuate the provisions of this act, and to compel any defendant to abide herewith: Provided, Any sums paid on licenses violating this act shall only be continued in the court's direction or until such time as the court can award defendants complete and full due process of law before entering a final order thereon, or until such time as a legal and equitable system of licensing can be determined according to the subsequent provisions of this act: Provided, further, In the event any defendant or defendants attempt to withdraw their said copyright works or property from the state in order to violate and render this act or the court's orders ineffectual, or to deprive the citizens of this state of such commodity, or to hamper the enforcement of any provision of this act, or to injure any citizen or user of music in any way, then the court shall immediately order the receiver to compile a complete list of all of the copyrighted works of said defendants which have been used in this state, and the court shall then determine the question of the establishment of license rates for the use of those copyrighted works controlled by the defendants so proceeded against; and for the purpose of aiding in the abolition of monopolies and price-fixing, and preventing violations of this act, the court shall determine a fair and just rate that the receiver should charge for the single and separate public performance for profit of each copyrighted work or works of said defendants, on a per piece system and basis of licensing, after determining such rate, the court shall immediately advise the receiver of the findings, and of its fair rate, and the same shall be filed of record in the cause, and the receiver may then issue licenses for the use of said music at such approved rate on a basis of so much money per each time a piece of music is played or used in a public

performance for profit; that said property shall be thus administered by the receiver for a period of one year, or until such time as the defendants, or the individual copyright owners of any combination so proceeded against take oath that they will abide by the ruling of the court and the provisions of this act; and all fees and funds collected by the receiver shall be turned over to the state treasurer, and no receiver's fees or attorney's fees shall be allowed, and the district attorney shall be the attorney for the receiver, and the state treasurer shall keep said money in a separate and special fund, subject to the order of the court only for whatever portion thereof that the court may order used to defray the actual expenses of the board and the receivership; at the end of one year, if the defendants and copyright owners or holders in any combination thus proceeded against, continue to wilfully disobey the court's orders, then the court shall issue an order, which shall be published in three public places, to the effect that unless the defendants obey all of the orders of the court within ten days from the date of said order, that the court will proceed to permanently deprive said defendants and each of them of their property; and the court shall then order said defendants to show cause within ten days why they should not be involuntarily compelled to assign all of their copyrighted works to the receiver forthwith, and to show cause why all of the funds as collected in the manner aforesaid from licenses, together with all of the copyrighted works including the performing rights thereto of said defendants and members of said combine, should not escheat and be forfeited forever to the State of Tennessee and be subject thereafter to administration by the state in the same manner as all other personal property belonging to the State of Tennessee; if any of said defendants and copyright holders, or owners, do appear before the end of said ten day period, and take oath that they will abide by the future orders of the court and the provisions of this act, then the

court shall release their copyrighted works and order the state treasurer to return any and all of their money which has been received or seized: Provided, further, The court shall retain such jurisdiction over their persons for such time as the court may deem necessary to insure strict compliance with the terms of the court's judgment and the provisions of this act; if any of said defendants or copyright owners or holders shall ignore or refuse to obey the show cause order, aforesaid, or fail to appear at the end of ten days as ordered and abide by the court's judgment, then the court shall make an order and enter judgment to the effect that all of the copyrighted works, including the performing rights thereto, of said defendants and the members of any defendant combination, shall be construed as having been escheated and forfeited to the State of Tennessee, and the court shall thereupon appoint some officer of the court to execute an involuntary assignment of all of the legal and equitable titles to all of the copyrighted works of each of said defendants and members of any defendant combination to the receiver, in the event the defendants or any of their members fail to execute a voluntary assignment, and the receiver shall immediately file said involuntary assignment at the United States Copyright Office at Washington, D. C.: and the court shall then order the receiver to close the estate, and turn the titles to said copyrighted works over by proper assignment from the receiver to the state treasurer of the State of Tennessee who shall thereafter administer, issue licenses for the use of the same in a manner consistent with this act, and conserve the same as state personal property in his possession, and according to law; and any funds left in the state treasury from said receivership shall escheat and be forfeited to the state and become part of the general fund; Provided, further, The state treasurer shall make a report to the legislature on each biennium of the amount of money received from such licensing and the amount of property he has on hand through the enforcement of this act.

Section 9. That in the event any person, or any of the defendants, or non-residents, or non-resident copyright owners or holders are proceeded against as herein outlined, and are served with process according to law, or any non-resident is served with process as outlined in the preceding sections of this act, and if any of said defendants, or persons, or aiders and abettors named as defendants, appear in any such proceeding by counsel or otherwise, or institute any special proceeding attacking such proceeding, or make any motion therein, either special or general, or if any of them appear to obtain the judgment of the court solely upon the sufficiency of the service of the process upon them, or upon any phase or particularity of said injunction proceedings, such special proceeding or appearance, or motion, or appearance, as the case may be, shall nevertheless be deemed as a general appearance even though the process may have been insufficient, and said parties and defendants as may thus appear in the action, for any reason or cause, whether they seek special or affirmative relief, shall thereafter be subject to the general orders and jurisdiction of the court for all purposes, and if any of said defendants or persons appear in any court proceeding instituted to effectuate this act solely for the purpose of challenging the validity of service of process upon them they shall be deemed to have surrendered themselves and as having submitted to the general jurisdiction of the court: Provided, however, This section shall not be construed as denying, and no attempt shall be made at any time in any proceeding in connection with the enforcement of this act, to restrain or deny any of said defendants, resident or non-resident, copyright holders or owners, or any person, or members of any defendant combination, entity, pool or monopoly of their rights or property without full and complete due process of law.

Section 10. Every person, in addition to the other penalties provided in this act, who violates or who procures, or aids or abets in the violating of any provision of this act, or who conspires to render ineffectual any valid order or decision of any court in the enforcement of this act, or who procures, conspires with, or aids or abets any person or persons in his or their failure to obey the provisions of this act, or to render ineffectual any valid order of any court in connection with the enforcement of this act shall be deemed guilty of a gross misdemeanor, and upon conviction, shall be punished by a fine not exceeding five hundred dollars ($500.00), or imprisonment in the county jail for not more than six months or both such fine and imprisonment.

Section 11. In case any part or portion of this act shall be held unconstitutional, such holding shall not affect the validity of this act as a whole or any other part or portion of this act, and if any clause, sentence, paragraph, subdivision, section or pa ' of this act shall for any reason be adjudged invalid, such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be strictly confined in its operation and holding to the specific clause, sentence, paragraph, subdivision, section, or part thereof, directly involved in the controversy in which such judgment shall have been rendered; and all other acts and laws in conflict herewith are hereby repealed.

Section 12. In the event more than one injunction suit provided for in this act is instituted in this state, in different counties by different prosecuting attorneys, but against the same defendants, the respective courts hearing the causes may issue orders against said defendants in the county, but in the event any of the various county proceedings enter in the state of receivership, as herein pro-

vided then the judges hearing the respective cause shall order those causes where the defendants are the same, to be consolidated in one action in one particular county, and in such county as the judges may decide, to the end that only one receiver may be appointed for the entire state for the property of the same defendant or defendants.

Section 13. BE IT FURTHER ENACTED, That this Act shall take effect from and after its passage, the public welfare requiring it.

Passed May 18, 1937.

BYRON PAPE
Speaker of the Senate.

WALTER M. HAYNES
Speaker of the House of Representatives.

GORDON BROWNING
Governor.

APPROVED
5-21-37

Opinion on Final Hearing in *Buck* v. *Gallagher*, 36 F. Supp. 405 (W. D. Wash., Dec. 23, 1940).

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION.

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*, Complainants, *vs.* PHIL H. GALLAGHER, as State Treasurer of Washington, *et al.*, Defendants.	In Equity Cause No. 606

Before: HANEY, Circuit Judge, and BOWEN and BLACK, District Judges.

HANEY, Circuit Judge.

This is a suit to enjoin enforcement of a Washington statute on the ground of its unconstitutionality. The cause has been submitted on an application for a permanent injunction.

Briefly stated, the statute attacked declares it to be unlawful for separate copyright owners to pool the copyrights in order to fix prices, collect fees, or issue blanket licenses for the use of such copyrights, except where the licenses are issued assessing rates on a "per piece" system of usage. The detailed provisions of the statute need not be discussed.

The bill prayed for a permanent injunction restraining defendants from taking any act or proceeding under the statute, and for a decree declaring such statute unconstitutional. It is alleged in the bill that on February 13, 1914, a small group of composers, authors and publishers organized a voluntary unincorporated non-profit association under the laws of New York, which they designated as the American Society of Composers, Authors and Publishers, hereafter called the Society, for the purpose of licensing to users of music throughout the country the right to publicly perform for profit the works of its members. It was further alleged that there are approximately 123 publisher members of the Society and about 1000 writer and composer members of the Society; that such members assign their respective exclusive right of public performance for profit in their respective musical compositions; that similar organizations exist in foreign countries, and the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all members of such foreign societies; and that the Society's blanket license permits the licensee to use many hundreds of thousands of compositions composed and written by more than 44,000 members of such foreign societies.

It appears that the members assign to the Society the exclusive right of public performance, and the Society then has the exclusive right to permit by licenses, licensees to use or not to use the compositions of the Society's members, to fix the prices for licenses, to sue for infringement, and in general, to manage the right of public performance in the same manner as the owner of the copyright.

The motion to dismiss on behalf of the defendants was based on several grounds, one of which was: "That mere unconstitutionality, even assuming it to exist, does not warrant injunctive relief, but that the facts alleged must bring the case within the recognized rules of equity relating

to injunctions, and that complainants have not done so." The motion to dismiss filed by intervener K M O, Inc., states a number of grounds, one being that the plaintiffs are not entitled to equity because they were a monopoly. Although no answers have been filed, we may treat the motions to dismiss as answers. Intervener Lockhart argues the monopoly question, but his motion to dismiss does not present such question. We treat his motion as an answer and amended so as to present the question.

Regarding the completeness of the monopoly of the Society, it is said in *Buck* v. *Swanson* (D. C. Neb.), 33 F. Supp. 377, 386:

> "* * * Of the popular music necessary for the successful operation of radio stations, dance halls, hotels and theaters, the society has control of about 85% or 90% and also has control of from 50% to 75% of the standard or older music that is played occasionally. All of the large and more influential publishers of music in the United States are members of the society. The users of music in Nebraska can not successfully carry on their business except they deal with the plaintiff Society because there is no place where nor person or agency to whom users of music in Nebraska may go in order to deal for public performance rights and negotiate for music in any substantial amount sufficient to meet the ordinary needs of music users in the state, except the society."

Mr. Justice Black in *Gibbs* v. *Buck*, 307 U. S. 66, 81, says:

> "* * * This combination apparently includes practically all (probably 95%) American and foreign copyright owners controlling rendition of copyrighted music for profit in the United States. Not only does this combination fix prices through a self-perpetuating board of twenty-four directors, but its power over the business of musical rendition is so great that it can refuse to sell rights to single com-

positions, and can, and does, require purchasers to take, at a monopolistically fixed annual fee, the entire repertory of all numbers controlled by the combination."

In the instant case the testimony of the operators of two of the largest radio broadcasting stations in Washington was that it would be impossible to operate such stations without the music controlled by the Society. The Society has neither submitted evidence, nor made argument to the contrary.

On the hearing for an injunction pendente lite, we dismissed the cause for lack of jurisdiction. *Buck* v. *Case,* 24 F. Supp. 541. On appeal our decree was reversed with directions to take evidence on the jurisdictional question. *Buck* v. *Gallagher,* 307 U. S. 95. Subsequently, we referred the case to a special master for the taking of evidence on the question, and directed him to make findings. The special master found facts disclosing jurisdiction in the court below. Believing that the evidence supports such findings, we sustain them as not being clearly erroneous.

Plaintiffs contend that the Washington statute is unconstitutional for a number of reasons, and rely on *Buck* v. *Swanson* (D. C., Neb.), 33 F. Supp. 377, *Buck* v. *Harton* (D. C. Tenn.), 33 F. Supp. 1014, and *Buck* v. *Gibbs* (D. C. Fla.), 34 F. Supp. 510, holding somewhat similar statutes unconstitutional. Before passing on that question, it is necessary to determine whether or not plaintiffs may invoke the aid of a court of equity. If a party "has been engaged in an illegal business and has been cheated, equity will not help him." *Wheeler* v. *Sage,* 68 U. S. (1 Wall.) 518, 529. In other words, before plaintiffs may invoke the aid of a court of equity, they must come into court with clean hands. *Keystone Co.* v. *Excavator Co.,* 290 U. S. 240, 244. If the Society exists in violation of the Sherman Anti-Trust Act, it, and the members composing it, are not entitled to a decree for its benefit.

Section 1 (15 U. S. C. A. Sec. 1) of the Sherman Anti-Trust Act provides in part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor * * *."

Section 2 (15 U. S. C. A. Sec. 2) of such act provides in part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

Whatever the distinction between these two sections may be,[1] the Supreme Court has recently said that Congress, by the act in question, "extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law." *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 498. The "effects" mentioned were "business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services." Id., p. 493. Such effects were brought about by "contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide market-

[1] *C. E. Stevens Co.* v. *Foster & Kleiser Co.*, 9 Cir., 109 F. (2d) 764, 770.

ing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market." Id., p. 497.

There can be little question here that the Society has the power to fix prices for the right to publicly perform compositions for profit. Likewise, it has restricted substantially all competition in the sale of such right, because it has all such rights. Since the interstate commerce feature is conceded to be present, the Society clearly violates the act in question (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 223) unless the right to publicly perform for profit is not embraced within the act. Upon that point the act says nothing expressly about rights or commodities. The statute is aimed at "restraints" of trade and commerce, and not at the "subjects" of the trade or commerce. Rights may be and often are the subject of trade or commerce, and the Sherman law limits restraints of trade in "rights" as well as commodities. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49. The restraint here is the power acquired by the assignments of the Society's members, to deal in a right acquired by copyrights, and thus we have a contract or combination in restraint of trade. *Straus* v. *Am. Publishers' Assn.*, 231 U. S. 222, 234.

Plaintiffs contend that if the activity of the Society "affects trade or commerce, it promotes rather than restrains it." Here, we are not concerned with such question. Congress has decided that if such a combination has acquired power to fix prices, it is an illegal combination in restraint of trade. Plaintiffs further contend that the power to fix prices, as here, is not the odious "price-fixing" condemned by the act in question. They say that while a gallon of oil is the same no matter who sells it, musical compositions are not gallons of oil, but each of them is different. As we have said before, it is immaterial what

the subject of the trade or commerce may be. The fact is that the Society has acquired the power to fix the prices at which rights of a particlar nature may be purchased by prospective users. We think that is sufficient under the statute.

Buck v. *Swanson* (D. C. Neb.), *supra*, *Buck* v. *Harton* (D. C. Tenn.), *supra*, and *Buck* v. *Gibbs* (D. C. Fla.), *supra*, do not involve the point herein taken.

Let the bill be dismissed.

BERT EMORY HANEY,
Bert Emory Haney, Circuit Judge.
JOHN C. BOWEN,
John C. Bowen, District Judge.

I concur in the result.

LLOYD L. BLACK,
Lloyd L. Black, District Judge.

Decision of Supreme Court of Louisiana Invalidating Louisiana Statute Imposing License Fee of $5,000 for Privilege of collecting royalties on copyrighted music in Each Parish of the State.

***State of Louisiana* v. *J. Studebaker Lucas*, 199 So. 126.**

(Decided November 4, 1940.)

Appeal from the Twenty-fourth District Court, for the Parish of Jefferson.—L. ROBERT RIVARDE, Judge.

Eugene Stanley, Attorney General of Louisiana, Niels F. Hertz, Special Assistant Attorney General, John E. Fleury, District Attorney, Ernest M. Conzelmann, Assistant District Attorney, for Appellants.

Nicholas G. Carbajal, Louis D. Frohlich, and Herman Finkelstein, for Appellees.

O'NEILL, C. J.:

The defendant was indicted for violating Act No. 137 of 1934, which undertakes to impose a license fee for the privilege of collecting any money or other valuable consideration for rights, royalties or rents on copyrighted music books, recorded music for mechanical reproduction, or radio programs. The license fee is $5,000 to be paid to each and every parish in which any such collection is made or attempted to be made. And a fine of $2,000 and imprisonment for a term not exceeding a year is imposed upon any one who violates the act. The defendant filed a motion to quash the indictment on the ground that the statute was unconstitutional. The court sustained the motion, declared the act unconstitutional, and dismissed the prosecution. The State is appealing from the decision.

The principal ground on which the defendant pleaded that the statute was unconstitutional—and the ground on which the plea was sustained—was that the so-called license fee was exorbitant and oppressive, and had the purpose and effect not of licensing the business which it was imposed upon, but of destroying the business, which was not objectionable to the public in any sense. Hence the defendant pleaded—and the judge maintained—that the statute was violative of the Fourteenth Amendment of the Constitution of the United States, in that it denied the defendant the equal protection of the law, and deprived him of his property without due process of law, by depriving him of the benefit of his copyrights, and of his right to conduct the business in which he was engaged.

The so-called license fee is exorbitant, and the terms of the statute are oppressive. A license fee of $5,000 to be paid to each and every parish in the State means that the license fee would amount to $320,000 for the privilege of doing business throughout the State. The gross amount collected by the defendant in 1939, the year in which he was indicted, on the business done in the whole State, was $65,297.39. The gross amount collected on the business done in that year in the Parish of Jefferson, in which the defendant was indicted, was $2,228.62. The average gross amount collected per parish was $1,053.18. It would be impossible for any person, firm or corporation engaged in the business to collect enough to pay the license tax in any parish. A statute which purports to levy a license tax upon a particular business or occupation, but which makes the tax so exorbitant that no one can pay it and carry on the business or occupation profitably, does not in fact license the business or occupation, but undertakes to abolish it. Such a statute is violative of the Fourteenth Amendment of the Constitution of the United States in so far as it deprives any one of his right to carry on a lawful business or occupation.

The judgment is affirmed.

Decree in

State of Washington v. *American Society of Composers, Authors and Publishers.*

(June 8, 1936, unreported.)

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON, *ex rel.* G. W. HAMILTON, Attorney-General,

Plaintiff,

—vs.—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, an unincorporated association, et al.,

Defendants.

FILED Superior Court Thurston Co. Wash. JUNE 8 3:01 PM 1936 ELLIS C. AYER, Clerk By Edwidge LaFond, Deputy

No. 16114

DECREE

This matter coming regularly on before the court for a hearing upon the petition of the defendant, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, and all of the parties being present and represented by their attorneys; and the court having considered the files in said cause and having considered testimony offered at said hearing and the contents of the Petition which have not been denied, and having heard the arguments and advice of counsel, and being fully advised in the premises,

IT IS NOW THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. The American Society of Composers, Authors and Publishers (hereinafter for brevity called the "Society"), a voluntary association of seven or more members, comprised exclusively of authors, composers and music publishers, was formed in the year 1914 under the laws of the State of New York, for the purpose of protecting and enforcing the so-called "small performing rights" of copyrighted musical works of such members, and to grant licenses to music users for the giving of public performances for profit of such works.

2. That since such formation, the Society has conducted its business, operations and activities in every State of the Union, as a central bureau for the issuance of licenses to music users for the public performance for profit of the works of its members, and through which performing rights of copyrighted musical works may be cleared, and such a bureau is necessary to protect the performing rights of authors, composers and music publishers, and is a convenience and necessity to the users of music in obtaining the performing rights.

3. That it is necessary for authors, composers and music publishers to belong to the Society to effectively enforce and protect the performing rights in their respective copyrighted works, and the Society is a convenience and a necessity to the users of music who will be considerably embarrassed, impeded, delayed and put to considerable expense if they had to deal separately with each piece of music performed and with each owner of the performing rights of each such piece.

4. That the Society was formed for lawful purposes and that the plan being used by the American Society of Com-

posers, Authors and Publishers whereby licensing agreements are entered into between license users in the State of Washington and the American Society of Composers, Authors and Publishers, an unincorporated association, and wherein the defendant association acted as a clearing house in the representation of the copyright owners of said music, and as the same is being conducted, is approved as a working, feasible plan and is not violative of any of the laws of the State of Washington, or of the Constitution.

5. That the Society serves a beneficial and useful purpose as a clearing house through which users may obtain and clear performing rights in musical compositions.

6. The Receiver is hereby directed to collect all amounts due from contract license users up to and including the 31st day of December, 1935, save and except such users as have paid directly to the Society during said period, in respect of works of the present membership of the Society.

7. It is further ordered and the Receiver is hereby directed to turn over, assign, transfer and deliver to the defendant Society all rights, goods, properties, assets, agreements, licenses, books, records, papers, documents, memoranda and accounts, of every name, nature, character or description whatsoever which came into his possession, custody or control by virtue of his appointment as such Receiver, or to which he became entitled by virtue of such appointment, save and except any moneys on hand and claims for money due to January 1, 1936 (less costs and disbursements and expenses of the receivership.)

8. That all orders made herein, assigning, conveying, transferring to or vesting in the Receiver copyrights or rights in copyrights, are hereby vacated, set aside and annulled, and any and all such assignments of copyright or

rights in copyrights are hereby cancelled and annulled, and the Receiver is hereby directed and ordered to make, execute, acknowledge and deliver to the Society and to its members, in such form as may be necessary to carry out the purpose and intent of this order within five days of the entry of this decree, such papers and documents as may be required or necessary to reassign and retransfer unto the Society and its members all copyrights and rights therein claimed by the Receiver under such orders.

9. That any rights in the works of the members of the Society under any assignment, license or permit heretofore made, issued or granted by the Receiver, are hereby declared to be and shall be of no force, effect or validity beyond the 1st day of January 1936.

10. That the complaint herein be dismissed upon the merits.

11. It is further ORDERED, ADJUDGED AND DECREED that the Receiver, upon duly complying with the terms and conditions of this decree, shall be discharged and his bond exonerated.

DONE in open court this 8th day of June, 1936.

(Signed) D. F. WRIGHT,
Judge.

[SEAL]

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SUPREME COURT OF THE UNITED STATES.

No. 312.—October Term, 1940.

Frank Marsh, as Secretary of State of Nebraska, et al., Appellants,
vs.
Gene Buck, Individually and as President of The American Society of Composers, Authors and Publishers, et al.

Appeal from the District Court of the United States for the District of Nebraska.

[May 26, 1941.]

Mr. Justice Black delivered the opinion of the Court.

Most of the questions presented by this case are the same as those that were raised in Nos. 610 and 611, this day decided. Here, as there, at the request of ASCAP and its co-complainants a federal District Court composed of three judges enjoined various state officials from enforcing a state statute[1] aimed primarily at price-fixing combinations operating in the field of public performance of copyright music.[2] Here, as there, the complainants alleged, and the defendants denied, that enforcement of the act had been threatened. Here, as there, the court below found that threats had been made, that some of the sections of the act were invalid, that the invalidity of those sections permeated the whole, and that the state officials should be enjoined from enforcing any of the numerous provisions of the act. But, as in the Florida case, the court below proceeded on a mistaken premise as to the rôle a federal equity court should play in enjoining state criminal statutes. Here, there was no more of a showing of exceptional circumstances, specific threats, and irreparable injury than in the Florida case. In his brief in this Court, the Attorney General of Nebraska stated that 'Appellants, as law enforcement officers, sincerely hope that no action under this law will be required. None was threatened

[1] Neb. Laws 1937, ch. 138.
[2] 33 F. Supp. 377.

before nor since the suit was started." With one possible exception, the record bears out the statement of the Attorney General; there was no evidence whatever that any threats had been made, but in his answer the Attorney General stated that he would "enforce the act against the complainant Society . . . [if] the complainant Society would operate in the State of Nebraska in violation of the terms of the statute by conniving and conspiring to fix and determine prices for public performance of copyrighted musical compositions . . . ." As we have just held in *Watson* v. *Buck*, it was error to issue an injunction under these circumstances.

In other material respects also, this case is like the Florida case. The court below failed to pass on what we consider the heart of the statute because of what it regarded as the pervading vice of the invalid sections. But section 12 of the Nebraska statute is similar to section 12 of the Florida statute and provides that "If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or non-enforceable, such decision shall in no way affect the validity of enforceability of any other part or parts of this Act." The legislative will is respected by the Supreme Court of Nebraska,[3] and the court below should have followed state law in this regard. That part of the statute on which the court did not pass—and the part which the Attorney General said he stood willing to enforce if violated—set up a complete scheme for the regulation of combinations controlling performing rights in copyright music. On the authority of *Watson* v. *Buck*, the decision below is reversed and the cause is remanded with instructions to dismiss the bill.

It is so ordered.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

[3] See Petersen *v.* Beal, 121 Neb. 348, 353, quoting and approving the following excerpt from Scott *v.* Flowers, 61 Neb. 620, 622-623: "The general rule upon the subject is that where there is a conflict between an act of the legislature and the constitution of the state, the statute must yield to the extent of the repugnancy, but no further [Citing authorities]. If, after striking out the unconstitutional part of a statute, the residue is intelligible, complete, and capable of execution, it will be upheld and enforced, except, of course, in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder. In other words, the legislative will is, within constitutional limits, the law of the land, and when expressed in accordance with established procedure, must be ascertained by the courts and made effective."